BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 2020-019
STANDARDS FOR THE DISPOSAL	)	
OF COAL COMBUSTION RESIDUALS	)	(Rulemaking - Water)
IN SURFACE IMPOUNDMENTS:	)	
PROPOSED NEW 35 ILL. ADM.	)	
CODE 845	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO FINAL POST-HEARING COMMENTS**, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: November 6, 2020

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

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Petitioner,

BY: /s/ Stefanie Diers
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THIS FILING IS SUBMITTED ELECTRONICALLY

SERVICE LIST

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO FINAL POST-HEARING COMMENTS

NOW COMES the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency"), by and through one if its attorneys, and hereby submits its Response to Final Post Hearing Comments as directed by the Hearing Officer Orders entered on October 4 and 20, 2020 in the above captioned rulemaking.

I. PROCEDURAL BACKGROUND

On March 31, 2020, the Illinois EPA filed its proposed rulemaking for coal combustion residual surface impoundments pursuant to Section 22.59 of the Illinois Environmental Protection Act, along with a Statement of Reasons ("SOR") in support. On April 24, 2020 the Illinois Pollution Control Board ("Board") accepted Illinois EPA's proposal for hearing and set prehearing deadlines. On June 2, 2020, Illinois EPA filed with the Board pre-filed testimony of eight witnesses: Lynn Dunaway, Darin LeCrone, Melinda Shaw, William Buscher, Lauren Martin, Amy Zimmer, Chris Pressnall, and Robert Mathis (Hrg, Ex. 1). Illinois EPA filed Answers to Pre-Filed Questions from the Board, Little Village Environmental Justice Organization, the Environmental Law and Policy Center, Prairie Rivers Network, and Sierra Club ("Environmental Groups," collectively), Springfield City Water, Light, and Power (CWLP), the Illinois Environmental Regulatory Group (IERG), Ameren, Midwest Generation (MWG), and Dynegy on August 3 (Hrg.

Ex. 2), August 5 (Hrg. Ex. 3) and August 6 (Hrg, Ex. 4), 2020. The Board held the first public hearing on proposed new 35 Ill. Adm. Code 845 ("Part 845") on August 11, 12, 13 and 25, 2020, in Springfield, Illinois and via videoconference. On September 23, 2020, Illinois EPA filed its First Post Hearing Comments.

The second public hearing was held on September 28 and 29, 2020 in Chicago, Illinois and via videoconference. Eighteen participant witnesses filed testimony and answers to pre-filed questions, all of which were entered into the record at hearing. On behalf of the Environmental Groups: Jo Lakota (Hrg, Ex. 40), Dolce Ortiz (Hrg. Ex. 12 & 13), Mark Hutson (Hrg. Ex. 14 & 15), Andrew Rehn (Hrg. Ex. 16 & 17), and Scott Payne and Ian Magruder (joint testimony) (Hrg Ex. 19 & 20). On behalf of Dynegy: Cynthia Vodopivec (Hrg. Ex. 21 & 22), Lisa Bradley (Hrg, Ex. 23 & 24), Melinda Hahn (Hrg, Ex. 28 & 29), Rudolph Bonaparte (Hrg. Ex. 31 & 32), David Hagen (Hrg. Ex. 34 & 35), Andrew Bittner (Hrg. Ex. 37 & 38) and Mark Rokoff (Hrg. Ex. 41 & 42). For MWG: Sharene Shaeley (Hrg Ex. 49 & 50), Richard Gnat (Hrg. Ex. 52 & 50), and David Nielson (Hrg. Ex. 54 & 50). On behalf of Ameren: Gary King (Hrg. Ex. 55 & 57) and Michael Wagstaff (Hrg. Ex. 56).

Dynegy filed Pre-Hearing Comments on September 25, 2020. MWG filed its First Post Hearing Comment on October 1, 2020. At the close of hearings in this matter, the Hearing Officer set an October 23, 2020 deadline for substantive post hearing comments, and an October 30, 2020 deadline for responses. Due to a delay in the receipt of the hearing transcript, a Hearing Officer Order was issued extending the deadline for post hearing comments to October 30, 2020 and the deadline for responses to November 6, 2020.

On October 30, 2020, final post hearing comments were filed by Illinois EPA, the Environmental Groups, CWLP, IERG, Ameren, MWG, and Dynegy. In addition, USEPA filed a

public comment directed to the Board regarding recent USEPA actions on Subtitle D of Part 257.

II. RESPONSE TO PROPOSED REVISIONS IN POST HEARING COMMENTS

Post hearing comments filed on October 30, 2020 contained several proposed revisions to Part 845 as proposed, as well as revisions considered throughout the rulemaking, for the Board's consideration. Illinois EPA has already responded to some of these proposed revisions in its Final Post Hearing Comments, while others are newly proposed. Illinois EPA provides its objections to certain proposed revisions below: first, addressing Ameren and IERG's proposed revisions, and then addressing the proposals from other participants in Section order.

Ameren

In its "Post-Hearing Brief," filed October 30, 2020, Ameren reasserts various arguments regarding Part 845 definitions, site-specific applicability issues and desired exemptions, and Agency cost tracking. The Agency addressed all of these arguments (that were not deemed outside or beyond the scope of this rulemaking of general applicability) in great detail during these proceedings, and it stands by its previous responses and by the Agency's *Final Post-Hearing Comments* filed October 30, 2020. *See* p. 50–58. Additionally, the Agency agrees with the *Post-Hearing Comments of the Illinois Attorney General's Office*, filed October 30, 2020, which further explain why Ameren's arguments should be rejected by the Board.

Illinois Environmental Regulatory Group

On Page 2 of its post hearing comments, IERG states:

> *See* proposed 35 Ill. Adm. Code 845.170(a) ("Only the following provisions apply to inactive closed CCR surface impoundments . . . ."). In the Agency's pre-filed responses to IERG's pre-filed questions, the Agency confirmed this, stating that "[o]nly the Subparts, Sections and subsections listed in Section 845.170 are applicable to inactive closed surface impoundments." Hearing Exhibit 2, Illinois EPA's Pre-filed Answers, PCB R 20-19, at 136 (Aug. 3, 2020).

The Agency stands by its responses regarding Section 845.170. However, on Pages 3 and 4 of the post hearing comments, IERG proposes that the term "if applicable" be added to Sections 845.250(b)(1), 250(b)(2), 270(a) and 780(b)(3). IERG states that the addition of "if applicable" at the end of the listed subsections will add clarity. The Agency disagrees. As proposed, there are four CCR surface impoundments at three facilities that meet the definition of "inactive closed CCR surface impoundment," which are subject to Section 845.170. The listed subsections apply to all other CCR surface impoundments subject to Part 845. Considering the small number of CCR surface impoundments exempt from the listed subsections, the Agency believes adding the term "if applicable" to provisions which are typically required, will add additional uncertainty. Further Section 845.780(b)(3) refers to groundwater monitoring pursuant to Subpart F. Subpart F is not listed in Section 845.170, therefore, the requirements of Section 845.780(b)(3) cannot possibly apply to inactive closed CCR surface impoundments. Therefore, the Agency urges the Board to keep the language of the above listed subsections as proposed by the Agency.

Section 845.120 Definitions

At hearing, following Dr. Bradley's reference to USEPA's discussion of de minimis amounts of CCR in surface impoundments in the 2015 federal CCR rule preamble, the Board requested that Dynegy provide regulatory language defining "de-minimis" impoundments for the Board's consideration. Hrg. Ex. 5; Hrg. Transcript, Sept. 29, 2020. p. 144-45,185-86. In response, Dynegy proposed the following definition in its *First Post Hearing Comment* filed on October 30, 2020:

> "De minimis unit" means any surface impoundment, including but not limited to process water or cooling water ponds**,** that only received CCR incidentally and does not contain an amount of CCR and liquid presenting a reasonable probability of adverse effects on human health or the environment. De minimis surface impoundments are not CCR surface impoundments."

The Agency strongly objects to the inclusion of any de minimis exemption, including the

definition of de-minimis proposed by Dynegy. First, Part 257 contains no definition of "de minimis" and creates no such exemption. And since Part 257 is a self-implementing program, USEPA has made no determinations whether any surface impoundment contains only de-minimis amounts of CCR. This in and of itself could be problematic, since Section 22.59(g)(1) requires that Part 845 be as least as protective and comprehensive as Part 257. Any definition of de-minimis has the potential of being less protective or comprehensive, because USEPA has failed to define the meaning of de-minimis and does not currently operate a permit program, pursuant to which determinations of de-minimis might be made.

If the Board determines that including a de minimis exemption in Part 845 is necessary and appropriate, the RCRA standard of no "reasonable probability of adverse effects" as explained by Lisa Bradley (Hrg, Ex. 23 & 24), could be applied. However, such a determination would have to be made based on site specific data. The Agency believes that the owner or operator would have to make a demonstration that no reasonable probability of adverse effects has or would occur from the subject impoundment, and that the Agency would have to agree with that demonstration before an impoundment could be deemed de-minimis.

The question of how to sufficiently demonstrate that an impoundment contains only a de-minimis amount of CCR remains unanswered in Dynegy's proposed definition. However, Dynegy has included the phrase "and liquids" into the definition of de-minimis. The Agency has provided extensive discussion in pages 31 through 35 of its *Final Post Hearing Comments* regarding the definition of "Inactive CCR Surface Impoundment" and the inappropriateness of requiring liquids to be present for a CCR surface impoundment to be regulated by Part 845. To summarize that discussion relative to de-minimis impoundments, an impoundment should not avoid regulation under Part 845 simply because the liquids in the impoundment have already

leaked into the environment or have been removed in preparation for closure. Including the term "and liquids" in the definition of "de-minimis" could allow a CCR surface impoundment with a huge amount of CCR to be a de-minimis impoundment and avoid regulation under Part 845, only because it has no liquid left in it. Further, the presence or absence of liquids has no bearing on the amount of CCR in a surface impoundment. Therefore, the Agency opposes consideration of the presence of "liquid" when defining a de-minimis impoundment.

The Agency does believe that past operational practices should have a bearing on whether an impoundment can be considered de-minimis. If an impoundment was operated for decades with a significant amount of CCR present, and then most of the CCR was removed so that currently there is truly a de-minimis amount of CCR present, the impacts of past operations, especially in unlined impoundments, is consequential. Therefore, the Agency opposes any definition of de-minimis that does not consider past operational practices at the impoundment. However, the term incidentally can have several meanings including "in passing," "accidentally" and even "fortuitously." The Agency doesn't believe it is relevant whether a significant amount of CCR accumulated in an impoundment accidently, or in passing over a long period of time. The important consideration is whether the amount of CCR is significant, or de-minimis and therefore poses no reasonable probability of adverse effects. Therefore, the Agency opposes any definition of de-minimis that requires the CCR present to be "incidental" since how the CCR came to be present in the impoundment is insignificant compared to the fact that the CCR is there. For the reasons discussed, the Agency opposes the definition of de-minimis as provided by Dynegy.

If the Board still deems inclusion of a de minimis definition and exemption necessary and appropriate over Illinois EPA's stated objections, the Agency offers the following revisions to

Dynegy's proposal that the Agency believes makes the definition more consistent with Part 845 and makes the definition more protective of human health and the environment.

> "De minimis unit" means any surface impoundment, including but not limited to process water or cooling water ponds**,** ~~that only received CCR incidentally and that~~ which has not in the past and does not currently contain an amount of CCR ~~and liquid~~ presenting a reasonable probability of adverse effects on human health or the environment as determined by the Agency. De minimis surface impoundments are not CCR surface impoundments.

Further, if the Board decides to include any definition and exemption for de minimis surface impoundments, the Agency requests that the final Board Order provide sufficient justification to assist the Agency in seeking USEPA approval of Illinois' program.

Dynegy also proposes revision to the definition of Inactive CCR surface impoundment by adding the requirement that a CCR surface impoundment contain both CCR and liquids to meet the definition, as follows:

> "Inactive CCR surface impoundment" means a CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015 . . . ."

The Agency has provided extensive discussion in its *Final Post Hearing Comments* regarding the definition of "Inactive CCR Surface Impoundment. *See* p. 31-35. While reviewing its post hearing comments for this response, the Agency notes that in the first paragraph on Page 35 of its post hearing comments, the Agency mistakenly used the term "Inactive Closed CCR Surface Impoundment" instead of the intended term "Inactive CCR Surface Impoundment." The Agency respectfully asks the Board to review and consider the Agency's post hearing comments related to this definition and adopt the definition as proposed in the Agency's filings.

Section 845.230 Operating Permits

The Agency strongly objects to the Environmental Groups' proposed requirements in Sections 845.230(a) and (d) that the plans and/or assessments, in addition to the certifications, be

submitted as part of an operating permit application. These plans and/or assessments are required to be developed under 40 CFR Part 257. Many of these plans and assessments that the proposed language revisions require to be submitted to the Agency are regulated by other agencies in accordance with other state or federal regulations. As examples, while the Agency wants to ensure that a Safety and Health plan has been prepared and certified as compliant, worker health and safety falls under the jurisdiction of the Illinois Department of Labor, and the Occupational Health and Safety Administration, while safety factor assessment, structural stability, and related issues are regulated by the Illinois Department of Natural Resources Dam Safety Program. The Agency does not wish to duplicate efforts and programs under the jurisdictions of other Agency programs and/or regulations.

Regarding the emergency action plan, fugitive dust control plan, and inflow design flood control system plans, the Agency objects to making these enforceable conditions of any operating permit as suggested by the Environmental Groups in newly proposed subsections (a)(20) and (d)(2)(T). As proposed, Part 845 already requires that these plans be prepared and certified by a Professional Engineer. Requiring them to be enforceable conditions of an operating permit is unnecessary and may cause conflict with other regulatory programs of this, or other agencies.

The Agency objects to MWG's proposed revisions to Section 845.230(d)[1], shown below.

(d) Initial Operating Permit for Existing, Inactive and Inactive Closed CCR Surface Impoundments

(1) The owner or operator of an existing **CCR surface impoundment, regulated under 40 CFR 257, or** inactive or inactive closed CCR surface impoundment who has not completed post-closure care must submit an initial operating permit application to the Agency by September 30, 2021;

(2) For existing CCR surface impoundments not regulated under

[1] Page 24 of MWG's *Second Post Hearing Comments* referenced this revision as belonging in Section 845.220(d), but the language is specific to operating permits and comes from Section 845.230(d).

40 CFR 257 but that are classified as regulated under 35 IAC 845, who has not completed post-closure care must submit an initial operating permit application to the Agency by March 31, 2023;

(3) The initial operating permit application for existing CCR surface impoundments that have not completed an Agency approved closure prior to July 30, 2021, must contain the following information and documents on forms prescribed by the Agency.

Illinois EPA invoiced the owners and operators of CCR surface impoundments that the Agency believes are subject to Section 22.59(j) of the Act, on or about December 15, 2019. Since invoices for fees under Section 22.59(j) apply to CCR surface impoundments, owners and operators were notified that the Agency considers all of the invoiced impoundments CCR surface impoundments, whether or not the owners or operators agree with that assessment. Some of the information required for the initial operating permit is not impoundment specific or may already exist, for example the Hydrogeologic Site Characterization or a groundwater monitoring system, previously installed, which may meet the requirements of Part 845. Therefore, owners and operators should already have completed some of the tasks required for submission with the initial operating permit and should be compiling that information since they have known since December 2019 that the Agency believes Part 845 will apply to them.

The proposed revisions appear to acknowledge that MWG believes there are CCR surface impoundments properly regulated by Part 845 that may not be regulated under Part 257. However, MWG's proposed revisions require some finding of what ponds are regulated by Part 257. Illinois EPA has not conducted any focused review of what CCR surface impoundments have been considered regulated Part 257, and there is nothing in the record identifying this new subgroup of impoundments.

Further and most importantly, for CCR surface impoundments required to close under Section 845.700(a) or electing to close under 845.700(b), the proposed date of March 31, 2023

for submission of an initial operating is entirely incompatible with Categories 1-5 of Section 845.700(g) and the associated deadlines for construction permits in Section 845.700(h). The Agency purposely proposed the dates for operating and construction permits so that an impoundment's initial operating permit is obtained prior to, or at least simultaneously with, any construction permit for closure. The Agency believes such a by-passing of the categorization and closure permit schedule outside the allowance made in Section 22.59(g)(9) of the Act and implemented by Section 845.700(d)(2), for schedules approved by USEPA, is not allowed by the Act. Therefore, the Agency opposes MWG's proposed revisions to Section 845.230(d) and urges the Board to adopt the Agency's final proposed rule, filed as Attachment A to its *Final Post Hearing Comments* on October 30, 2020.

Section 845.240 Pre-Application Public Notification and Public Meeting

The Agency objects to the proposed changes by CWLP in 845.240(a) and (g), shown below.

a) At least 30 days before the submission of a construction permit application, the owner or operator of the CCR surface impoundment must hold at least two public meetings to ~~discuss~~ solicit public comment on the new construction, corrective action or closure construction project that will require a permit from the Agency ~~the proposed construction,~~ where at least one meeting is held after 5:00 p.m. in the evening. Any public meeting held under this Section must be located at a venue that is accessible to persons with disabilities, and the owner or operator must provide reasonable accommodations upon request.

* * *

g) ~~Fourteen (14) days following the public meetings required pursuant to Section 845.240, the~~ The owner or operator shall post on its publicly available website ~~distribute~~ a general summary of the issues raised by the public that are relevant to the selection of alternatives for the project, as well as a response to those relevant ~~issues or~~ comments ~~raised by the public~~. If these comments resulted in a revision, change in a decision, or other such considerations or determination, a summary of these revisions, changes, and considerations shall be included in the summary. Such a summary shall be distributed by email to any attendee who requests a copy by providing an email address at the public meeting. The

response to comments required by this subsection must be made available no less than 14 days prior to submittal of the final construction permit application to the Agency.

Illinois EPA opposes the changes proposed by CWLP in Section 845.240(a); specifically, the replacement of the word "discuss" with the requirement to "solicit public comment." The Agency believes there is a significant difference between discussing a project for which a permit will be sought and just soliciting public comment. Whether intentional or not, the proposed language appears to only require that the owner or operator accept comments from the public. The Agency believes a key objective of the pre-application public meeting to be more of an interactive dialogue between the parties. The intent is for the owner or operator to present their proposal to the public and allow for more of a question and answer format, where the owner or operator engages with the public and provides answers to questions to the extent reasonable. Additionally, Section 845.240(a) as proposed by the Agency uses the term "discuss" to parallel the language of 40 CFR 257.96(e). It is the Agency opinion that deleting the term "discuss" and replacing it with "soliciting public comment" would not be as protective and comprehensive as Part 257. Therefore, the Agency urges the Board to adopt the language the Agency suggests in its final proposed Section 845.240(a), filed October 30, 2020.

The Agency objects to changes by CWLP in Section 845.240(g) due to the appearance that the owner or operator is determining what will be relevant to the public for public comments. The general summary should include all issues raised at the public meeting, not only those considered relevant by the owner/operator.

The Agency objects to Dynegy's proposed language changes in Section 845.240(b)(1) - (3), shown below. The deletions in subsection (1), (2), and (3) do not fulfill the intent of meaningful public participation required in Section 22.59(g) of the Act. The Agency does not

object to adding the notice to the owner or operator's CCR website required in Section 845.810, nor does the Agency object to the inclusion of emailing the notice to the listserv as proposed in newly proposed subsection (4).

b) The owner or operator must prepare and circulate a notice explaining the proposed construction project and any related activities and the time and place of the public meeting. The owner or operator of the CCR surface impoundment must:

1) mail or hand-deliver the notice to the Agency~~and all residents within a one mile radius from the facility boundary~~;

2) post the notice on the website required pursuant to Section 845.810 ~~all of the owner or operator's social media outlets; and~~

3) ~~post~~ mail the notice to the clerk of the city, town or village located within 10 miles of the facility requesting posting in conspicuous locations throughout the village~~s~~, town~~s~~, or city~~ies within 10 miles of the facility~~, or use appropriate broadcast media (such as radio or television).; and

4) emailing the notice to the Agency's listserv for the facility.

Finally, the Environmental Group propose revising Section 845.240(f) by adding a new subsection (4) requiring owners or operators to explain the listserv at the pre-application public meeting and provide it to the Agency. The Agency does not object to the additional requirements, but suggests the following amendments as follows:

f) At the public meeting, the owner or operator of the CCR surface impoundment must:

* * *

4) explain that the Agency is creating a listserv for the facility, compile a list of interested persons ~~at~~ from those that attend the public meeting, and transmit that list ~~with~~to the Agency with the permit application.

Section 845.260 Draft Permit Public Notice and Participation

The Environmental Groups proposed several revisions to the public notice for draft permits required in Section 845.260(b). Illinois EPA does not object to most of the additions. However, the Agency opposes inclusion of the facility's CCR website in the Agency's public notice of the

draft permit to be issued in newly proposed subsection (b)(2)(H). Anything relied upon by the Agency in drafting the permit must be maintained in the Agency's permit record, and instructions to access the Agency's information is already required in the public notice. To include the owner or operator's website in the Agency's notice, where it may contain a large amount of information that is not relevant to the permit, could serve to confuse the public as to the scope of the public comments sought.

The Agency also objects to the Environmental Groups' newly added subsection (c)(6) to Section 845.260, shown below.

> 6) The applicant shall post all permit application materials on its facility's CCR website, including all underlying supporting documents, prior to the beginning of the public comment period established by the Agency.

The establishment of a website and the burden of relevant documents being placed on the facility's website is appropriately placed on the facility by 845.240(e). The language proposed could be read as creating a prerequisite to the Agency issuing the draft permit and beginning the public comment period. Adding this language to Agency public notice requirements under 845.260(c) potentially opens the Agency permit decision to appeal if the Agency does not verify and first require that all documents are posted to the facility website prior to the start of the public comment period. If enforcement actions proved necessary, this unavailability of information, which is outside the permit record, could unnecessarily delay issuance of a final Agency decision significantly. The Agency does not control posting of documents to these external websites and adding this requirement to this section puts an inappropriate burden on the Agency and its permitting process.

The Environmental Groups propose extending the public comment period to 45 days in subsections (c) and (d) of Section 845.260. The comment period for the other major water pollution control permit program within Illinois EPA's Division of Water Pollution Control, the NPDES

permit program, which regulates discharges from major industrial sources, is presently no longer than 30 days pursuant to Board regulations. 35 Ill. Adm. Code 309.109. The Agency may extend the comment period pursuant to Section 845.260(c)(4) where circumstances warrant, but, especially considering the already tight timeframes provided for in art 845 as proposed, the Agency prefers not to extend the public comment period from 30 days to 45 days as proposed for all permits, as it would not be consistent with the Agency's current practice for other Bureau of Water programs.

Finally, Illinois EPA objects to the Environmental Groups' proposed language in Section 845.260(f) requiring that when the Agency holds a public hearing or when the Agency receives any written public comments, the Agency shall prepare a responsiveness summary. As required by proposed Section 845.270(c), the Agency is required to provide a notice of the issuance or denial of a permit not only to the applicant, but to any person who provides an e-mail address, to any person who requested a public hearing, and to any person on the Agency listserv for the facility. Such a notice shall briefly indicate any significant changes which were made from those terms and conditions in the draft permit. As is the case with the existing NPDES permit program, a responsiveness summary is only necessary following a public hearing process. The responsiveness summary is not only a response to comments received, but also a summary of the public hearing process itself.

Section 845.280 Transfer, Modification and Renewal

Illinois EPA strongly opposes the Environmental Groups' proposal to make the Alternative Source Demonstration under Section 845.650(d)(4) a permit modification for reasons already provided in *Illinois EPA's Final Post Hearing Comments*. See p. 12-13. The Agency respectfully requests that the Board reject the Environmental Groups' proposed revision and adopt Section

845.280 as proposed by the Agency.

Section 845.420 Leachate Collection and Removal System

MWG argues that the requirements for leachate collection and removal systems should be removed from Part 845. The Agency provided its response to MWG's arguments against leachate collection systems for CCR surface impoundments in its *Final Post Hearing Comments* specific to Mr. Nielson's testimony. *See* p. 43-50. Should the Board choose to include Section 845.420, MWG has now proposed the following revision for the Board's consideration:

> A new CCR surface impoundment **that is larger than 20 acres** must be designed, constructed, operated and maintained with a leachate collection and removal system. The leachate collection and removal system must be designed, constructed, operated, and maintained to collect and remove leachate from the leachate collection system of the CCR surface impoundment during its active life and post-closure care period.

Should the Board reject the limitation based on the size of the impoundment, MWG proposes the following:

> A new CCR surface impoundment must be designed, constructed, operated and maintained with a leachate collection and removal system. The leachate collection and removal system must be designed, constructed, operated, and maintained to collect and remove leachate from the leachate collection system of the CCR surface impoundment during its active life and post-closure care period. **An owner or operator may propose an alternative collection system that is as equally protective to human health and the environment.**

The Agency objects to the MWG proposal to require a leachate collection and removal system only for impoundments coving an area of less than 20 acres. MWG states that CCR impoundments smaller than 20 acres are more likely to be closed by removal; however, closure by removal is not required for any new CCR impoundments. The reduction of head on the liner of an CCR impoundment is important for all CCR surface impoundments regardless of their size. The

Agency's position on the importance of requiring a leachate collection system is supported by the USEPA 2014 Risk Assessment ("RA"). The composite liner modeled in the RA included a leachate collection system above the composite liner. Hrg. Ex. 50, Ex. 1, p. 4- 8 and 4-9. The RA did not assess a composite liner scenario without a leachate collection system. The Agency stands by the leachate collection and removal system it has proposed.

The Agency also opposes the MWG proposed narrative language, which includes the phrase "that is as equally protective to human health and the environment." Any alternative leachate collection and removal system proposal should contain specific design details. The Agency objects to the alternative language proposed by MWG which is vague and subject to interpretation. This type of vague language would necessarily lead to litigation over varying interpretations and should not be adopted.

Section 845.610 General Requirements

Illinois EPA strongly objects to MWG's proposed 845.610(b)(3)(D), which changes the requirement to submit all sampling data to the Agency within 60 days of completion of sampling, to submission within 60 days of receipt of analytical results. This revision would potentially give up to four months for results of each sampling event to be submitted to the Agency after the sampling event occurs. The original 60 days proposed by the Agency for submittal of the sampling results to the Agency after the event occurs should be plenty of time based upon the Agency's familiarity with laboratory turn-around times. The new proposed language change would give the facility two more months after they receive the sampling results to turn them into the Agency. There is no need for this to take an additional two months.

On page 15 of MWG's *Second Post Hearing Comments*, MWG appears to rely upon Illinois EPA's response to MWG's Pre-Filed Question 71 regarding "formal confirmation" of an initial exceedance and when the timeframe for initiating the assessment of corrective action is

triggered. Hrg. Ex. 3, p. 26. Since an exceedance can't be known until results are available, it makes sense that the receipt date of the data is when an exceedance is confirmed, thus triggering the timeframe within which corrective action must be initiated. Here, MWG inaccurately extrapolates from this response to claim that "the Agency understands 'completion of sampling' as the date the laboratory analytical data is received." What the Agency understands is that the results should be submitted as soon as they become available from the laboratory, and 60 days from completion of sampling gives adequate time for the facility to receive the results and forward them to the Agency.

Dynegy proposes changing statistically significant increase over background levels in Section 845.610(b)(3)(B) to statistically significant levels over the GWPS, as follows:

> b) Required submissions and Agency approvals for groundwater monitoring
>
> * * *
>
> 3) All owners and operators of CCR surface impoundments must:
>
> * * *
>
> B) evaluate the groundwater monitoring data for statistically significant levels over ~~background levels~~ the groundwater protection standards for each well at the waste boundary for the constituents listed in Section 845.600 after each sampling event;

Dynegy proposes a similar revision in Section 845.610(e)(3)(E) ("statistically significant levels over ~~background levels~~ the groundwater protection standards"). The Agency strongly opposes both of these revisions. In all instances, the groundwater monitoring results must be compared with the background levels for a CCR surface impoundment. For new CCR surface impoundments the groundwater protection standard is the background concentration (Section 845.600(b)), therefore a statistically significant level over background will be a triggering event for an alternative source demonstration or an assessment of corrective measures. For existing and inactive CCR surface

impoundments that have constituent background concentrations above the numerical groundwater protection standards (Section 845.610(a)(2)), a statistically significant level over background for those constituents will be a triggering event for an alternative source demonstration or an assessment of corrective measures.

For existing and inactive CCR surface impoundments that have constituent background concentrations below the numerical groundwater protection standards (Section 845.610(a)(1)), the numerical concentrations in Section 845.610(a)(1) are the statistically significant level above background. The numerical groundwater protection standards are based on human health and environmental considerations. If the background concentration of a constituent is below the numerical standard there should be no allowance for the subject CCR surface impoundment to exceed the numerical groundwater protection standard by a statistically significant amount to trigger an alternative source demonstration or an assessment of corrective measures. The proposed revisions to Section 845.610(a)(3)(B) and (e)(3)(E) completely undermine the use of health and environmentally based groundwater protection standards and does not provide protection to human health and the environment.

The Agency similarly opposes the revisions to Section 845.610(e)(4) proposed by Dynegy, shown below:

> A section at the beginning of the annual report must provide an overview of the current status of groundwater monitoring program and corrective action plan for the CCR surface impoundment. At a minimum, the summary must:
>
> A) specify whether groundwater monitoring data shows a statistically significant ~~increase~~ level over ~~background concentrations~~the groundwater protection standards for one or more constituents listed in Section 845.600;
>
> B) identify those constituents having a statistically significant ~~increase~~ level over ~~background concentrations~~the groundwater protection standards and the names of the monitoring wells associated with such an increase;

C) ~~specify whether there have been any exceedances of the groundwater protection standards for one or more constituents listed in Section 845.600;~~

~~D) identify those constituents with exceedances of the groundwater protection standards in Section 845.600 and the names of the monitoring wells associated with such an exceedance;~~

Subsections (4)(A) and (4)(B) are designed to make the owners and operators as well as the Agency aware that concentrations of a constituent have experienced statistically significant increases but have not yet risen above groundwater protection standards. This is a preventive step for existing and inactive CCR surface impoundments. This knowledge would allow owners and operators the ability to take voluntary action that may prevent the exceedance of a groundwater protection standard and the required corrective actions under Part 845. Unlike subsections (4)(A) and (4)(B), subsections (4)(C) and (4)(D) address situations where a constituent concentration has exceeded a groundwater protection standard and an alternative source demonstration or a corrective action will be required. Illinois EPA finds Dynegy's revisions, which drastically change the intent and purpose of the provisions as proposed, not sufficiently protective of human health and the environment for reasons outlined above, and therefore unacceptable.

The Agency also strongly objects to Dynegy's proposed language change in 845.610(e), which reduces the requirement to one potentiometric surface map provided for each annual groundwater monitoring and corrective action report. As currently proposed, groundwater elevation levels will be measured monthly. Dynegy argues that it would be burdensome to produce potentiometric surface maps for their proposed daily measurements taken at one upgradient and one downgradient groundwater monitoring well, so only one potentiometric map should be included in the annual report. The Agency notes that it is impossible to produce an accurate potentiometric map from just two daily groundwater elevation levels—every other groundwater

elevation on the map would have to be extrapolated from those two elevations. It is, however, reasonable to produce a potentiometric map utilizing either monthly or quarterly groundwater elevation data. The Agency believes potentiometric surface maps must be prepared and included for each full groundwater elevation monitoring event which occurs over a year, whether it be monthly or quarterly. This is not unusual and generally standard practice to have done on sites with groundwater monitoring. It helps produce a visual demonstration of the direction and gradient of groundwater flow at a site for each sampling event during the various times of the year.

For the reasons stated above, the Agency urges the Board to reject MWG and Dynegy's proposed revisions and adopt Section 845.610 as contained in the Agency's proposal filed as Attachment A to its *Final Post Hearing Comments* filed on October 30, 2020.

Section 845.620 Hydrogeologic Site Characterization

The Agency objects to Dynegy's removal of "Climatic aspects" from the requirements in Section 845.620(b), along with its substitutions. Climatic aspects are important to a site's hydrogeologic characterization and are common in environmental documents. Climatic aspects include, but are not limited to, precipitation amounts and temperatures and are directly related to hydrogeologic information. Aquifer thickness, groundwater flow rate and groundwater direction are covered by other subsections in 845.620(b) and are not appropriate replacements for climatic aspects.

The Agency also objects to Dynegy's proposed revision to Section 845.620(b)(3), (4) and (5) limiting the identification of surface water bodies, water intakes, pumping wells and other groundwater uses, and nature preserves to within one half mile of the surface impoundment. The Agency purposely proposed language that left this requirement more open-ended so the data collection could be based on the specific site characteristics. All of the CCR surface impoundment

sites will need to perform groundwater monitoring under the proposed rule for corrective action and closure. Groundwater monitoring wells and other groundwater uses must be identified throughout the area that will be modeled as part of these efforts. The groundwater information is not just for potential water quality impacts, but to provide data necessary to create and help calibrate a groundwater model. The best distance for developing the model will be based on site specific hydrogeologic factors not an arbitrary fixed distance. Similarly, intakes on streams and surface water in general, have a greater potential to be impacted more than one half mile downstream, but a much shorter distance up stream. The potential threats to nature preserves would also tend to be directional, but also dependent on site specific factors. Therefore, the Agency opposes Dynegy's proposed revisions to Section 845.620(b) and urges the Board to adopt the provision as reflected in the Agency's final proposed rule filed October 30, 2020.

MWG also proposed changes to Section 845.620(b) to which the Agency objects, provided below:

> b) The hydrogeologic site characterization shall include but not be limited to the following:
>
> * * *
>
> 4) Identification of ~~nearby~~ pumping wells and associated uses of the groundwater **that are within 2,500 feet of the CCR surface impoundment**.
>
> * * *
>
> 13) Vertical and horizontal extent of the geologic layers to a minimum depth of 100 feet below land surface, including lithology and stratigraphy **that may be based on available site specific or local information**;
>
> * * *
>
> 15) Chemical and physical properties of the geologic layers to a minimum depth of 100 feet below land surface **that may be based on available site specific or local information**;

First, the Agency objects to MWG's language change to Section 845.620(b)(4) limiting the identification of pumping wells and other groundwater uses to within 2,500 feet of the surface

impoundment. The Agency purposely proposed language that left this requirement more open-ended based on the specific site characteristics. All of the CCR surface impoundment sites will need to perform groundwater monitoring under the proposed rule for corrective action and closure. Groundwater monitoring wells and other groundwater uses must be identified throughout the area that will be modeled as part of these efforts. Identification of groundwater pumping wells and usage out to a radius of only 2,500 feet is not even an area of one square mile. A corrective action or closure alternatives analysis utilizing a model of less than one square mile would rarely be sufficient.

Second, regarding subsections (b)(13) and (15), the Agency is concerned that MWG's proposed revisions provide equal deference to site specific information and "local information," and give the impression that limited or no site-specific information is necessary. While the Agency testified that it may accept literature in certain scenarios where site specific information is not readily available or obtainable, those circumstances are limited. Hrg. Transcript Aug. 13, 2020, p. 78-79. Literature reviews can include outdated information or can have been studied at too great a distance from the site to be relied upon as the sole or limited source for a site characterization. Literature reviews can be included in hydrogeologic site characterizations and the Agency does not object to supplemental usage of literature reviews. The Agency believes, however, that physical, site-specific data is the best information to characterize a site. The Agency is concerned that specifically allowing a literature review in this portion of the rule weakens the requirement of physical site-specific information. As a reminder, Section 845.210(d) allows for previous assessments and investigations to be used at sites for review, which could include literature reviews.

Section 845.630 Groundwater Monitoring Systems

The Agency opposes Dynegy's inclusion of "uppermost aquifer" in Section 845.630(a)(2), shown below:

> a) Performance standard. The owner or operator of a CCR surface impoundment must install a groundwater monitoring system that consists of a sufficient number of wells, installed at appropriate locations and depths, to yield groundwater samples that:
>
> * * *
>
> 2) Accurately represent the quality of groundwater passing the waste boundary of the CCR surface impoundment. The downgradient monitoring system must be installed at the waste boundary that ensures detection of groundwater contamination in the uppermost aquifer. All potential groundwater contaminant pathways must be monitored.

Except for the aquifer location restriction in Section 845.300, for which the language comes from Part 257, the Agency has consistently required the monitoring of "groundwater," not the uppermost aquifer, throughout Part 845. The Agency believes that the groundwater protection standards are applicable whether or not a particular geologic formation meets the definition of an aquifer. In fact, subsection (a)(2) requires the monitoring of all contaminant pathways, a requirement also found in Part 257, which makes it clear that the uppermost aquifer is not the only groundwater of concern. The Agency does not believe adding the term "groundwater" to the last sentence of subsection (a)(2) is necessary as the subsection is discussing the groundwater monitoring system, however the Agency is not opposed to its inclusion. The Agency is opposed to the inclusion of "uppermost aquifer" is Section 845.630(a)(2) and prefers the Board adopt Section 845.630 as contained in the Agency's final Part 845 proposal filed as Attachment A to its *Final Post Hearing Comments* on October 30, 2020,

Section 845.640 Groundwater Sampling and Analysis Requirements

The Agency strongly opposes Dynegy's proposed revisions to Section 845.640(h) reflected below:

h) The owner or operator of the CCR surface impoundment must determine whether or not there is a statistically significant ~~increase~~ level over ~~background values~~ the groundwater protection standard for each constituent in Section 845.600.

1) In determining whether a statistically significant ~~increase~~ level has occurred, the owner or operator must compare the groundwater quality of each constituent at each monitoring well designated pursuant to Section 845.630(a)(2) or (d)(1) to the ~~background value of that constituent~~ groundwater protection standard, according to the statistical procedures and performance standards specified under subsections (f) and (g) of this Section.

2) Within 60 days after completing sampling and analysis, the owner or operator must determine whether there has been a statistically significant ~~increase~~ level over ~~background~~ the groundwater protection standard for any constituent at each monitoring well.

The groundwater protection standards for new CCR surface impoundments in Section 845.600 is background, which means that a statistically significant increase over background is a statistically significant level over the groundwater protection standard. The same holds true for an existing or inactive CCR surface impoundment that has a background constituent concentration above the numerical groundwater protection standards. However, when the background concentration at an existing or inactive CCR surface impoundment does not exceed the numerical groundwater protection standard, the substitution of language is unacceptable.

The numerical groundwater protection standards are based on health and environmental considerations. Therefore, to require that some statistically calculated concentration above the groundwater protection standard is necessary, when groundwater up gradient of the CCR surface impoundment has not been impacted above that concentration, is not protective of human health and the environment. Furthermore, many of the GWPS in 845.600(a)(1) are the same numerical limits contained in Part 620. To allow a statistically significant increase over the numerical GWPS before recognizing that an exceedance (or violation) has occurred at existing and inactive CCR

surface impoundments would be inconsistent with and less protective than Part 620, which still applies at the subject sites. Hrg. Transcript Aug. 13, 2020, p. 29-30. For these important reasons, the Agency urges the Board to reject Dynegy's proposed revisions to Section 845.640(h).

Section 845.650 Groundwater Monitoring Program

Dynegy proposed several revisions to Section 845.650, which are provided below in their entirety for ease of reference:

b) Monitoring Frequency

(1) The monitoring frequency for all constituents with a groundwater protection standard in Section 845.600 and Calcium shall be at least quarterly during the active life of the CCR surface impoundment and the post-closure care period or period specified in Section 845.740(b) when closure is by removal, unless such frequency has been reduced pursuant to subsection 2.[2]

* * *

(2) ~~The groundwater elevation monitoring frequency shall be monthly.~~ In addition to measuring groundwater elevations in accordance with Section 845.640(c), daily groundwater elevation data must be collected from one monitoring well located upgradient and one well located downgradient of the CCR surface impoundment.

(3) Five years after the completion of closure activities, the owner or operator of a CCR surface impoundment may request modification of the post-closure care plan to reduce the frequency of groundwater monitoring to semi-annual sampling, to eliminate daily groundwater elevation monitoring pursuant to Section 845.650(b)(2), or both. IEPA may approve of such a modification where the owner or operator demonstrates the following:

A) That monitoring effectiveness will not be compromised by the reduced frequency of monitoring;

[2] This revision reflects the text contained in Dynegy's Attachment 1, p. 36 of its Post Hearing Comments. The revision to Section 845.650(b)(1) contained in the narrative on page 4 of Dynegy's Post Hearing Comments references Section 845.780(g), which does not exist in either the Agency's proposed Part 845 or any newly proposed provisions the Agency could identify.

B) That sufficient data has been collected to characterize groundwater; and

C) That concentrations of constituents monitored pursuant to Section 845.650(a) at the down-gradient monitoring well(s) show no statistically significant increasing trends that can be attributed to the CCR surface impoundment.

(4) If, after revising the post-closure care plan pursuant to subsection 2[3], a statistically significant increasing trend is detected, monitoring shall revert to a quarterly frequency, pursuant to Section 845.650(b)(1).

* * *

d) If one or more constituents are detected at a statistically significant level above a ~~, and confirmed by an immediate resample, in exceedance of~~ the groundwater protection standard~~s~~ in Section 845.600 in any sampling event, the owner or operator must notify the Agency which constituent exceeded the groundwater protection standard and place the notification in the facility's operating record as required by Section 845.800(d)(16). The owner or operator of the CCR surface impoundment also must:

Illinois EPA opposes certain revisions Dynegy proposed to Section 845.650(b) Subsections (b)(1) and (b)(4) refers to a reduction in frequency related to subsection (b)(2), however (b)(2) relates only to the measurement of groundwater levels and only proposes the use of one upgradient and one down gradient well. It is not clear from the proposed revision that collection of analytical samples will not also be limited by the cross-reference provided. Subsection(b)(3) may be a more appropriate reference since it refers specifically to groundwater monitoring and groundwater elevation monitoring separately. Other than the above concerns, the Agency has provided its comments on any proposal to reduce the frequency of groundwater monitoring in its *Responses to the Board's Questions for Witnesses Testifying at the Second*

[3] This revision reflects the text contained in Dynegy's Post Hearing Comments, Attachment 1, p. 37. The revision to Section 845.650(d) contained in the narrative on page 4 of Dynegy's Post Hearing Comments references Section 845.780(g)(1), which does not exist in either the Agency's proposed Part 845 or any newly proposed provisions the Agency could identify.

Hearing, p. 5-6 (Sept. 24, 2020).

The Agency strongly objects to Dynegy's revision proposed in Section 845.650(d). Consistent with the explanations provided for the Agency's opposition to revisions proposed by Dynegy in Sections 845.610 and 640, this requirement applies to new, existing and inactive CCR surface impoundments. Therefore, the exceedance of the groundwater protection standard may be a statistically significant increase or it may be a concentration over a numerical standard. The Agency's proposed rule language works in either instance. Therefore, the Agency urges the Board to reject Dynegy's proposed revision to Section 845.650(d)

MWG proposed several of its own revisions to Section 845.650. For ease of reference, MWG's proposed revisions to which the Agency objects are provided below, with the Agency's comments following each subsection.

a) The owner or operator of a CCR surface impoundment must conduct groundwater monitoring consistent with this Section. At a minimum, groundwater monitoring must include groundwater monitoring for all constituents with a groundwater protection standard in Section 845.600 and Calcium. The owner or operator of the CCR surface impoundment must submit a groundwater monitoring plan to the Agency with its operating permit application.

1) **After twelve quarters of groundwater monitoring, an owner or operator may petition the Agency to reduce the constituents analyzed based upon the CCR leachate chemistry in a CCR surface impoundment. The leachate characterization may consist of either sampling and analysis of pore space liquid within the CCR or applicable laboratory leach testing of representative CCR sample(s) for the groundwater monitoring constituents listed in Section 845.600 and Calcium.**

2) **If the Agency approves the reduction of constituents, the owner or operator must analyze the CCR leachate chemistry every five years or if there is a change in coal source, combustion process, or handling process. If there is a change in the leachate chemistry, the monitoring program must be immediately adjusted to analyze for the constituents detected in the leachate.**

3) **An Agency disapproval is not a final decision appealable to the Board; however, a disapproval does not prevent an owner or operator from submitting subsequent petition(s).**

Illinois EPA is opposed to the above proposed revisions to Section 845.650(a). The Agency believes the simplest and most reliable way to determine what constituents may be leaking from a CCR surface impoundment is to analyze for the full suite of constituents. Further, the Agency's opinion is that no constituent may be completely eliminated from monitoring under Part 845, because Part 257 does not allow complete elimination of any constituent from monitoring. A complete elimination of monitoring for any constituent contained in Appendix III or IV of Part 257 would therefore be inconsistent with Section 22.59(g)(1) of the Act and prohibited.

b) Monitoring Frequency

1) The monitoring frequency for all constituents with a groundwater protection standard in Section 845.600 and Calcium, **or as amended pursuant to Section 845.650(a),** shall be at least quarterly during the active life of the CCR surface impoundment and the post-closure care period or period specified in Section 845.740(b) when closure is by removal, **except as allowed by Section 845.650(b)(3)**

The Agency is opposed to these proposed revisions to Section 845.650(b)(1), which refer to other subsections to which the Agency is opposed, as explained relative to those subsections. Therefore, the Agency respectfully requests these proposed revisions to Section 845.650(b)(1) not be accepted by the Board.

A) For existing CCR surface impoundments **regulated under 40 CFR 257**, a minimum of eight independent samples from each background and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a) and Calcium no later than 180 days after the effective date of this Part. **The owner or operator may also rely upon data collected pursuant to Section 845.210(d).**

The Agency is opposed to MWG's proposed revisions to Section 845.650(b)(1)(A).

These revisions refer to concepts in other subsections and create a link between those subsections to which the Agency is opposed, as explained relative to those subsections. Part 845 does not prohibit the use of existing groundwater monitoring data and the Agency is not opposed to its use when the Agency deems the data is acceptable. Therefore, the Agency respectfully requests these proposed revisions to Section 845.650(b)(1)(A) not be accepted by the Board.

> **B)** **For existing CCR units not regulated under 40 CFR 257 but that are classified as regulated under 35 IAC 845, a minimum of eight independent samples from each background and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a) and Calcium no later than 18 months after the effective date of this Part.**

The Agency is strongly opposed to MWG's proposed revisions to Section 845.650(b)(1). Part 257 allows only six months for new CCR surface impoundments to complete monitoring to establish background. The Agency therefore believes it reasonable that a "newly regulated" CCR surface impoundment also be given only six months to determine background. As explained more completely in the Agency's response to Section 845.230(d), an additional 18 months to establish background may not be consistent with the requirements of Sections 845.700(g) and (h), due to the additional time allowed for monitoring. Therefore, the Agency respectfully requests these proposed revisions for a new Section 845.650(b)(1)(B) not be accepted by the Board.

> C) For new CCR surface impoundments, and all lateral expansions of CCR surface impoundments, a minimum of eight independent samples for each background well and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a) and Calcium during the first 180 days of sampling.

* * *

3) After the initial five years of groundwater monitoring, the owner or operator may reduce the sampling frequency to a semi-annual basis, if the owner or operator demonstrates that monitoring effectiveness has not been compromised, that sufficient quarterly data has been collected to characterize groundwater, and that leachate from the monitored unit does not constitute a threat to groundwater. For the purposes of this Section, the source must be considered a threat to groundwater if the results of the monitoring indicate either that the concentrations of any of the constituents monitored is above the groundwater protection standard in Section 845.600 and Calcium, or as amended in Section 845.650(a). The owner or operator must first obtain the certification of a qualified professional engineer, place the certification in the operating record and submit the certification to the Agency as part of the Annual Report in Section 845.550.

* * *

The Agency is opposed to this proposed addition to Section 845.650(b). First, Part 845 is a program administered by the Agency and therefore modification must be subject to Agency review and approval. It is not clear from the proposed revisions that Agency review and approval is required. Second, this proposed new subsection refers to leachate analysis, which the Agency opposes as a substitute for groundwater analysis. Finally, this proposed new subsection refers to changes to Section 845.650(a) to which the Agency has already stated its opposition. For these reasons, the Agency respectfully requests that the Board reject MWG's proposed revisions for a new Section 845.650(b)(3)

d) If one or more constituents **being monitored** are detected, and confirmed by an immediate resample, in exceedance of the groundwater protection standards in Section 845.600 in **two consecutive quarterly** sampling event**s**, the owner or operator must notify the Agency which constituent exceeded the groundwater protection standard and place the notification in the facility's operating record as required by Section 845.800(d)(16). The owner or operator of the CCR surface impoundment also must:

* * *

3) Except as provided in subsection (d)(4), within 90 days of the **two consecutive quarterly** ~~detected~~ exceedance **events** of the groundwater protection standard, initiate an assessment of corrective measures as required by Section 845.660.

The Agency is opposed to MWG's proposed revisions to Section 845.650(d) and (d)(3). There is no need to specify constituents "being monitored" as the Agency proposes, consistent with Part 257, that all constituents be monitored each monitoring event. Allowing two consecutive quarters means that six months will be allowed to pass before the owner or operator either makes an alternative source demonstration or begins an assessment of corrective measures. The proposed revisions to these subsections also assume that a CCR surface impoundment is subject to quarterly groundwater monitoring, even though MWG in Section 845.650(b)(C)(3) proposes semi-annual monitoring. Therefore, if the Board were to allow semi-annual monitoring, these proposed revisions taken together would allow as much as a year to pass before an assessment of corrective measures begins. The Agency believes that up to a year delay in beginning an assessment of corrective measures is unnecessarily long and urges the Board to reject MWG's proposed revisions to Section 845.650(d).

> 4) Alternative Source Demonstration. The owner or operator of a CCR surface impoundment may, within 60 days of the **two consecutive** ~~detected~~ exceedance **events** of the groundwater protection standard, submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination, or that the exceedance of the groundwater protection standard resulted from error in sampling, analysis, statistical evaluation, natural variation in groundwater quality, or a change in the potentiometric surface and groundwater flow direction. Any such demonstration must be supported by a report that includes the factual or evidentiary basis for any conclusions and must be certified to be accurate by a qualified professional engineer.
>
> * * *

The Agency is opposed to MWG's proposed revisions to Section 845.650(d)(4). As with MWG's proposed revisions to subsection (d) and (d)(3), up to one year of additional time would be allowed before an owner or operator was required to take action. Therefore, the Agency respectfully requests these proposed revisions for a new Section 845.650(d)(4) not be

accepted by the Board.

> C) If the Agency does not concur with the written demonstration made pursuant to subsection (d)(4) of this Section**, the Agency's nonconcurrence is a final Agency decision appealable to the Board pursuant to Part 105 of the Board's rules. If an owner or operator appeals the Agency decision, any further corrective actions required under Sections 845.660, 845.670, and 845.680 are stayed pending the appeal.**
>
> D) **If the owner or operator does not appeal the Agency's nonconcurrence**, the owner or operator of the CCR surface impoundment must initiate the assessment of corrective measures requirements under Section 845.660.

Illinois EPA does not believe any revisions to subsections (d)(4)(C) and (d)(4)(D) are needed in Section 845.650. The Agency does not necessarily object to clarifying that a nonconcurrence with an alternate source demonstration is a final agency decision, however the Agency strongly objects to MWG's revisions to Section 845.650(d)(4)(C) and (D) that create an automatic stay of the initiation of assessment of corrective measure requirements in Section 845.660. Under the Administrative Procedures Act (APA), only certain permits are required to be stayed in their entirety during appeals. 5 ILCS 100/10-65(b). Otherwise, the Board has found that it has the authority to grant a discretionary stay upon request by the petitioner. *Community Landfill Co. and City of Morris v. IEPA*, PCB 01-48, PCB 01-49 (consol.), slip op. (Oct. 19, 2000). Where an automatic stay is not afforded by the APA, several factors are evaluated by the Board in determining whether a stay is appropriate:

> (1) a certain and clearly ascertainable right needs protection;
> (2) irreparable injury will occur without the injunction;
> (3) no adequate remedy at law exists;
> (4) there is a probability of success on the merits; and
> (5) the likelihood of environmental harm if a stay is granted.

Id. at 4. Importantly, in the context of staying the initiation of an assessment of corrective measures, the likelihood of environmental harm coupled with a petitioner's likelihood of success are important considerations. Allowing an automatic stay of corrective actions where the petitioner has a

low likelihood of success and environmental harm will continue for as long as an appeal is pending, is unacceptable. The discretion to issue a stay must remain with the Board.

Section 845.660 Assessment of Corrective Measures

To align with its proposed revisions to Section 845.650, MWG proposes revising Section 845.660 as follows:

> a) Unless the Agency has concurred with an alternative source demonstration made pursuant to Section 845.650(d)(4) **or the owner or operator has filed an appeal of the Agency's nonconcurrence**, the owner or operator must initiate an assessment of corrective measures to prevent further releases, to remediate any releases and to restore the affected area.
>
> 1) The assessment of corrective measures must be initiated within 90 days of finding that any constituent listed in Section 845.600 has been detected in exceedance of the groundwater protection standards **in two consecutive quarterly sampling events**, or immediately upon detection of a release of CCR from a CCR surface impoundment.

For the reasons stated above in response to MWG's proposed revisions to Section 845.650(d)(4), Illinois EPA similarly states its strong objection to MWG's proposed revision to Section 845.660 creating an exception to the deadline to initiate assessment of corrective measures. Additionally, providing such an exception in Part 845 would run afoul of the Agency's statutory mandate to be as protective as Part 257, and potentially interfere with USEPA's approval of Illinois' program. Illinois EPA is also opposed to MWG's proposed revisions to Section 845.660(a)(1). As explained in the Agency's response to Section 845.650(b), the Agency believes that a delay of up to one year, depending on the sampling frequency, is too long to delay an assessment of corrective measures. Accordingly, the Board should reject MWG's proposed revisions to Section 845.660.

Section 845.700 Required Closure or Retrofit of CCR Surface Impoundments

Illinois EPA objects to Dynegy's proposed revisions to 845.700(g)(1) and (g)(5), which create a much higher standard for categorization of a CCR surface impoundment as a Category 2 impoundment. As drafted, Agency designation of a Category 2 impoundment pursuant to the (g)(5) factors is a finding of imminent threat warranting the designation. Dynegy's revision requires two separate elements be fulfilled: an Agency designation under (g)(5) and a separately supported finding of an imminent threat to human health and the environment. The Agency believes a (g)(5) finding warrants a Category 2 designation for closure prioritization and strongly opposes creating a subjective standard applicable to every Category 2 categorization or designation. The Agency would not oppose replacing "and" with "or" in Dynegy's revision to (g)(1)(B), as reflected below, so that a (g)(5) designation would not necessarily subject an owner or operator to potential liability based on the "imminent threat" language of that provision, however, the Agency encourages the Board to reject Dynegy's proposed revision to Section 845.700(g)(5) in its entirety.

Section 845.710 Closure Alternatives

Dynegy proposes new subsection (d) to 845.710, which would authorize an owner or operator to "elect to implement Environmental Land Use Controls, pursuant to the procedures set forth in 35 Ill. Adm. Code 742.1010" in selecting a closure alternative under Part 845. Such a provision is not authorized by the Illinois Environmental Protection Act. Environmental Land Use Controls (or ELUCs) are authorized by Section 58.17 of the Act when necessary to manage risk to human health or the environment arising out of contamination left in place pursuant to procedures in 58.5 (risk-based remediation objectives) and Part 742 (risk-based corrective action objectives). 415 ILCS 5/58.17. ELUCs are institutional controls that can be used to impose land use limitations or requirements related to environmental contamination when such contamination exceeds the most stringent Tier 1 remediation objectives and is left in place on an off-site property. Because

ELUCs are not authorized or designed to be used outside scope of TACO rules, the Agency strongly opposes, and encourages the Board to reject, Dynegy's proposed Section 845.710(d).

Section 845.750 Closure with a Final Cover System

The Agency objects to Dynegy's proposed reduction in the thickness of the final cover. The final cover system is based on the current practices required for landfills in Illinois (35 Ill. Adm. Code 811.314), which also require leachate collection and removal systems. The proposed final cover requirements are not overly protective because existing CCR surface impoundments closed with CCR in place have no low permeability liners and no leachate collection and removal systems. Mr. Bonaparte states that the final cover system proposed by Dynegy can often meet the performance standards of Section 845.750(a). Hrg, Ex. 31, p. 6. Mr. Bonaparte then opines that at locations where performance standards cannot be met, the final cover can be supplemented with one or more additional engineering measures. Hrg, Ex. 31, p. 7. It is not protective of groundwater to utilize a final cover which may or may not meet the performance standards and simply rely one or more additional engineering measures. The additional measures that Mr. Bonaparte refers to would include a means of capturing contaminated groundwater due to the final cover not limiting infiltration into the CCR impoundment. This process will involve operating a pumping system which may need to be operated for extended periods of time. It is not appropriate to minimize final cover system requirements and rely on other remedial measures to address an inadequate final cover system.

III. Response to Other Substantive Comments

Outside of specifically proposed revisions to Part 845, Illinois EPA provides additional response to other general comments filed with the Board below.

A. Illinois CCR Rule Compliance Data and Information Websites

On Pages 20 and 21 of their *Post Hearing First Notice Comments*, CWLP suggests that the Agency's proposal in Section 845.810(a) to require a website separate from the federal website

required by Part 257 serves no purpose but to assist the Agency in finding relevant information. Even if that were so, the Agency will be administering a permit program for CCR surface impoundments, therefore ease of access for the Agency is a valid reason to have a separate repository. However, because Part 845 is a permit program instead of self-implementing like Part 257, Illinois EPA anticipates that documents will be organized differently for submission as part of permits. There will be operating and construction permits and associated applications. Construction permits will be needed for closure and potentially corrective action. Many of the disparate reports required by Part 257 will become part of an annual consolidated report, under Section 845.550.

Further, the Agency intends to get approval by USEPA to manage CCR surface impoundments in place of Part 257. There is no way to predict how long that approval process will take, because the only other participating states (Oklahoma and Georgia) have adopted Part 257 into their rules, instead of creating a more comprehensive rule as the Agency has proposed. So for some unknown period of time, and considering the differing the requirements between the programs, there will be the necessity of two publicly available repositories. If CWLP is concerned that members of the public will have difficulty finding an Illinois-specific publicly available site, it could take measures to plainly identify them on CWLP's home-page and communications. The Agency urges the Board to adopt the language the Agency suggests in its final proposed Section 845.810 as reflected in Attachment A of its *Final Post Hearing Comments* filed October 30, 2020.

B. USEPA Public Comment

On October 29, 2020, USEPA sent a letter to the Board regarding Updates to the Federal Regulations for Coal Combustion Residuals, which the Board posted as a Public Comment. The USEPA letter outlines two updates identified as Part A and Part B. The primary focus of Part A is a change by USEPA in the date by which CCR surface impoundments that are unlined or fail the

aquifer location restriction must cease receipt of waste (85 Fed. Reg. Aug. 28, 2020, 53516). Included in the amendment are provisions for owners and operators of CCR surface impoundments to make demonstrations for extensions of time to cease receipt of waste if there is no alternative capacity or the owner or operator will cease use of a coal-fired boiler by date certain. The primary focus of Part B is to establish a method by which owners and operators of clay lined CCR surface impoundments can make demonstrations that their clay lined impoundments do not pose a reasonable probability of adverse effect. An approved demonstration extends the time until the CCR surface impoundment must cease receipt of waste, which is based on the time the clay lined CCR surface impoundment can be safely operated.

When drafting Part 845, the Agency was aware, through communications with USEPA, that Part A was expected to be adopted by USEPA, before Part 845 became final. Therefore, the Agency included general provisions in its proposal filed March 30, 2020.

With the final adoption of Part A by USEPA, the Agency was able to make some revisions to Part 845, primarily in Section 845.700, which are included in the Agency's final proposed rule filed in its *Final Post Hearing Comments* on October 30, 2020. These revisions more accurately reflect USEPA's final rules in Part 257.103(f). The specifics and timing of Part B were not as well developed at the time the Agency was drafting Part 845. Therefore, the Agency did not include the provisions of Part B in the March 30 proposal. Because the final rule was not signed until October 15, 2020, the Agency did not propose any revisions to Part 845 reflecting Part B. However, the Agency has reviewed the provisions of Part B. The demonstrations under Part B allow clay lined CCR surface impoundments, which are otherwise considered unlined to continue to receive waste for a specified time period. Since Part 845 does not incorporate any of the provisions of Part B, clay lined CCR surface impoundments will continue to be considered unlined and will be required

to close on the same schedule as other unlined CCR surface impoundments. The Agency believes that its final proposed rule is as protective and comprehensive as both the Part A and Part B amendments to Part 257.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Petitioner,

BY: /s/ Stefanie Diers
Stefanie Diers

Dated: November 6, 2020

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THIS FILING IS SUBMITTED ELECTRONICALLY

CERTIFICATE OF SERVICE

I, the undersigned, on affirmation state the following:

That I have served the attached **NOTICE OF FILING** and **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S FINAL POST-HEARING COMMENTS** by e-mail upon Don Brown at the e-mail address of don.brown@illinois.gov, upon Renee Snow at the e-mail address of Renee.Snow@Illinois.Gov, upon Matt Dunn at the e-mail address of mdunn@atg.state.il.us, upon Stephen Sylvester at the e-mail address of ssylvester@atg.state.il.us, upon Andrew Armstrong at the e-mail address of aarmstrong@atg.state.il.us, upon Kathryn A. Pamenter at the e-mail address of KPamenter@atg.state.il.us, upon Virginia I. Yang at the e-mail address of virginia.yang@illinois.gov, upon Nick San Diego at the e-mail address of nick.sandiego@illinois.gov, upon Robert G. Mool at the e-mail address of bob.mool@illinois.gov, upon Vanessa Horton at the e-mail address of Vanessa.Horton@Illinois.gov, upon Paul Mauer at the e-mail address of Paul.Mauer@illinois.gov, upon Deborah Williams at the e-mail address of Deborah.Williams@cwlp.com, upon Kim Knowles at the e-mail address of Kknowles@prairierivers.org, upon Andrew Rehn at the e-mail address of Arehn@prairierivers.org, upon Faith Bugel at the e-mail address of fbugel@gmail.com, upon Jeffrey Hammons at the e-mail address of Jhammons@elpc.org, upon Keith Harley at the e-mail address of kharley@kentlaw.edu, upon Daryl Grable at the e-mail address of dgrable@clclaw.org, upon Michael Smallwood at the e-mail address of Msmallwood@ameren.com, upon Mark A. Bilut at the e-mail address of Mbilut@mwe.com, upon Abel Russ at the e-mail address of aruss@environmentalintegrity.org, upon Susan M. Franzetti at the e-mail address of Sf@nijmanfranzetti.com, upon Kristen Laughridge Gale at the e-mail address of kg@nijmanfranzetti.com, upon Vincent R. Angermeier at the e-mail address of va@nijmanfranzetti.com, upon Alec M. Davis at the e-mail address of adavis@ierg.org, upon Jennifer M. Martin at the e-mail address of Jmartin@heplerbroom.com, upon Kelly Thompson at the e-mail address of kthompson@ierg.org, upon Walter Stone at the e-mail address of Walter.stone@nrgenergy.com, upon Cynthia Skrukrud at the e-mail address of Cynthia.Skrukrud@sierraclub.org, upon Jack Darin at the e-mail address of Jack.Darin@sierraclub.org, upon Christine Nannicelli at the e-mail address of christine.nannicelli@sierraclub.org, upon Stephen J. Bonebrake at the e-mail address of sbonebrake@schiffhardin.com, upon Joshua R. More at the e-mail address of jmore@schiffhardin.com, upon Ryan C. Granholm at the e-mail address of rgranholm@schiffhardin.com, upon N. LaDonna Driver at the e-mail address of LaDonna.Driver@heplerbroom.com, upon Alisha Anker at the e-mail address of aanker@ppi.coop, upon Chris Newman at the e-mail address of newman.christopherm@epa.gov, upon Claire A. Manning at the e-mail address of cmanning@bhslaw.com, upon Anthony D. Schuering at the e-mail address of aschuering@bhslaw.com, upon Jennifer Cassel at the e-mail address of jcassel@earthjustice.org, upon Melissa Brown at the e-mail address of Melissa.Brown@heplerbroom.com, upon Thomas Cmar at the e-mail address of tcmar@earthjustice.org,, and upon Kiana Courtney at the e-mail address of KCourtney@elpc.org.

That my e-mail address is Stefanie.Diers@illinois.gov

That the number of pages in the e-mail transmission is 43.

That the e-mail transmission took place before 4:30 p.m. on the date of November 6, 2020.

/s/ Stefanie Diers
November 6, 2020