**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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| In the Matter of: | ) | |
| STANDARD FOR THE DISPOSAL OF COAL COMBUSTION RESIDUALS IN SURFACE IMPOUNDMENTS: PROPOSED NEW 35 ILL. ADMIN. CODE 845 | ) | PCB 2020-019 (Rulemaking - Land) |

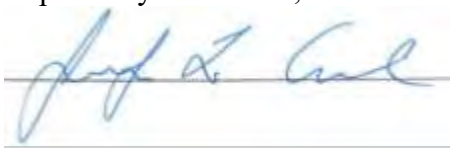
**NOTICE OF ELECTRONIC FILING**

To: Attached Service List

PLEASE TAKE NOTICE that on November 6, 2020, I electronically filed with the Clerk of the Illinois Pollution Control Board ("Board") the **ENVIRONMENTAL LAW & POLICY CENTER, PRAIRIE RIVERS NETWORK, SIERRA CLUB, AND LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION'S FINAL RESPONSE COMMENTS**, copies of which are served on you along with this notice. Attachments to the Comments will be sent in separate filings.

Dated: November 6, 2020

Respectfully Submitted,



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| PROPOSED NEW 35 ILL. ADM. | ) | |
| CODE 845 | ) | |

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**DATED**: November 6, 2020

## Introduction

The Environmental Law & Policy Center ("ELPC"), Prairie Rivers Network ("PRN"), Sierra Club, and Little Village Environmental Justice Organization ("LVEJO") (collectively, "Environmental Groups" or "Commenters"), hereby submit these final response comments on the draft rules proposed by the Illinois Environmental Protection Agency ("the Agency" or "IEPA") in the above-referenced docket.

As we submit these final comments, we want to thank the Board, the Agency, and other participants in this matter for their dedication and effort in this fast-paced, broad rulemaking. The consequences of making the wrong choices here could leave generations of Illinois communities without clean and safe water, that most precious of resources. We believe the Board will make the right choice. Please meet this moment with clear, strong regulations that protect Illinoisans against the fouling of our waters, air, and land, and safeguard our communities as we face greater environmental and health challenges in the coming years.

## I. Illinois' Regulations May Be More Protective Than the Federal CCR Rule.

In its Final Comments, the Agency opposes some of the environmental groups' proposals to strengthen the Proposed Rule on the basis that the changes depart from the language in the federal coal ash rule in Part 257. For example, responding to Mr. Hutson's suggestion that the agency define and incorporate the phrase "uppermost zone of saturation," the Agency notes that it "is seeking to obtain federal approval of Illinois' CCR surface impoundment program. The Agency has worked closely with the USEPA during the Part 845 rulemaking process and has been frequently reminded to keep the language and function of Part 257 as similar as possible."[1] The Agency opposed Mr. Hutson's suggested addition of floodplains to the location restrictions on the same basis.[2]

But the Agency's explanation for not considering Mr. Hutson's proposed additions – which are necessary to ensure ash is not left in water or inundated by floodwaters[3] – is unavailing. The Federal CCR Rule is the *floor*, not the ceiling for the Illinois Rules. The Coal Ash Pollution Prevention Act directs the Board to adopt rules governing coal ash impoundments in Illinois that are "*at a minimum . . . at least as protective . . . as* the federal regulations . . . or amendments thereto promulgated by the Administrator of the [USEPA] in Subpart D of 40 CFR 257 governing CCR surface impoundments."[4] Moreover, the WIIN Act amended RCRA by, among other things, directing EPA to approve state coal ash permitting programs that "require[]

[1] Illinois EPA's Final Post-Hearing Comments at 10 (Oct. 30, 2020) (hereinafter "IEPA Post-Hearing Comments").
[2] *Id.* at 11. ("Floodplains have not been included in the location restrictions in Part 257, and therefore are not included as a location restriction in Part 845 for the same reasons listed above for retaining consistency with the federal regulations.").
[3] Ex. 14, Prefiled Testimony of Mark Hutson at 6-12 (Aug. 27, 2020) (hereinafter "Hutson Test."); Ex. 15, Prefiled Answers of Mark Hutson, *passim* (Sept. 24, 2020) (hereinafter "Hutson Answers").
[4] 415 ILCS 5/22.59(g)(1) (emphasis added).

each coal combustion residuals unit located in the State to achieve compliance with . . . criteria that . . . *[are] at least as protective as*" the federal criteria for CCR units under 40 C.F.R. Part 257.[5] In other words, the Illinois rules may be as protective or *more* protective than the federal rule; there is no need for the Illinois rules to be "similar" where they are more protective. Indeed, the Agency has explicitly recognized its authority to provide stronger protections than the federal rule by adopting such measures elsewhere in its proposed rule.[6] Thus, any attempt to justify the failure to propose adequately protective regulations cannot be based on limitations in the WIIN Act or the Coal Ash Pollution Prevention Act.

Moreover, we question the Agency's assertion that "[c]hanges to definitions and location restrictions will require additional explanation and justification to USEPA to gain federal approval."[7] The agency will merely need to demonstrate that the changes make the rule more protective than the federal baseline, for which there is ample support in the rulemaking record.[8] That the changes will require slightly more work from the Agency is no reason to reject a proposal that strengthens the rule and moves it closer to achieving goals of the Coal Ash Pollution Prevention Act to ensure the "responsible disposal and storage of coal [ash]."[9]

## II. Costs May Not Be Considered in Developing These Rules, and Environmental Groups' Proposed Modifications Are Reasonable Regardless.

### A. Costs May Not Be Considered in the Development or Implementation of These Rules.

Cost may not be considered in the development of these rules or in the Agency's implementation of them. As detailed in Section I above, Illinois' rules for CCR surface impoundments must be "at least as protective and comprehensive as" the Federal CCR Rule.[10] In *Utility Solid Waste Activities Group v. Environmental Protection Agency* ("*USWAG*"), the Court of Appeals for the D.C. Circuit held that costs may not be considered in setting standards for coal

[5] 42 U.S.C. § 6945(d)(1)(B) (emphasis added); *see also Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 437 (D.C. Cir. 2018) ("the WIIN Act does not affect the validity of the Rule itself . . . . ").
[6] *See, e.g.*, IEPA Final Post-Hearing Comments at 31-35 (leaving out "liquids" in definition of "inactive surface impoundments" in order to include unlined CCR impoundments that have leaked dry); *id.* at 41-42 (proposing groundwater monitoring program to require quarterly monitoring instead of semi-annual, and all constituents in a single tier instead of the phased detection and assessment monitoring in the federal rule); *id.* at 43-44 (leachate collection for impoundments).
[7] IEPA's Final Post-Hearing Comments at 10.
[8] *See, e.g.,* Ex. 14, Hutson Test. at 6-12; Ex. 15, Hutson Answers, *passim.*
[9] 415 ILCS 5/22.59(a).
[10] 415 ILCS 5/22.59(g)(1).

ash disposal units under the Federal CCR Rule (or any modifications thereto).[11] Specifically, the USWAG court rejected an industry challenge to a provision of the federal CCR rule providing that extension of closure deadlines may not be based on cost or inconvenience.[12] The Court explained:

> Under any reasonable reading of RCRA, there is no textual commitment of authority to the EPA to consider costs in the open-dump standards. RCRA's statutory language instructs the EPA to classify a disposal site as a sanitary landfill and not an open dump only "if there is no reasonable probability of *adverse effects on health or the environment* from disposal of solid waste at such facility." 42 U.S.C. § 6944(a) (emphasis added). There is no explicit mention of costs in section 6944; nor is there any flexible language such as "appropriate and necessary" that might allow the EPA to consider costs in its rulemaking.[13]

Costs, accordingly, may not be taken into consideration in establishing the federal CCR Rule.

If costs were considered in the development of these rules, Illinois' rules would be less protective than the federal CCR Rule. Taking cost into account can lead to weaker protection of Illinois' communities and environment in several ways: owners of coal ash impoundments might seek to cut corners in exploring the extent of a contamination plume,[14] in modeling the impacts of a particular remedial measure,[15] or – almost certainly – in selecting a closure option that costs

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[11] *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 448-49 (D.C. Cir. 2018) (hereinafter "*USWAG*"), in the record as IEPA Statement of Reasons, Attach. 3; *see also Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 363 (D.C. Cir. 1989) ("EPA must consider costs in setting its [maximum contaminant levels under the Safe Drinking Water Act]; there is no similar limitation in § 3004 of RCRA.").

[12] *Id.*

[13] *Id.*

[14] *See* Ex. 15, Hutson Answers at 9 (explaining that the rules should be more specific with regard to how to characterize the nature and extent of the contamination plume because, "in practice, many facilities are not particularly interested in developing sufficient data to define the location, depth, or rate of movement of the leading edge of contaminant plumes, and do not take the necessary measures to do so").

[15] *See* Ex. 19, Prefiled Testimony of Scott Payne and Ian Magruder at 31 (Aug. 27, 2020) (hereinafter "Payne & Magruder Test") ("Our review of the model reports generated for the three sites in Illinois indicate that owner/operators may not adequately document model development either because the importance of model documentation is not understood, *it is costly to do so*, or proper documentation will reveal severe deficiencies in the modeling process.") (emphasis added).

less[16] but does not ensure long-term environmental protection.[17] Indeed, Dynegy witness Mark Rokoff testified that "Closure by removal can be more costly and oftentimes may be more costly than closure in place, and that when looking at the ability to do a cost recovery, whatever the option is, that cost is a deciding factor or a notable factor in the overall selection process."[18]

At the hearing, Mr. Dunaway confirmed that the Agency agrees that taking costs into consideration would render the Illinois rules less protective than the federal CCR rule and is, thus, prohibited by the Coal Ash Pollution Prevention Act. Responding to a question concerning Agency review of requests for extensions, Mr. Dunaway explained:

> In looking at Part 257, since neither inconvenience nor cost can be considered, and since our 845 has to be at least stringent, the Agency – it was the Agency's opinion that since these demonstrations of no alternative capacity would have to be reviewed every six months and we were not allowed, under part 257 or would not be allowed under part 257, to consider inconvenience or cost, that we would not be able to approve any of those, but we would have to review those demonstrations

[16] *See* Tr. Sept. 30, 2020 13:14-16 (Testimony of Rokoff) ("Additionally, closure by removal is rarely selected if there is no ability for cost recovery."); *Id.* at 27:11-23 (Testimony of Rokoff) ("Q. Are you aware of instances in which an owner or operator's decision not to move forward with a closure method was based primarily on cost? A. As I look back at my experience, cost is, again, one of many factors. So it's unfair for me to say that that's the primary factor but, rather, one of many primary factors that aid the final selection. I will note that my testimony does indicate that cost is an important factor, as we've seen by the charts. As a matter of fact, in states that don't have cost recovery, 1 percent of the volume of cost of material is currently identified as closure by removal"); *see also* Ex. 16, Prefiled Testimony of Andrew Rehn at 7 (Aug. 27, 2020) (hereinafter "Rehn Test.) ("[T]he way I've seen Illinois EPA regulate coal ash sites . . . is to request more information about industry proposals until the company refines their solution to something that Illinois EPA can accept. If this back and forth becomes a stalemate, Illinois EPA might deploy its only prescriptive tool – an enforcement action. In my opinion, this regulatory method incentivizes industry to do a lackluster job in their initial offering, trying to find the cheapest option that will get approval and having no real reason to do a comprehensive analysis.")

[17] *See* ELPC, PRN, Sierra Club and LVEJO Final Post-Hearing Comments at Section III (Oct. 30, 2020) (hereinafter "Envt'l Groups Post-Hearing Comments").

[18] Tr. Sept. 30, 2020 32:14-19.

> every six months, and it would consume our time reviewing demonstrations that we couldn't approve.[19]

Mr. Dunaway similarly testified that it is improper, for the same reasons, to consider costs in evaluating and approving proposals for corrective action:

> MS. CASSEL: . . . [I]s it the Agency's understanding that costs cannot be considered in decisionmaking processes under Part 845?
>
> MR. DUNAWAY: Lynn Dunaway. 845 requires financial assurance for corrective action and, therefore, there has to be some cost analysis done there. However, for selecting a corrective action, there is not a cost element in Part 845.670.
>
> MS. CASSEL: How will the Agency ensure that costs are not considered in that evaluation for corrective action?
>
> MR. DUNAWAY: The Agency will review the information provided which only those elements in Part 670 are what the Agency would consider. So an owner/operator could attach costs to all of those which would probably be useful

[19] Tr. Aug. 25, 2020 10:6-18; *see also id.* at 10:19 - 11:7 ("MS. GALE: I'm sorry. The original question was is, you believe it to be extremely challenging to meet the burden of proof under 257.103. And just so I understand, your explanation is because you understand USEPA says that you can't consider inconvenience or cost and that you also don't want to review them every six months. Is that it? I'm just trying to understand you. MR. DUNAWAY: Yes. Since we can't – since we would not be able to consider cost or inconvenience, that means that if there would be any capacity anyplace within the world that you could find capacity, then you would have to do that.")

> for calculating their financial assurance. However, that is not what the Agency considers if it is not listed here. So it's not open for consideration.[20]

Mr. Dunaway also reiterated that consideration of costs is improper in evaluating and approving closure methods,[21] and the Agency's prefiled answers likewise reiterate that understanding.[22]

To ensure compliance with the Coal Ash Pollution Prevention Act and protect Illinois communities and environment, the Board should make clear that consideration of costs is impermissible in both the development and implementation of these rules.

B. Even if Costs Could Be Considered, Environmental Groups' Proposed Changes Are Reasonable and Sensible Proposals That Protect Illinoisans Against Unnecessary Costs.

Even if the Board were to conclude that costs may be considered in the development or implementation of these rules, the Board should adopt the Environmental Groups' proposals to strengthen these rules because they are economically reasonable, sensible solutions to avoid imposing potentially significant costs on future generations of Illinois residents.

Requiring removal as the closure method for coal ash ponds with coal ash in contact with water, in floodplains, or in other risky locations is one such sensible solution. As explained by geologist Mark Hutson, "'Cleaning up contaminated ground water is a long and costly process and in some cases may not be totally successful.'"[23] Because, as set out in detail in our post-hearing comments, leaving coal ash in contact with water, in floodplains, or in other risky

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[20] Tr. Aug. 13, 2020 165:3 - 166:14; *see also* Ex. 2, IEPA Answers at 41 (Aug. 3, 2020) ("33. Does the Agency plan to consider any information concerning costs of different corrective action alternatives in reviewing corrective action construction permit applications? Response: Cost is not a factor listed for consideration for any activity required by Part 845.").

[21] Tr. Aug. 13, 2020 236:4-17 ("MR. GRANHOLM: . . . The Agency answered a number of questions about the consideration of costs including consideration of costs in the closure alternatives analysis. Is the Agency aware of anything in the federal CCR rule that precludes the inclusion of costs as a factor in the closure alternatives assessment required under 845.710? MR. DUNAWAY: Dunaway. To the best of my understanding, the USWAG, U-S-W-A-G, decision the court determined that the RCRA regulations do not authorize the EPA to consider costs.").

[22] *See* Ex. 2, IEPA Answers at 61 ("15. Does the Agency plan to consider any information concerning costs of different closure alternatives in evaluating construction permit applications for closure? Response: No."); *id.* at 79 ("14. Regarding proposed 35 Ill. Adm. Code 845.220, why do the rules not require cost estimates be provided as part of a construction permit? Response: Section 845.220 contains the technical requirements which must be provided in a construction permit application. These include location restrictions, design criteria, and other technical information which must [sic] met to receive a construction permit. This information is necessary to determine compliance with the technical performance requirements of the proposed rule. *These technical requirements do not allow cost to be considered.*") (emphasis added).

[23] Ex. 14, Hutson Test. at 4 (quoting Ex. 14, Attach. 1 at 3); *see also USWAG*, 901 F.3d at 422 (IEPA Statement of Reasons, Attach. C at 7) ("The EPA has acknowledged that it 'will not always be possible' to restore groundwater or surface water to background conditions after a contamination event").

locations does not ensure permanent protection against groundwater pollution,[24] capping in place in those circumstances "essentially . . . shift[s] forward the environmental remediation costs associated with electricity production during our lifetimes to be paid by our grandchildren."[25] Moreover, the longer coal ash leaches into groundwater, the more challenging and costly cleaning up that pollution may become.[26] As Indiana regulators concluded, removal is economically reasonable given the likelihood that it will avoid remediation costs in the future.[27]

Requiring more thorough assessments to provide needed data for groundwater modeling is similarly economically reasonable. As Scott Payne and Ian Magruder explain,

> Our proposed requirement of the hydrogeologic site characterization to include site specific contaminant attenuation and dispersion properties for each geologic unit should be able to be accomplished using existing information on lithology and contaminant travel times available from lithologic logs and water quality monitoring performed for other requirements of the rule. Developing site specific contaminant attenuation and dispersion properties for each geologic unit should be considered a standard modeling practice for GCT modeling. Our proposal to require actual CCR porewater sampling or leachate testing of CCR from the site is justified considering the importance of that data in developing accurate models and accurate predictions of closure and corrective action performance, including whether water quality standards are achieved.
>
> Monitoring wells are already required to be installed to assess background water quality and wells are also required upgradient and downgradient of surface impoundments. We do not believe that the additional work to aquifer test these wells or to instrument some of these wells with digital pressure transducers will be

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[24] *See* Envt'l Groups Post-Hearing Comments at Section III.

[25] Ex. 14, Hutson Test. at 24; *see also id.* at 19 ("Disposal of CCR must be treated as a permanent problem deserving a permanent remedy, not a remedy that relies on continuing intervention to contain contamination to the disposal site."); *id.* at 24-25 (discussing continued leaching of unsafe levels of contamination out of closed coal ash disposal sites in Town of Pines, Indiana).

[26] *See USWAG*, 901 F.3d at 429 (IEPA Statement of Reasons, Attach. C at 22) (finding that "leakage from unlined impoundments is more pervasive and less amenable to any quick, localized fix"); Ex. 15, Hutson Answers at 13 ("[R]eleases from impoundments located on floodplains are subject to migrating in different directions depending on river stage. The effect can be that groundwater contaminants are spread in multiple directions from the facility making adequate and reliable groundwater monitoring a very difficult endeavor.").

[27] Ex. 46, Order, *Verified Pet. Southern Indiana Gas & Elec. Co. re "Brown County Pond*," Ind. Util. Regulatory Comm'n, Case No. 45280 at 17 (May 13, 2020) ("We recognize the economic and environmental advantages of the [Closure By Removal] approach to achieving CCR compliance, . . . including long term mitigation of risk to the extent a [Closure In Place] approach would expose Petitioner to future additional remediation requirements at the pond.").

excessive. The majority of the cost is already incurred in constructing the wells and performing the site monitoring visits as is required by other portions of the rule.[28]

Similarly, Environmental Groups' modeling recommendations are feasible and reasonable. Mr. Payne and Mr. Magruder explain that they "have seen many instances where modeling performed for site characterization and groundwater remediation meets the standards we are proposing so we know it is both possible and economically feasible."[29] In fact, the recommendations save Agency time and resources by avoiding the need for back-and-forth with industry regarding inadequate submissions. In Mr. Payne's and Mr. Magruder's words, "Submission of subpar or underfunded site characterization or modeling to IEPA for review wastes agency resources and the time needed to correct them and has the potential to hide important site characteristics that impact water quality."[30]

The enhanced structural stability mandates that Environmental Groups propose – namely, providing for public review of, and comment on, structural stability assessments and plans; requiring that the Agency review and, if appropriate, approve those assessments and plans; and mandating that compliance with approved plans be included as permit conditions – are also sensible solutions that protect Illinoisans from potentially significant costs. The catastrophic collapse of an unlined coal ash pond at Tennessee Valley Authority (TVA)'s Kingston plant in 2008 "ruptured a natural gas line, disrupted power in the area, damaged or destroyed dozens of homes," and cost the TVA "more than $1.2 billion to remove Coal Residuals and contaminated sediment from the river and adjoining areas, to monitor and repair associated damage, and to construct a new disposal unit."[31] Other coal ash spills have been similarly devastating, including a Virginia spill where "it was estimated that 217,000 fish were killed in a 90-mile stretch of the [Clinch] river in Virginia and Tennessee . . . , [the spill] decimated benthic macro-invertebrate populations for a distance of over three miles below the spill site, and snails and mussels were eliminated for over 11 miles below the Clinch River power plant."[32] The additional scrutiny urged by Environmental Groups – besides being required by the Coal Ash Pollution Prevention Act[33] – requests little of industry and the Agency and can result in countless savings in avoided remediation costs and avoided harm that, in some cases, may not be possible to remediate.

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[28] Ex. 20, Payne & Magruder Answers at 25-26.
[29] *Id.* at 26; *see also id*. ("This is not a new concept. Other regulatory arenas, such as Superfund, require high quality, properly developed, well supported, and documented modeling deliverables. Cost is not a deterrent to the requirement for groundwater modeling to meet basic standards under these regulatory programs and nor should cost [sic] a deterrent be under CCR rules").
[30] *Id.*; *see also* Ex. 16, Rehn Test. at 7 ("[T]he way I've seen Illinois EPA regulate coal ash sites . . . is to request more information about industry proposals until the company refines their solution to something that Illinois EPA can accept.")
[31] *USWAG*, 901 F.3d at 423 (IEPA Statement of Reasons, Attach. C at 9).
[32] Ex. 5, EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21, 302, 21,457 (Apr. 17, 2015).
[33] *See* 415 ILCS 5/22.59(g)(1)-(6).

Importantly, financial assurance requirements – while critically important – cannot be relied on to ensure owners and operators absorb all remediation costs associated with ongoing leaching and/or failures of ash ponds. Such requirements do not apply to all impoundments[34] and, for those impoundments for which they do apply, they cease at the end of the post-closure care period.[35] The risks of ash pond collapse and of ongoing groundwater and surface water contamination, however, continue long after post-closure care has ended.[36] Accordingly, if the Board decides that economic reasonableness is relevant to this rulemaking, it should conclude that Environmental Groups' proposals to modify the proposed rules are sensible, reasonable changes that protect Illinoisans against the risk of significant clean-up costs in the future.

## III. The Rules Must Ensure Long-Term Protection of Illinois' Waters and Environment.

### A. A Clear Standard Prohibiting the Abandonment of Coal Ash in Water or in Risky Locations Is Consistent with the Coal Ash Pollution Prevention Act.

#### 1. *Both the Coal Ash Pollution Prevention Act and the Federal CCR Rule Establish a Preference for Removal as the Default Closure Method.*

Contrary to the assertions of Springfield City, Water, Light and Power ("CWLP"),[37] a clear standard explicitly barring closure in place of CCR impoundments with coal ash in contact with water is in no way inconsistent with the Coal Ash Pollution Prevention Act or the federal CCR rule that sets the floor for these rules. Rather, both the Act and the federal CCR rule establish removal as the default closure method. The Illinois legislature's preference is apparent in Section 22.59(d), which provides that:

> Before commencing closure of a CCR surface impoundment, in accordance with Board rules, the owner of a CCR surface impoundment must submit to the Agency for approval a closure alternatives analysis that analyzes all closure methods being considered and *that otherwise satisfies all closure requirements* adopted by the Board under this Act. *Complete removal of CCR, as specified by the Board's rules, from the CCR surface impoundment must be considered and analyzed* . . . . The selected closure method must ensure compliance with regulations adopted by the Board pursuant to this Section.[38]

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[34] *Id.* 5/22.59(f).
[35] *See* proposed 35 Ill. Adm. Code §§ 845.920(a)(2), (b)(2).
[36] *See* Envt'l Groups Post-Hearing Comments at Section III; *see also* Ex. 15, Hutson Answers at 6 ("Potential damage to waste containment and protection structures will continue indefinitely, but maintenance of these structures will eventually be terminated. It is my opinion that we must make good decisions now in order to minimize future problems associated with today's wastes.").
[37] *See* City Water Light & Power Final Post-Hearing Comments at 3, 5-6, 13 (Oct. 30, 2020) (hereinafter "CWLP Post-Hearing Comments").
[38] 415 ILCS 5/22.59(d) (emphasis added).

As is clear from this provision, the only closure method that the legislature requires owners or operators of coal ash ponds to analyze in all cases is removal. That the legislature would require analysis of removal at all sites, but not of closure in place, indicates that it understands removal to be permissible at all sites, whereas closure in place is not a priority: it need not be evaluated if it is not an option, or not under consideration, for a given coal ash pond.

Section 22.59(d) also makes clear that the closure alternatives analysis is not the sole mechanism for determining the closure method for a given ash pond. Rather, the closure method must "satisf[y] all closure requirements" adopted by the Board and "ensure compliance with" the rules at issue here.[39] This language reveals removal as the default closure method in light of the Act's directive that the rules must be "at least as protective and comprehensive as" the federal CCR rule,[40] which also sets removal as the default closure method. That that is so is evidenced by both the clear language of the federal rule as well as other statements by USEPA. First, under the federal rule, an owner or operator of a CCR surface impoundment may always elect to close by removal.[41] Unlike for closure in place, there are no closure performance standards required for closure by removal, nor any preconditions that must be met for removal to be selected.[42]

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[39] *Id.*

[40] *Id.* 5/22.59(g)(1).

[41] *See* 40 C.F.R. § 257.102(c) ("Closure by removal of CCR. An owner or operator may elect to close a CCR unit by removing and decontaminating all areas affected by releases from the CCR unit. CCR removal and decontamination of the CCR unit are complete when constituent concentrations throughout the CCR unit and any areas affected by releases from the CCR unit have been removed and groundwater monitoring concentrations do not exceed the groundwater protection standard established pursuant to 257.95(h) for constituents listed in appendix IV to this part.").

[42] *Compare* 40 C.F.R. § 257.102(c) with § 257.102(d) ("Closure performance standard when leaving CCR in place – (1) The owner or operator of a CCR unit *must* ensure that, at a minimum, the CCR unit is closed in a manner that will: (i) Control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere; (ii) Preclude the probability of future impoundment of water, sediment, or slurry; (iii) Include measures that provide for major slope stability to prevent the sloughing or movement of the final cover system during the closure and post-closure care period; (iv) Minimize the need for further maintenance of the CCR unit; and (v) Be completed in the shortest amount of time consistent with recognized and generally accepted good engineering practices. (2) Drainage and stabilization of CCR surface impoundments. The owner or operator of a CCR surface impoundment or any lateral expansion of a CCR surface impoundment *must* meet the requirements of paragraphs (d)(2)(i) and (ii) of this section prior to installing the final cover system required under paragraph (d)(3) of this section. (i) Free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues. (ii) Remaining wastes must be stabilized sufficient to support the final cover system. (3) [sets forth requirements for the final cover system].") (emphasis added); *see also* proposed Sections 845.740 and 845.750.

Second, the preamble to the 2015 federal CCR rule supports USEPA's view of removal as the default closure method. As Mr. Hutson noted, USEPA's statement that closure by removal and closure in place "can be equally protective, provided they are conducted properly"[43] is:

> consistent with [Mr. Hutson's] suggested changes to the rules. The preamble specifically states the clean closure and closure in place "**can** be equally protective, **provided they are conducted properly**." The preamble does not state that closure in place is always equally protective. It also does not state that closure in place consists only of placing a cap over the waste. Closure in place can be an effective closure method in locations where the waste can be isolated from water, with a cap alone in some locations, or with a cap and other remedies needed to segregate the waste from water in other locations. In [his] opinion, an in-place closure that allows groundwater to flow through disposed waste is not equally protective with removal.[44]

Indeed, in guidance posted by USEPA on its website years after it drafted the 2015 preamble, USEPA explained that "Both clean closure and closure with waste in place can be equally protective, provided that the requisite performance standards are met."[45] EPA also clarified that, if the performance standards for closure in place cannot be met, the owner or operator may not select that closure method:

> If the performance standards for clean closure and the performance standards for closure with waste in place can be met, an owner or operator may determine which alternative is appropriate for their particular unit. . . . The CCR rule does not require an owner or operator to use one closure option over the other in such situations. However, the facility must meet all of the performance standards for the closure option it has selected, and if it cannot meet all of the performance standards for one option, then it must meet all of the performance standards for the other option. For example, *if the facility is unable to meet the performance standards for closure with waste in place for a particular unit (or portion of a unit), it must clean close the unit (or that portion*).[46]

Even Dynegy witness Andrew Bittner acknowledges that an owner/operator may not always choose closure in place.[47] In sum, the language of the Coal Ash Pollution Prevention Act and the federal CCR rule, together with USEPA's interpretations thereof, make clear that a standard

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[43] *See* Ex. 5, 80 Fed. Reg. 21,302 at 21,412.
[44] Ex. 15, Hutson Answers at 36-37 (emphasis in original).
[45] Ex. 10, USEPA webpage: *Relationship between the RCRA's CCR Rule and the CWA's NPDES Permit Requirements*, at 7 (emphasis added). The website specifies that it was "last revised on July 18, 2018." *Id*.
[46] *Id.* (emphasis added).
[47] *See* Ex. 37, Prefiled Testimony of Andrew Bittner at 15 (Aug. 27, 2020) ("If [closure in place] were determined not to be protective of human health and the environment for a particular [surface impoundment], it would not be eligible for selection as the closure alternative for the impoundment.").

explicitly barring closure in place of CCR impoundments with coal ash in contact with water is wholly consistent with the Act.

2. *Site-Specific Analysis Will Show What the Record Already Shows: Leaving Coal Ash in Water, in Floodplains, and in Other Inappropriate Locations Poses Too Much of a Risk to Illinois Waters and Communities.*

Dynegy and CWLP emphasize the "site-specific" analyses required by the proposed rules and suggest that site-specific analysis is always the best way to determine the proper closure method for a CCR surface impoundment.[48] Certainly, site-specific analysis is a necessary component of determining which closure options are permissible for a given CCR impoundment. As USEPA explains, "[w]hether any particular unit or facility can meet the performance standards is a fact and site-specific determination that will depend on a number of factual and engineering considerations, such as the hydrogeology of the site, the engineering of the unit, and the kinds of engineering measures available."[49]

The need for site-specific analysis does not mean, however, that bright-line standards that apply generally to certain categories of CCR surface impoundments are inappropriate. It is clear from the evidence in the record, before any site-specific analysis takes place, that coal ash ponds with "intersecting groundwater would have a higher likelihood of future releases than does a site where the waste is contained above groundwater."[50] Mr. Hutson explained that, for that reason, he "recommend[ed] that the Illinois rule prohibit ash from being left submerged in groundwater."[51]

As discussed above, the closure performance standards already limit the closure options for impoundments that cannot meet those standards for closure in place. For example, no unlined CCR surface impoundment with coal ash in contact with water would be able to "[c]ontrol, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste,"[52] because water will saturate the ash after closure, allowing contaminants to continue

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[48] *See* Dynegy's Final Post-Hearing Comments at 1 (Oct. 30, 2020) (hereinafter "Dynegy's Post-Hearing Comments"); CWLP Post-Hearing Comments at 3, 5-6, 12-15.

[49] Ex. 10, USEPA webpage: *Relationship between the RCRA's CCR Rule and the CWA's NPDES Permit Requirements*, at 7.

[50] Ex. 15, Hutson Answers at 18; Envt'l Groups' Post-Hearing Comments at Section III.

[51] Ex. 15, Hutson Answers at 18.

[52] Proposed Section 845.750(a)(1); 40 C.F.R. § 257.102(d)(1)(i). The modeling completed by Dynegy witness David Hagen does not support a contrary position; in fact, Mr. Hagen explicitly did not consider the full language of the closure performance standards in completing his modeling, omitting any language requiring evaluation of the "maximum extent feasible" or "as much as…is feasible." *See* Ex. 34, Prefiled Testimony of David Hagen at 3 (Aug. 27, 2020) (hereinafter "Hagen Test.").; Ex. 35, Prefiled Answers of David Hagen at 11 (Sept. 24, 2020) (hereinafter "Hagen Answers"). Notably, in addition to avoiding

to leach from the CCR.[53] For the same reasons, unlined CCR impoundments with coal ash in contact with water will be not be able to close in place in a manner that will "[c]ontrol, minimize or eliminate, to the maximum extent feasible . . . releases of CCR, leachate, or contaminated run-off to the ground or surface waters . . . ."[54] Nor will it be possible to "eliminate" free liquids[55] by "removing liquid wastes or solidifying the remaining wastes and waste residues"[56] at such impoundments, where groundwater continues to saturate coal ash within the ash pond.

It is inefficient and unnecessary, however, to rely on lengthy analyses of those multi-factor performance standards to establish what the record already shows: namely, that allowing unlined coal ash impoundments in floodplains or with intersecting groundwater to close in place poses too high of a risk to Illinois waters and communities.[57] A provision that explicitly bars closure in place of coal ash ponds in the floodplain or with groundwater that intersects the ash pond is both authorized by the Act and consistent with its objectives.[58] Moreover, explicit rules will enhance regulatory clarity, reducing the likelihood of resource-intensive enforcement suits and thereby minimizing the demands on the Agency's, and the Board's, limited time and resources.[59] Such rules are in the interest of the public, the Agency, and the Board, and we strongly urge the Board to adopt them here.

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evaluation of the full proposed performance standards, Mr. Hagen's modeling is flawed in several other ways. In modeling closure by removal, Mr. Hagen did not account for "the effect that dewatering the CCR has on the ability of redox-sensitive constituents to migrate from the impoundment" nor did he "review[] groundwater monitoring data for redox-sensitive constituents at sites where removal is underway or has been completed" for this testimony. Ex. 35, Hagen Answers at 46. Finally, Mr. Hagen modeled a groundwater boron concentration of 4mg/L. *See* Ex. 35, Hagen Answers at 15. That boron concentration has been exceeded – sometimes several times over – in groundwater at multiple Illinois coal ash impoundments, including impoundments at the Waukegan, Will County, Powerton, Lincoln Stone Quarry, Dallman/ Lakeside, Hennepin, Coffeen, Vermilion, Wood River, Meredosia, Hutsonville, and Marion plants. *See* Ex. 18, *Cap and Run. Toxic Coal Ash Left Behind by Big Polluters Threatens Illinois Water* (Nov. 2018). Mr. Hagen's modeling is accordingly not representative of Illinois coal ash impoundments and their higher concentrations of contamination.

[53] *See* Envt'l Groups' Post-Hearing Comments at Section III.

[54] Proposed Section 845.750(a)(1); 40 C.F.R. § 257.102(d)(1)(i).

[55] "Free liquids" are defined in proposed Part 845 as they are in the federal CCR rule: that is, as "liquids that readily separate from the solid portion of a waste under ambient temperature and pressure." Proposed Section 845.120; 40 C.F.R. § 257.53.

[56] Proposed Section 845.750(b)(1); 40 C.F.R. § 257.102(d)(2)(i).

[57] *See*, *e.g.*, Ex. 15, Hutson Answers at 14-15 (explaining that "Risk assessment is a factor used in evaluating remedial actions that, if Part 845 is successful, would be less frequently utilized to justify contaminant releases."); *id.* at 15 ("It is unclear to me that risk assessment addresses potential risks of releases due to future deterioration or damage to cap systems, or changes in river channel location").

[58] *See* 415 ILCS 5/22.59(a), 22.59(g)(1).

[59] In the interest of conserving the Agency's limited resources, Environmental Groups also want to note their agreement with both the Agency and Illinois Attorney General's Office that the Board should reject

B. The Rules Should Not Allow Closure in Place for Coal Ash Impoundments Located In Floodplains.

The rules should explicitly prohibit coal ash impoundments located in floodplains from closing in place. The Agency has stated that there is no need to explicitly include floodplains as unstable areas under Section 845.340.[60] However, as noted in the Environmental Group's post-hearing comments, leaving coal ash in floodplains poses significant risks as impoundments located in floodplains are potentially subject to a variety of natural events or forces capable of impairing the ability of a surface impoundment to prevent releases.[61]

IEPA states that there is no need to explicitly include floodplains as unstable areas because there is nothing in the rules that precludes floodplains from being unstable areas, and floodplains have not been included in the location restrictions in Part 257.[62] Additionally, landfills are allowed to be constructed in floodplains, and according to the Agency, including floodplains in Subpart C's location restrictions would "substantially decrease[]" the option to retrofit a coal ash impoundment.[63]

The rules must do more to address the significant risks posed by leaving coal ash in floodplains. It is insufficient to not preclude floodplains from being considered "unstable areas." Storm-induced high water events can overtop berms and increase the potential for catastrophic release of wastes, and rising water elevations caused by even minor high water events will re-wet CCR contained in an unlined disposal unit and renew production of leachate each time.[64] The Agency should not base the decision of whether coal ash can be left in floodplains on site-by-site demonstrations purporting to show that the location in the floodplain is "a stable location or can be constructed in such a way to maintain structural stability."[65] As noted in the Environmental

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Ameren's cost tracking proposal. See IEPA's Final Post-Hearing Comments at 57-58; Post-Hearing Comments of the Illinois Attorney General's Office at 9-11. Ameren's proposal to track agency costs is based on the Site Remediation Program ("SRP"), which is a fundamentally different type of program than the Agency's forthcoming CCR permitting program. Ameren's proponent of its proposal, Gary King, admitted that the only reason the Agency tracks cost in the SRP context is because the Agency can seek reimbursement from regulated entities for those costs. Tr. Sept. 30, 2020 254:3-7. In contrast, as Gary King admitted, there are no cost reimbursement provisions in the Agency's proposed rules, Tr. Sept. 30, 2020 254:20-255:2, therefore the need to track costs does not exist. Requiring burdensome cost tracking would be a waste of time and Agency resources since no purpose would be served by such tracking. As noted by the Illinois Attorney General's Office, the Coal Ash Pollution Prevention Act does not require or condone cost tracking, *see* Post-Hearing Comments of the Illinois Attorney General's Office at 10-11 (Oct. 30, 2020), and as noted by the Agency, the Coal Ash Pollution Prevention Act does not condone or authorize any cost reimbursement, either. IEPA's Final Post-Hearing Comments at 58.

[60] IEPA's Final Post-Hearing Comments at 11-12.

[61] Envt'l Groups Post-Hearing Comments at 33-34.

[62] IEPA's Final Post-Hearing Comments at 11.

[63] *Id.* at 11-12.

[64] Envt'l Groups Post-Hearing Comments at 33.

[65] IEPA's Final Post-Hearing Comments at 11.

Group's post-hearing comments, engineering is insufficient to adequately protect coal ash impoundments located in floodplains because any engineering would require regular inspection and maintenance for as long as flood protection is required, however, the post-closure care period for impoundments is generally intended to extend only for thirty years past facility closure.[66] Although potential damage to waste containment and protection structures will continue indefinitely, maintenance of these structures will eventually be terminated.[67]

The Agency should also not default to the federal rule to "retain[] consistency."[68] The Coal Ash Pollution Prevention Act requires the rules to be "at least as protective as" the federal rule,[69] but there is nothing in the Act that prevents the rules from being more stringent than the federal rule. Moreover, because the rules must ensure long-term protections of Illinois' waters and environment, they should be tailored to address state-specific concerns, such as the increase of overall flood risks due to increasing precipitation, especially heavy rain events, which are anticipated to increase in Illinois.[70]

For these same reasons, retrofitting coal ash impoundments located in floodplains is equally problematic and poses the same significant risks. Therefore, retaining coal ash impoundments, whether operating or closed, on a river's floodplain must be viewed as unacceptable waste management planning and a practice that will facilitate contamination of waters of the state and have potentially catastrophic results for future residents.[71]

C. The Scope and Frequency of Monitoring Should Not be Reduced.

1. *The Scope and Frequency of Monitoring for Coal Ash Constituents Should Not Be Reduced.*

CWLP and Dynegy argue that the monitoring frequency should be reduced from quarterly to semi-annually during post-closure care if certain conditions are met.[72] The basis for Dynegy's argument is the cost associated with monitoring. Midwest Generation ("MWG") also argued that there should be a reduction in the number of constituents monitored.[73] . First, as to Dynegy's argument that monitoring should be reduced in frequency in post-closure due to the cost of monitoring, cost may not be considered by the Board in deciding the requirements of the rules. The Coal Ash Pollution Prevention Act requires that the rules for CCR surface

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[66] Envt'l Groups Post-Hearing Comments at 35.
[67] *Id.*
[68] IEPA's Final Post-Hearing Comments at 11.
[69] 415 ILCS 5/22.59(g)(1) (emphasis added); *supra* at Section I.
[70] Envt'l Groups Post-Hearing Comments at 35.
[71] *Id.* at 34.
[72] CWLP Post-Hearing Comments at 11-12; Dynegy First Post-Hearing Comment at 12-14 (Oct. 30, 2020).
[73] Midwest Generation's Second Post-Hearing Comments at 10-11 (Oct. 30, 2020) ("MWG's Second Post-Hearing Comments").

impoundments be "at least as protective . . . as" the federal CCR rule.[74] Costs may not be considered in the federal CCR rule.[75] Accordingly, in order to meet the Act's requirement in relation to the federal CCR rule, costs may not be considered in Illinois' regulations governing CCR.[76]

Second, as to the argument that the range of constituents monitored should be reduced, CAPPA's requirement that the State rules are at least as protective as the Federal Rule again comes into play.[77] At a minimum, Appendix III and IV constituents must be monitored.[78] Further, testimony from the Agency made clear that just because a constituent does not show up in monitoring results at a certain point in time, does not mean that it won't show up in monitoring in the future.[79] As MWG points out, "the constituents which may leach from CCR are dependent upon the source of the coal, the generating unit's combustion process, and the handling process post-combustion."[80] If any one of those things changed, it would change the constituents in the leachate in an impoundment and change the constituents identified in monitoring. Consistent with the Agency's testimony and also MWG's comments on variability in CCR leachate, witness Mark Hutson also pointed out that coal ash and leachate vary.[81]

> Porewater within a CCR disposal unit is horizontally and vertically variable. This variability produces concentrations of CCR-related contaminants in porewater samples that vary widely between sample locations. A single porewater sampled collected at distance from the downgradient monitoring well should not be assumed to represent the chemistry of porewater across the impoundment nor of leachate that has exited the impoundment.[82]

All of these variations can lead to variations in monitoring results over time. As a result, the Board should not revise the rules to reduce monitoring frequency or the range of constituents monitored. We agree with the Agency recommendation that "the Board adopt the quarterly groundwater monitoring frequency as proposed in Section 845.650(b)(1)."[83] In addition, for the sake of administrative expediency, "[t]he Agency would prefer to have a single list of parameters that they need to look at instead of site specific limits for each CCR unit."[84]

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[74] 415 ILCS 5/22.59(g)(1).
[75] *See Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 448 (D.C. Cir. 2018) ("Under any reasonable reading of RCRA, there is no textual commitment of authority to the EPA to consider costs in the open-dump standards…").
[76] *See supra* Section II.
[77] 415 ILCS 5/22.59(g)(1).
[78] 40 CFR § 257.
[79] Tr. Aug. 13, 2020 117:6-24.
[80] MWG's Second Post-Hearing Comments at 10.
[81] Ex. 14, Hutson Test. at 13, 16-17.
[82] *Id.* at 17.
[83] IEPA Final Post-Hearing Comments at 42.
[84] Tr. Aug. 13, 2020 118:14-17.

2. *Groundwater Elevation Monitoring Should be Daily in At Least One Upgradient and One Downgradient Monitoring Well and Monthly at Others.*

CWLP and Dynegy argue that daily monitoring of groundwater elevations is too frequent.[85] The record in this proceeding establishes the importance of accurate groundwater elevations that capture all temporal variations. Understanding the frequency and magnitude of groundwater contact with CCR is critical to evaluations of closure options and whether they will be effective.[86] The site characterization needs to reflect whether CCR is separate from groundwater.[87] "[D]aily groundwater elevation measurements will greatly improve this characterization."[88] Quarterly or monthly groundwater elevation measurements often miss the river flooding events during which groundwater inundates the impoundment or groundwater flow is reversed. Id.

> All three of the CCR facilities we reviewed have a high water table, and the CCR is frequently inundated with groundwater. This is a common situation where coal fired power plants are sited next to a major river and the impoundments are constructed on the floodplain. The regular inundation of CCR in unlined or poorly lined impoundments creates a perpetual source of contamination to groundwater because the high groundwater will rewet the CCR even after the CCR impoundment is capped and closed. This contaminant pathway should be evaluated in all closure plans and accounted for in models used to predict the performance of the closure plan. … Continuous groundwater level data are needed to evaluate the frequency and magnitude of groundwater inundation. Water level measurements should be recorded at least daily in one monitoring well upgradient and one downgradient of the CCR unit.[89]

Daily groundwater elevation measurement is a common industry practice and easy to do. "Instrumenting wells with digital pressure transducers will provide a much more consistent and detailed dataset."[90] "Daily water level data are common. We employ digital pressure transducers in many of our groundwater monitoring projects and it is an industry standard practice when frequent water level data are needed for site characterization."[91]

Finally, Dynegy proposes that if daily measurements are done in one upgradient and one downgradient well for each impoundment, that the Agency's proposal for monthly measurements at all other wells be abandoned.[92] The basis for Dynegy's argument is costs, including the cost of having personnel visit the site on a monthly basis. As discussed above, costs may not be

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[85] CWLP's Post-Hearing First Notice Comments at 7; Dynegy First Post-Hearing Comment at 16-20.
[86] Ex. 20, Payne & Magruder Answers at 10.
[87] *Id.*
[88] *Id.*
[89] Ex. 19, Payne & Magruder Test. at 19.
[90] Ex. 20, Payne & Magruder Answers at 10.
[91] *Id.* at 7.
[92] Dynegy First Post-Hearing Comments at 19.

considered in developing these rules.[93] In addition, as discussed in the preceding paragraphs, quarterly monitoring misses periods of flooding.[94] Monthly monitoring at all other wells in addition to daily monitoring at select wells is needed to understand the frequency and magnitude of flooding events, especially smaller events that may not impact and entire site or entire monitoring network. For these reasons, the Environmental Groups maintain our position that the rules should require daily groundwater elevation monitoring in one upgradient and one downgradient well from each impoundment while maintaining monthly measurements of groundwater elevation in all other wells.

3. *The Rules Should Require Monitoring of Leachate Concentrations and Liquid Elevation in Ash Ponds.*

IEPA argues against requiring leachate pore samples on the grounds that "it certainly isn't easy to collect multiple leachate pore samples from within each surface impoundment."[95] . Similarly, both CWLP and IEPA argue against ongoing measurement of liquid elevation in ash ponds using piezometers. "While the Agency appreciates the reasoning behind Mr. Hutson's opinion, installation of piezometers within CCR impoundments come [sic] with various difficulties"[96] CWLP argues that monitoring of water elevation inside impoundments "should only be required for developing an initial site characterization."[97]

IEPA concedes that the accuracy of contaminant transport models, however, is greatly dependent on having correct contaminant source concentrations, liquid elevations, and percolation rates from CCR impoundments. "[S]ince the elevation in an unlined CCR surface impoundment can, depending on site specific conditions, be necessary to determine groundwater flow . . . the Agency is proposing a new Section 845.650(b)(3)" requiring that "[m]easurement of water elevation within the CCR surface impoundment shall be conducted each time groundwater elevations are measured pursuant to Section 845.650(b)(2) prior to dewatering for closure."[98] "[U]sing model calibration to arrive at source concentration allows inaccuracies in other model parameters to perpetuate through the calibration process, compounding in the calibrated source concentration."[99] In addition, "[t]he validity and value of an ASD based on impoundment water

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[93] *See supra* Section II.
[94] Ex. 20, Payne & Magruder Answers at 10.
[95] IEPA Final Post-Hearing Comments at 17.
[96] *Id.* at 14.
[97] CWLP's Post-Hearing First Notice Comments at 8.
[98] IEPA Final Post-Hearing Comments at 78; *see also* Ex. 19, Payne & Magruder Test. at 13; Ex. 14, Hutson Test. at 12. "Measurement of free liquid and porewater head inside both lined and unlined impoundments and landfills is needed to obtain an accurate approximation of the direction of groundwater flow in the immediate vicinity of unlined units and assist with leak detection in lined units. The apparent water table or potentiometric surface can appear wildly different when the internal leachate elevation is considered than when it is ignored, up to and often including reversal of indicated flow directions on the upgradient side of unlined impoundments." Ex. 14, Hutson Test. at 12.
[99] Ex. 19, Payne & Magruder Test. at 13

rather than porewater chemistry is highly questionable."[100] Accuracy cannot be sacrificed just because gathering data is hard. In addition, witnesses Mark Hutson, Scott Payne, and Ian Magruder all suggest that collecting leachate pore samples in most cases would not be difficult.[101]

IEPA argues against changes to Section 845.620 on the basis that "while it may be possible under some circumstances, it certainly isn't easy to collect multiple leachate pore samples from within each surface impoundment during use and prior to installation of final cover."[102] CWLP raises a similar point.[103] In this critique, both IEPA and CWLP completely ignore the fact that Payne and Magruder offer leachate testing as an alternative to collecting pore water samples. "Alternatively, leachate testing of CCR could be used to determine source concentrations. Leachability testing should use the Leaching Environmental Assessment Framework (LEAF), which is the U.S. EPA recommended leaching test method for CCR (Kosson et al. 2009, 2014)."[104] Since there is an alternative to collecting pore water samples for times when such sampling would not be safe or feasible, IEPA's critique does not offer a basis to reject Mr. Payne and Mr. Magruder's suggested amendment requiring use of accurate data in modeling source concentrations and leachate percolation. For these reasons, the Environmental Groups continue to recommend that the Rules require monitoring of leachate concentrations and liquid elevations in ponds.

D. The Rules Must Require Proper Modeling

1. *The Rules Should Require Consideration of the Entire Data Set of Groundwater Elevation Data in Calibration.*

The Agency also argues that the whole data set of groundwater elevation should not automatically be used in calibration. The "Agency wants to emphasize the need for the use of professional judgment in the appropriate application and use of groundwater elevation data in calibration rather than an assumption of an automatic use of all available data."[105] In Mr. Payne and Mr. Magruder's testimony, they suggested the term "consider" the entire data set instead of

[100] Ex. 14, Hutson Test. at 13.
[101] Ex. 19, Payne & Magruder Test. at 13 ("CCR leachate concentration should be relatively easily sampled at most sites"); Ex. 15, Hutson Answers at 50.
[102] IEPA Final Post-Hearing Comments at 17.
[103] See CWLP's Post-Hearing First Notice Comments at 10-11 (noting "serious practical and safety concerns with how these recommendations would be implemented"). Also, as discussed in the preceding paragraph, multiples witnesses have testified that collecting leachate pore samples would be manageable at most impoundments.
[104] Ex. 19, Payne & Magruder Test. at 14.
[105] IEPA Final Post-Hearing Comments at 16-17.

mandating the use of the entire data set.[106] With "consider" as the standard, Mr. Payne's and Mr. Magruder's' language suggests the use of professional judgment.[107]

> [A]ll groundwater elevation data should be included in the hydrogeologic characterization reports and evaluated for use as a calibration target. Our opinion is that having all water elevation data provided in the site characterization will help to evaluate the frequency and magnitude of groundwater contact with CCR and will help with development of the site conceptual model. If data are questionable it should be flagged as such. If data are not used for model calibration its exclusion should be explained in the modeling report. Our proposed amendment to Sections 845.220 (c)(2)(C) and 845.220 (d)(3)(C) is worded 'Pre-defined calibration targets which consider the entirety of available Hydrogeologic Site Characterization data required in 845.620.' We use the word 'consider' so that available data are evaluated for use as calibration targets, but data may be excluded from calibration if there is a valid reason to do so.[108]

Mr. Payne and Mr. Magruder thus agree with the Agency that professional judgment can be used to exclude data from use in model calibration but the modeler needs to offer an explanation in the modeling report and provide a valid reason related to the accuracy of the data.

2. *Issuance of Groundwater Modeling Guidance is Consistent with Precedent and Appropriate Here.*

IEPA argues that it is not "practicable for a guidance doc to be created prior to the close of the record, it cannot be part of this rulemaking and cannot be incorporated by reference."[109] The Board can include the development of the guidance document as part of its Order or even provide for the development of a guidance document as part of the rule.[110] In the circumstances where a guidance document does not go through Board rulemaking or is not incorporated by reference, "[t]he function of the guidance document is to provide guidance by permitting the Agency to set forth minimal standards. An applicant can assure himself of prompt permit issuance by conforming to the criteria of the guidance document."[111] In order to make such a guidance document enforceable, the Agency can then return to the Board with a proposed amendment to the Rule to incorporate the guidance document by reference. Alternatively, the Agency can update the guidance document as modeling evolves and forego Board rulemaking. This is not uncharted territory for the Agency. IEPA is certainly accustomed to developing and

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[106] Ex. 19, Payne & Magruder Test. at 35 (Proposed 845.220(c)(2)(C) (suggesting "Pre-defined calibration targets which consider the entirety of available Hydrogeologic Site Characterization data required in 845.620").
[107] *Id.*
[108] Ex. 20, Payne & Magruder Answers at 4 (emphasis added).
[109] IEPA Final Post-Hearing Comments at 16.
[110] *See In re Proposed Amendments to Chapter 4 of the Regulations of the Illinois Pollution Control Board*, 1980 WL 14396, at *2 (July 24, 1980).
[111] *Id. at* *22.

offering guidance.[112] Mr. Payne and Mr. Magruder have established that past pond closure modeling practices in Illinois have been deficient.[113] A guidance document is essential to improving those practices and the procedural hurdles to developing such a guidance document are manageable.

3. *The Agency's Statements Concerning the HELP Model Are Unsupported and Should be Disregarded.*

IEPA argues that there are ways to use the HELP model that reflect ash contact with water.[114] IEPA's entire paragraph on the HELP model does not include a single citation to any supporting evidence in the record in this proceeding.[115] First, IEPA did not pursue any questioning of Mr. Payne or Mr. Magruder on this point. IEPA asked Mr. Payne and Mr. Magruder one question about whether it is possible to change the bottom layer in the HELP model, but Mr. Payne or Mr. Magruder did not agree that the HELP model with a vertical percolation layer would accurately reflect ash in contact with groundwater.[116] The Agency did not follow up with any further questions to Mr. Payne or Mr. Magruder on this point or on any other mechanisms through which the HELP model could accurately account for coal ash in contact with groundwater.[117]

In addition, Agency witnesses did not discuss the HELP model's capacity to account for ash contact with water. When asked the following question, the Agency did not identify the HELP model as a model that can be used to account for ash contact with groundwater:

> g. Are there groundwater modeling methods that account for continuous or intermittent saturation of coal ash due to rising groundwater or the lateral flow of groundwater, rather than from solely recharge from above?...
> i. If so, which methods?
>
> Response: One method would be to use a combination of river boundary cells or constant heads cells for nearby water bodies, and general head boundary cells for the cells at the bottom of the impoundments using MODFLOW. There are, however, other ways this could be accomplished.[118]

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[112] *See, e.g.,* IEPA, et al., *Guidance Document for Groundwater Protection Needs Assessments* (Jan. 1995), *available at* http://www.epa.state.il.us/water/groundwater/publications/needs-assessment.pdf.
[113] Ex. 19, Payne & Magruder Test.; Ex. 20, Payne Magruder Answers.
[114] IEPA Final Post-Hearing Comments at 18.
[115] *Id*.
[116] Ex. 20, Payne & Magruder Answers at 3-4.
[117] *See* Tr. Sept. 29, 2020 at 89:3-101:19.
[118] Ex. 2, First Set of IEPA Prefiled Answers at 60-61 (Aug. 3, 2020) [hereinafter "IEPA Answers"].

Thus, when given the opportunity to identify a model that does have the capacity to model ash in contact with groundwater, the Agency only identified MODFLOW by name, and did not explicitly identify HELP.[119]

Finally, the Agency did not attach any exhibits to its Post-hearing Comment to support its contentions regarding the HELP model's capacity to model ash in contact with groundwater.[120] The Agency has completely failed to provide any evidentiary support of its factual assertions regarding the HELP model and all of the factual assertions by the Agency regarding the HELP model's capacity to model ash in contact with the groundwater in post-hearing comment should be disregarded.

4. *The Rules Should Require Modeling of Cap Deterioration.*

IEPA opposes modeling deterioration of the cap used for closure in place. As discussed in Environmental Groups' Post-Hearing Comments,[121] modeling deterioration of the cap is essential to ensuring that groundwater is protected after the end of the post-closure care period and for decades into the future. As a result, the Board should include a requirement for modeling deterioration of the cap used for closure in place.

E. The Rules Must Not Allow Groundwater to Remain Contaminated.

1. *The Rules Must Not Leave Coal Ash Contamination Hidden.*

In order to protect Illinois' environment and communities, it is important that the Board ensure that contamination is not left hidden, as pollution that remains undetected logically will not be remediated. First, the Board should finalize the Agency's recommendation that all liners and contaminated subsoils be removed as part of the closure by removal process. Closure by removal requires decontamination of "all areas affected by releases"[122] and, under the Agency's proposal, appropriately requires removal of contaminated subsoils.[123] As Ms. Zimmer explained, liners have holes and punctures and can be damaged during removal of CCR; if they are not removed or replaced, any contamination that remains above them or in them will continue to migrate through them.[124] Abundant evidence shows that Illinois impoundments are polluting groundwater[125] and, likely, the soils underlying the impoundments. If a liner is not removed, it will be very difficult if not impossible to excavate contaminated subsoils, as required to decontaminate areas affected by releases and comply with the Coal Ash Pollution Prevention

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[119] *Id.*
[120] IEPA Final Post-Hearing Comments at 18.
[121] *See* Envt'l Groups' Post-Hearing Comments at 49-50.
[122] *See* IEPA's Final Post-Hearing Comments at 87.
[123] *Id.*
[124] Tr. Aug. 25, 2020 71:2-75:13.
[125] *See* Ex. 18, *Cap and Run:* Toxic Coal Ash Left Behind by Big Polluters Threatens Illinois Water (Nov. 2018); Ex. 16, Rehn Test. at 5; Envt'l Groups Post-Hearing Comments at Section II.

Act's directive that the rules be "at least as protective . . . as" the federal CCR rule.[126] Moreover, there is evidence that, at some impoundments, coal ash was left underneath liners.[127] If the liner is not removed, it will be more difficult, if not impossible, to access that underlying coal ash and remove it. Accordingly, the Board should accept the Agency's proposal[128] that all liners and contaminated subsoils be removed as part of the closure by removal process.

For similar reasons, the Board should require removal of liners, contaminated subsoils, and contaminated sediment as part of any retrofitting of coal ash ponds. The Board should thus delete the words "as necessary" from the Agency's proposed language concerning retrofits under Section 845.770(a)(1).[129] Similarly, the Board should add language to Section 845.770(a)(1) to clarify that, to retrofit a CCR surface impoundment, the owner/operator must remove contaminated soils and sediments not only "from" the CCR surface impoundment, as the Agency proposes, but also any contaminated soils and sediments underlying or affected by releases from the CCR surface impoundment.[130]

The Board also should decline to adopt IERG's request that Inactive Closed Coal Ash Impoundments be excluded from groundwater monitoring and corrective action requirements during post-closure. As evidence in the record makes clear, inactive closed CCR surface impoundments continue to leach out contaminants in excess of groundwater protection standards.[131] There is no basis in the Coal Ash Pollution Prevention Act for excluding those impoundments from necessary requirements to protect communities – in fact, just the opposite, as explained by the Illinois Attorney General in its comments[132] – nor is there any reason why communities and waters adjacent to those impoundments should be subject to lesser protections than impoundments that remain active.

Finally, as discussed in Environmental Groups' Post-Hearing Comments,[133] the Board should not allow coal ash contamination to go unnoticed or unremediated by leaving coal ash

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[126] 415 ILCS 5/22.59(g)(1); 40 C.F.R. § 257.102(c) (providing that closure by removal involves "removing and decontaminating all areas affected by releases from the CCR unit," and that "CCR removal and decontamination of the CCR unit are complete when *constituent concentrations throughout the CCR unit and area areas affected by releases from the CCR unit* have been removed and groundwater monitoring concentrations do not exceed the groundwater protection standard . . . .") (emphasis added).
[127] *See* Ex. 9, *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Interim Board Order and Opinion at 25, 33 (June 20, 2019) (hereinafter "PCB 13-15, Interim Order").
[128] *See* IEPA's Final Post-Hearing Comments at 87.
[129] *See id.* at 90.
[130] *See id.*
[131] *See*, *e.g.*, Hagen Test. at 24 (noting, with regard to Hutsonville Pond D, that "[s]ome CCR is below the water table" and in the monitoring reviewed, "boron consistently exceeded the proposed standard"); *id.* at 26-27 (concerning Venice, noting that "[g]roundwater at this site is in contact with CCR during high water stages of the adjacent Mississippi River" and in the monitoring reviewed, "boron consistently exceeded the proposed standard," including after "cap construction completed" in Oct. 2012).
[132] *See* Post-Hearing Comments of the Illinois Attorney General's Office at 4-7 (Oct. 30, 2020).
[133] *See* Envt'l Groups' Post-Hearing Comments at 24.

constituents iron, manganese, and vanadium off the list of constituents for which groundwater protection standards have been set. Applying both Part 620 and proposed Part 845 standards at the same time is administratively burdensome, according to the Agency,[134] so for coal ash constituents such as iron, vanadium, and manganese, the best approach is to include those constituents under Part 845.

2. *The Rules Should Not Narrow Mandates to Assess Corrective Measures.*

The Board also should not narrow the mandates triggering corrective action for groundwater pollution at coal ash impoundments. First, the Board should reject Midwest Generation's argument that it is "unreasonable" to require corrective action or an alternate source demonstration after detection of one constituent in one quarter,[135] as well as Dynegy's proposal that corrective action be triggered solely when a statistically significant level over groundwater protection standards is identified.[136] The Agency explained in its answers and testimony why it is reasonable and appropriate for an exceedance, confirmed by an immediate resample, to trigger corrective action. Specifically, Mr. Dunaway testified that requiring an assessment of corrective measures after detection of an exceedance is consistent with how corrective action is triggered under Part 620 (which sets out the Agency's longstanding groundwater protection standards and related requirements).[137] In response to questioning by Mr. Rao, Mr. Dunaway explained that, under Part 620, "if you've exceeded the numerical standard, corrective action is the – you don't have a choice."[138] Mr. Dunaway also testified that a groundwater monitoring sample followed by an immediate resample should be a "reliable indicator of the amount of concentration in groundwater,"[139] and that he is comfortable with the Agency's proposal to trigger corrective action mandates after a resample.[140] If an owner or operator believes that another source has caused an exceedance of groundwater protection standards, it has an opportunity to demonstrate that via an alternate source demonstration under proposed Section 845.650(d)(4).

Next, an assessment of corrective measures must not be triggered only by exceedances detected "at the downgradient waste boundary," as the Agency proposes in its Post-Hearing Comments.[141] As explained in detail in Environmental Groups' Post-Hearing Comments, there are many circumstances under which a purported "background" or "upgradient" monitoring well may be, in fact, impacted by coal ash pollution.[142] That can occur, for example, if contaminated groundwater is migrating in all directions (radially) out of the impoundment.[143] An assessment of

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[134] *See* Tr. Aug. 13, 2020 131:1-6 (Testimony of Dunaway).
[135] *See* Midwest Generation, LLC, Post-Hearing Comments at 6-8.
[136] *See* Dynegy Final Post-Hearing Comments at redline p. 27, pdf 52-54.
[137] *See* Tr. Aug. 13, 2020 129:12-131:6 (Testimony of Dunaway).
[138] *Id.* at 130:10-13; *see also id.* at 131:1-3 (Testimony of Dunaway) (". . . once you go over the numerical standard, you're supposed to use corrective action . . .").
[139] *Id.* at 132:2-9.
[140] *Id.* at 132:23-133:7.
[141] *See* IEPA Final Post-Hearing Comments at 79.
[142] *See* Envt'l Groups' Post Hearing Comments at 18-23.
[143] *See id.* at 18-21.

corrective measures should, accordingly, be triggered in the instance that concentrations exceeding groundwater protection standards are found in upgradient wells, in addition to downgradient ones. To require otherwise would be inconsistent with, and less protective than, the federal CCR rule, which does not include any such limitation.[144] It would, as such, run afoul of the Coal Ash Pollution Prevention Act.[145] As noted above, if an owner/operator believes that another source is the cause of contamination in an upgradient well, it may submit an alternate source demonstration to the Agency.

Finally, the Board should reject the request of Midwest Generation to stay the assessment of corrective measures during the pendency of an appeal of an Agency non-concurrence with an alternate source demonstration.[146] Commencing an assessment of corrective measures – which is what is required following an exceedance of a groundwater protection standards[147] – is not the same thing as commencing corrective action. It is merely beginning a process to evaluate which corrective measures are needed to achieve the standards set out at proposed Section 845.670(d), which must be approved as part of a corrective action construction permit by the Agency.[148] There is relatively little burden on the owner to commence the assessment process, and the public benefits by moving one step closer to clean up of the pollution.

Moreover, at many of the coal ash ponds subject to proposed Part 845, the federal CCR rule's groundwater monitoring requirements – together with the mandates to assess corrective measures when groundwater protection standards are exceeded – have been in place for years.[149] Although there are important differences between the federal CCR rule's groundwater monitoring program and the more protective program proposed by the Agency, the assessment of corrective measures process that has already begun at some sites[150] would provide a "running

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[144] *See* 40 C.F.R. § 257.95(g) ("If one or more constituents in appendix IV to this part are detected at statistically significant levels above the groundwater protection standard established under paragraph (h) of this section in any sampling event, the owner or operator must prepare a notification identifying the constituents in appendix IV to this part that have exceeded the groundwater protection standard"); *Id.* § 257.96(a) ("Within 90 days of finding that any constituent listed in Appendix IV to this part has been detected at a statistically significant level exceeding the groundwater protection standard defined under 257.95(h), or immediately upon detection of a release from a CCR unit, the owner or operator must initiate an assessment of corrective measures to prevent further releases, to remediate any releases and to restore affected area to original conditions").

[145] 415 ILCS 5/22.59(g)(1).

[146] *See* Midwest Generation, LLC Final Post-Hearing Comments at 14.

[147] *See* Proposed Section 845.660.

[148] *See* Proposed Section 845.200(a)(1) (as modified by the proposed changes set out in IEPA's Final Post-Hearing Comments at 63); Proposed Section 845.670(b).

[149] *See* 40 C.F.R. § 257.94(b) (requiring existing CCR impoundments to develop a "minimum of eight independent samples from each background and downgradient well" to be "collected and analyzed . . . no later than October 17, 2017"); *id.* § 257.90(b) (requiring existing CCR surface impoundments to install the groundwater monitoring system, develop the groundwater monitoring program, and initiate detection monitoring, among other things, by October 17, 2017); *id.* § 257.95; *id.* § 257.96.

[150] *See*, *e.g.*, Ex. 51 (letters concerning the meeting concerning possible corrective action measures at the Lincoln Stone Quarry).

start" for the assessment of corrective measures under Illinois rules, and further delay would serves little purpose – unless, as explained in Environmental Groups' Post-Hearing Comments, that delay is to provide the public the opportunity to review an alternate source demonstration.[151] In that circumstance, Environmental Groups could support a limited delay (of one to two months) of the deadline for submission of the assessment of corrective measures.

3. *All Coal Ash Contamination Should Be Addressed in Corrective Action Under Part 845.*

As explained in our initial comments, all onsite coal ash that is causing or contributing to exceedances of groundwater protection standards should be addressed via the corrective action requirements of Part 845.[152] Contrary to the Agency's assertion,[153] "other remedial programs" do not suffice to address groundwater contamination caused by other coal ash on the property of the coal ash impoundments. As Dynegy witness Mr. Hagen made clear, attempts at remediation will fail if other onsite coal ash contributing to groundwater contamination is not simultaneously remediated.[154] Moreover, leaving cleanup of other onsite coal ash to another program will very likely result in significant use of Agency and Board resources, such as the time-consuming litigation that is currently ongoing throughout the state to enforce violations of Part 620 associated with CCR.[155]

Requiring cleanup of other onsite coal ash in Part 845 is not only a far more efficient, transparent, and protective remedy than relying on "other remedial programs"[156] to address the problem, it is also consistent with the Coal Ash Pollution Prevention Act – specifically, the mandate that "No person shall . . . cause or allow, directly or indirectly, the discharge, deposit, injection, dumping, spilling, leaking, or placing of any CCR upon the land in a place and manner so as to cause or tend to cause a violation [of] this Section or any regulations or standards adopted by the Board under this Section."[157] It likewise furthers one of the Agency's stated objectives for this rulemaking, which is "to afford Illinois' groundwater resources equal

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[151] *See* Envt'l Groups' Post-Hearing Comments at 27-29, 89-91.
[152] *See* Envt'l Groups' Post-Hearing Comments at 30-31, 52.
[153] *See* IEPA's Final Post-Hearing Comments at 13.
[154] *See* Tr. Sept. 29, 2020 257:10-20 (Testimony of Hagen) ("Q. No, I think this is a different question. I'm asking whether a remediation could fail to achieve the groundwater protection standard if there is an onsite source of the same pollutant that is not addressed by the remediation? A. If I'm understanding your question correctly, I believe that's what my answer is is that if a remediation is undertaken, but is not addressing the actual source of the contamination, it is likely that that remediation will fail"); Ex. 35, Hagen Answers at 50 ("Without knowledge of background to the unit, the owner/operator may be trying to remediate something other than the unit, a proposition that would be destined for failure.").
[155] *See* Post-Hearing Comments of the Illinois A.G.'s Office at 2, n.1 (listing four enforcement matters relating to groundwater pollution from coal ash currently pending before the Board).
[156] As the Attorney General's office notes, for ash ponds and coal ash landfills, the Site Remediation Program – and associated Tiered Approach to Corrective Action standards – do not apply. *See id.* at 8-9.
[157] 415 ILCS 5/22.59(b)(3).

protection regardless of the means by which an owner or operator elects to manage CCR."[158] Accordingly, the Board should adopt Environmental Groups' recommendations that the rules require "background" groundwater concentrations to reflect groundwater not affected by CCR and to require cleanup of any onsite CCR that is contributing to groundwater contamination.[159]

## IV. The Rules Must Provide Better Protections for Communities Near, and Workers at, Coal Ash Ponds.

### A. The Closure Alternatives Analysis Should Require Consideration of Transportation Alternatives.

The closure alternatives analysis should be required to consider, at a minimum, transport of removed ash by rail, barge, and low-polluting (including, where feasible, electric) trucks, or a combination thereof. The Agency asserts that requiring consideration of specific types of transportation in the closure alternatives analysis is not necessary because requiring an extensive evaluation where certain modes of transportation may not have reason to be considered could be "unnecessarily burdensome."[160] This assertion, even if true – which Commenters question, as described below – provides no basis to prevent the Agency from fulfilling its duties to carry out the mandates of the Illinois Environmental Protection Act and the Coal Ash Pollution Prevention Act.

As noted in the Environmental Group's post-hearing comments, the Agency is charged with carrying out the mandates of the Illinois Environmental Protection Act, such as minimizing dust pollution, and the Agency has the authority to enforce fugitive dust restrictions that protect communities and the public from CCR dust.[161] Consistent with that authority, the Agency already administers fugitive dust regulations that concern trucks and transport.[162] Moreover, in the Coal Ash Pollution Prevention Act, the legislature directed the Agency to ensure "responsible removal of CCR from CCR surface impoundments."[163] Thus, regardless of any claimed "burden" on owners/operators, the rules must carry out the legislature's mandate to achieve "responsible removal" of coal ash, including ensuring that coal ash is transported in the least polluting manner available for each site.

Moreover, it is unclear just how requiring consideration of transportation alternatives would potentially "unnecessarily burden[]" owners or operators since, as noted in Section II of these comments, costs may not be considered in developing the Part 845 rules. Any burden imposed on owners/operators to evaluate different transportation alternatives is far outweighed by the benefit that such analysis would provide to the public, the Agency, and the Board in determining the best method to minimize dust and other pollution, and to develop the best

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[158] IEPA's Final Post-Hearing Comments at 43.
[159] *See* Envt'l Groups' Post-Hearing Comments at 18-31.
[160] IEPA's Final Post-Hearing Comments at 9.
[161] Envt'l Groups Post-Hearing Comments at 66, 71.
[162] Envt'l Groups Post-Hearing Comments at 66, 71.
[163] 415 ILCS 5/22.59(g)(10).

transportation plan possible to limit safety and other impacts to communities through which coal ash will be transported.[164] Because such analysis helps limit risk and harm, it furthers the purpose of the Act and should be required.

B. Workers Must Be Protected, But Not as Dynegy Proposes.

Worker protections must be enhanced, but not as Dynegy proposes.[165] We agree with Dynegy that worker protections must be expanded; however, the best way to expand worker protections is by mandating clear, robust dust protections and monitoring, as described in our post-hearing comments.[166] EPA's 2014 Coal Ash Risk Assessment supports strong requirements for fugitive dust controls, finding that dust could create an inhalation hazard for workers and community members without proper controls, as IEPA has acknowledged.[167] As IEPA pointed out, the 2014 Risk Assessment's conclusions demonstrate that coal ash "is toxic and can create human health hazards under certain scenarios," contradicting Dynegy witness Bradley's prefiled testimony.[168] "Consideration"[169] or "assessment"[170] of worker safety is not enough; the rules must require strong fugitive dust protections and the monitoring necessary to ensure that those protections are working.

## V. The Rules Must Provide Agency Oversight And Meaningful Public Participation.

A. With Some Exceptions Noted Below, The Environmental Groups Generally Agree with the Agency's Proposed Changes to Proposed Sections 845.210, 845.220, 845.230, 845.240, 845.260, and 845.270.

In our initial comments, we proposed a number of changes to proposed Sections 845.230, 845.240, 845.260, 845.270, and 845.280.[171] Some of our proposed changes included those proposed by the Agency in its post-hearing comments filed on September 24, 2020,[172] and our initial comments indicated where we were adopting a proposal by the Agency or where we were adopting with modifications a proposal by the Agency.

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[164] *Id.*
[165] *See* Dynegy's First Post-Hearing Comment at 10-11.
[166] *See* Envt'l Groups Post-Hearing Comments at 62-69.
[167] IEPA's Post-Hearing Comments at 28-29 (citing Ex. 23, Prefiled Testimony of Lisa Bradley).
[168] *Id.* at 29; *see also* USEPA, *Human and Ecological Risk Assessment of Coal Combustion Residuals (Final)* at 3-24 (Dec. 2014) (Excerpt provided as Ex. 27) ("Under the uncontrolled management scenario, concentrations of arsenic were found to pose acute risk, and PM 2.5 was found to exceed the 24-hour NAAQS."); Tr. Sept. 29, 2020 at 163:21-167:18).
[169] Dynegy's First Post-Hearing Comment at 10.
[170] Ex. 37, Prefiled Testimony of Andrew Bittner at 12 (Aug. 27, 2020).
[171] *See* Envt'l Groups Post-Hearing Comments at 72-106.
[172] *See generally* IEPA Post-Hearing Comments, Attach. 2 (Sept. 24, 2020).

In their final post-hearing comments, the Agency has proposed more changes – the majority of which we support as they pertain to Sections 845.210 to 845.270.[173] For example, we support their proposed changes to proposed Sections 845.210,[174] 845.220,[175] 845.230,[176] and 845.260.[177] We support the Agency's proposed changes to proposed Section 845.240(b),[178] the addition of a new subsection (b)(4) to Section 845.240(b),[179] and the proposed change adding subsection (g) to proposed Section 845.240.[180] We also support the intent behind the Agency's proposed change to Section 845.240(c),[181] but with the caveat that the change remove "by non-English speaking members of the public," as noted in our initial comments.[182] Likewise, we support the intent behind the Agency's proposed change to Section 845.270(e)(3),[183] but with the caveat that the appeal deadline should not begin to toll until the Agency has served its final determination on the Agency's listserv for the particular CCR surface impoundment at issue, as noted in our initial comments.[184]

In their final post-hearing comments, in response to Andrew Rehn's suggestion that the Agency have a third-party review the safety factor assessments, the Agency stated that it intends to work in conjunction with the Illinois Department of Natural Resources ("DNR").[185] However, that arrangement is not set out in the proposed rules, and, therefore, it may not always be the case. In addition, the lack of clarity around the role the DNR will play bolsters our overarching argument for why the proposed rules need to require the safety factor assessment, structural stability assessment, and other important plans and assessments to be part of a permit application (and not just the certifications), so that the public can also review and comment on the adequacy of those plans and assessments.[186]

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[173] *See* IEPA Final Post-Hearing Comments at 63-70.
[174] *Id*. at 63.
[175] *Id*. at 64-65.
[176] *Id*. at 65-67.
[177] *Id*. at 68-70.
[178] *Id*. at 67.
[179] *Id*. at 67-68.
[180] *Id*. at 68.
[181] *Id*. at 68.
[182] Envt'l Groups Post-Hearing Comments at 100 (under the Environmental Groups proposal, the last clause in the last sentence of proposed Section 845.240(c) would read "and the owner or operator must provide translation services during the public meetings required by Section 845.240(a), if requested.").
[183] IEPA Final Post-Hearing Comments at 70.
[184] Envt'l Groups Post-Hearing Comments at 104 (under the Environmental Groups proposal, proposed Section 845.270(e)(e) would read: "All appeals must be filed with the Board within 35 days after the final action as specified in Section 845.210(e) is served on the applicant and served on the Agency's listserv for the facility.").
[185] IEPA Final Post-Hearing Comments at 9.
[186] *See* Envt'l Groups Post-Hearing Comments at 72-87.

B. The Board Should Reject the CWLP, Dynegy, and IERG's Proposals to Hinder Meaningful Public Participation in the Proposed Part 845 Rules.

The Coal Ash Pollution Prevention Act calls for meaningful participation of Illinois residents, especially vulnerable populations who may be affected by regulatory actions, and mandates that there be meaningful public participation procedures.[187] Recommendations proffered by CWLP and Dynegy to change proposed Section 845.240 create hurdles for the public to participate meaningfully in this process and, thus conflict with the intent of the Coal Ash Pollution Prevention Act.

In response to pre-filed questions from the Environmental Groups, the Agency, relying on the U.S. EPA's definition, explained that meaningful involvement occurs when:

> Potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; the public's contribution can influence the regulatory agency's decision; the concerns of all participants involved will be considered in the decision-making process; the decision makers seek out and facilitate the involvement of those potentially affected[188]

As a member of the public so aptly commented, "[t]he word meaningful was included in the act for a purpose, to ensure that stakeholders and interested individuals play a meaningful role in the decision-making process."[189] Mr. Lan Prichart of Eco-Justice Collaborative went on to say:

> [I]t's my opinion that meaningful public participation requires several key elements and tonight I want to very briefly address two. One is making process open and assessable to all stakeholders and interested parties and the second is being transparent, making key documents and information used in the decision-making process readily accessible and providing adequate time for review and comment.[190]

In sum, the public participation process should not be "merely checking off a box."[191]

Meaningful public participation is especially important as applied to environmental justice communities, given that it is critical to the incorporation of environmental justice

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[187] 415 ILCS 5/22.59 (a)(5); (g)(6).
[188] Ex. 2, IEPA Prefiled Answers at 96 (Aug. 3, 2020); *see also* Ex. 7, IEPA Environmental Justice Public Participation Policy at 4. ("Illinois EPA will encourage the permit applicant to meet with community stakeholders to promote open dialogue early in the permitting process for permitting actions likely to be of significant public interest. Meaningful public outreach often occurs prior to the submission of a permit application to the Agency.").
[189] Tr. Public Comments. Aug 12, 2020 48:13-16.
[190] Tr. Public Comments Aug. 12, 2020 49:1-9.
[191] Tr. Public Comment Aug. 12, 2020 49:18.

considerations. CWLP raises concerns with the possibility of the environmental justice data changing from year to year and expects that the applicable dataset to utilize for characterization of its site will be the 2020 data when it becomes available in the second half of 2021.[192] We note that part of the fluctuation in numbers seems to come from the addition of the one-mile buffer and agree with the Agency's position to have the one-mile buffer. However, due to the potential fluctuation in data, as even noted by IEPA during the first hearing,[193] we urge the Board to utilize IEPA's existing inclusive model and incorporate additional factors that reflect the pollution burden and input of the community, which can demonstrate that an area is an area of environmental justice concern.[194]

CWLP and Dynegy recommendations include requiring fewer pre-application public meetings and limiting the methods of notice of those meetings. These recommendations are counter to the Coal Ash Pollution Prevention Act's mandate for meaningful public participation. Public meetings are not a unique feature of these regulations, as CWLP suggests,[195] but rather a requirement under the Part 257 federal rule.[196] Multiple public meetings provide community members the opportunity to participate, and CWLP acknowledges that "the Agency intended to require regulated facilities to utilize multiple methods of public notification to catch as many members of the interested public as possible."[197] It is critical that the proposed rules not create an "out" for an owner or operator to not provide adequate notice about ways to engage. The regulations must not leave room for vague or unclear notices by allowing or directing the owner or operator to rely on "best judgment" to keep the public informed.

IERG also proposes changes to Proposed Section 845.250 and 845.270 that would limit public participation.

The Environmental Groups therefore oppose the following proposals by CWLP and Dynegy to amend Section 845.240(a):

- CWLP Proposal: Section 845.240(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

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[192] *See* CWLP Post-Hearing Comments at 17.
[193] Tr. Aug. 13, 2020 at 197:8-13 (Testimony of C. Pressnall) ("MS. COURTNEY: Is it possible for the demographic data relied upon by EJ Start to underestimate the minority population or the income data by a percentage point? MR. PRESSNALL: I'm sure it's possible.").
[194] Tr. Aug. 13, 2020 at 186:17-22 (Testimony of C. Pressnall) ("MR. PRESSNALL: I don't think any screening tool includes every possible environmental justice community. MS. COURTNEY: Including the IEPA screening tool? MR. PRESSNALL: I reckon."); Ex. 11, Environmental Justice Commission Letter.
[195] *See* CWLP Post-Hearing Comments at 17.
[196] 40 C.F.R. 257.96(e) ("The owner or operator must discuss the results of the corrective measures assessment at least 30 days prior to the selection of remedy, in a public meeting with interested and affected parties").
[197] *See* CWLP Post-Hearing Comments at 17-18.

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.[198]

The Environmental Groups oppose CWLP's proposal to strike the word "discuss" from Proposed Part 845.240(a). It is important that the owner/operator not just hear what community members have to say, but that they also answer questions that the community raises. To take in public comment but have no dialogue with the public fails to provide meaningful public participation. "Solicitation" means "the act or an instance of requesting or seeking to obtain something; a request or petition,"[199] whereas "discuss" means "to talk about,"[200] "to investigate by reasoning or argument,"[201] "to present in detail for examination or consideration,"[202] or "to talk about something with somebody, especially in order to decide something."[203] Simply soliciting comments from the public without allowing for discussion does not provide for meaningful public participation as required by Coal Ash Pollution Prevention Act. In order to for residents to "have an appropriate opportunity to participate in decisions"[204] there should be a discussion rather than simply asking residents for their thoughts without any requirement for the owner or operator to substantively engage or respond to public concerns.[205]

- Dynegy Proposal: Section 845.240(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~~one public meetings, after 5:00 p.m., to discuss 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

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[198] *See* CWLP Post-Hearing Comments at 18-19.
[199] "SOLICITATION," Black's Law Dictionary (11th ed. 2019).
[200] "DISCUSS," MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/discuss
[201] *Id*.
[202] *Id*.
[203] "DISCUSS," OXFORDLEARNERSDICTIONARIES.COM, https://www.oxfordlearnersdictionaries.com/us/definition/english/discuss
[204] Ex. 2, IEPA Prefiled Answers at 96 (Aug. 3, 2020).
[205] "I have been at way too many IDOT hearings and other agencies which I won't mention that have, like, an open house forum where the public just wanders around to tables with posters and has to sum up the right questions to ask to certain staff. The procedure you're doing is the right one and I really think you must specify within the regulations how the public hearing should be held for the sites that are under consideration, closure. It is really critical that there is a public forum and that there is an opportunity for the public to hear other comments, to hear a full explanation of the site that is understandable and also to hear other comments from their neighbors or other friends or people that they don't know. This is a very important part of the democratic process. So I encourage you to specify that within the regulations." Tr. Public Comments Aug. 12, 2020 at 38:2-21.

> at a venue that is accessible to persons with disabilities, and the owner or operator must provide reasonable accommodations upon request.[206]

The Environmental Groups support the Agency's proposal to require at least two pre-application public meetings, and do not see any compelling reason to exclude a second public hearing as Dynegy suggests in its edits and as CWLP encourages the Board to consider.[207] To afford meaningful public participation, there should be ample opportunity for the public to engage with the owner or operator of the facility. We agree with CWLP that it is important for participants to all hear the same information and comments,[208] which is why it is important that the meetings be held in a setting where the owner or operator hosting the meeting cannot isolate community comments from other members of the community.[209] There, however, must be more than one public meeting, as the Agency proposed. It cannot be assumed that everyone in a community concludes working at 5 PM or is available in the evenings, which is why the Agency proposed two pre-application meetings, with one being in the evening and the other in the afternoon. For example, in attempting to facilitate meaningful public participation, the Agency in the public meetings had multiple times available for the public to attend and the public comment periods of this hearing were held both in the afternoon and in the evening. The same should be the case for the pre-application public meetings.

Dynegy expresses concern for the number of meetings that it will have to hold.[210] In response to testimony, Cynthia Vodopivec, Dynegy Vice President of Environmental Health and Safety, was asked how many personnel would participate in these meetings. She stated that "Dynegy cannot predict at this time who will attend these meetings." Notably Dynegy directly employs approximately 650 people in Illinois,[211] but implied that several of the same consultants would be at the meetings.[212] Environmental Groups believe that it is important that the appropriate staff at the meetings can answer the questions presented by the community members because otherwise there cannot be meaningful participation.[213]With 650 employees across the

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[206] *See* Dynegy Final Post-Hearing Comments, Att. A at 14.
[207] *See* CWLP Post-Hearing Comments at 18.
[208] *See* CWLP Post-Hearing Comments at 18.
[209] *See* Tr. Public Comments Aug. 12, 2020 at 38:2-21; *see* Envt'l Groups Post-Hearing Comments at 92-93 (Midwest Generation hosted a meeting to present the Assessment of Corrective Measures for Lincoln Stone Quarry and the format of the meeting was one-on-one dialogue between individual members of the public and representatives of the company. The company failed to engage in any meaningful dialogue with members of the community and failed to meaningfully respond to their comments.).
[210] *See* Dynegy Final Post-Hearing Comments, Att. A at 14.
[211] *See* Ex. 21, Prefiled Testimony of Cynthia Vodopivec at 3 (Aug. 27, 2020).
[212] Ex. 22, Prefiled Answers of Cynthia Vodopivec at 24 (Sept. 24, 2020).
[213] *See* Envt'l Groups Post-Hearing Comments at 87-89, 91; *see also* Public Comment Tr. Aug. 12, 2020 at 49:20-24, 50:1 ("This principle should be applied to the pre-application public meeting where currently only 14 days notice is proposed. You can be assured that you will get no meaningful input with this short timeframe and with little to no advance information available.").

state, it appears that Dynegy should be well equipped to ensure that each of the public meetings is adequately staffed by the appropriate personnel.

- CWLP Proposal: Section 845.240(b) The owner or operator must prepare and circulate a notice explaining the proposed ~~construction~~ project requiring a construction permit from the Agency ~~and any related activities~~ and the time and place of the public meeting. Such notification must be mailed, delivered or posted at least 14 days prior to the public meeting. The owner or operator of the CCR surface impoundment must take all reasonable and good faith efforts to:[214]

We oppose CWLP's proposed revision to proposed Section 845.240(b) because "reasonable and good faith efforts" is an ambiguous phrase that provides an "out" for an owner or operator to avoid meeting the provisions of Section 845.240 by claiming that it took "reasonable and good faith efforts." We reference our concerns about the public meeting for the Joliet 9/ Lincoln Stone Quarry surface impoundment, where Midwest Generation failed to adequately engage with the public and failed to provide adequate notice to the public under the federal Part 257 regulations.[215] We also note that in our Post-Hearing Comments, we advocated for the public to receive two more weeks of notice before the pre-application public meeting to ensure adequate notice to facilitate meaningful public participation.[216]

- CWLP Proposal: Section 845.240 (b)(1) mail or hand-deliver the notice to the Agency and all addresses determined to be ~~residents~~ within a one-mile radius from the facility boundary using reasonably available tools and methods;[217]

- Dynegy Proposal: Section 845.240 (b)(1) mail or hand-deliver the notice to the Agency ~~and all residents within a one mile radius from the facility boundary~~;[218]

The Environmental Groups oppose both CWLP and Dynegy's proposed revisions to proposed Section 845.240(b)(1). We do not think "residents" should be deleted from this text because then the notice could go to a landlord or property owner that may not inform the tenants (i.e., residents) who are proximately impacted by neighboring the impoundment. Keeping notice from tenants is a hindrance to meaningful public participation because it does not ensure that the potentially affected residents have an appropriate opportunity to participate. As stated by a member of the public: "It's extremely important that our community knows how to be informed and how to stay informed and how to stay active, but there tend to be many elements that limit us from knowing more and it's not that we don't care. It's just that we don't know."[219] Rather than

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[214] *See* CWLP Post-Hearing Comments at 19.
[215] *See* Envt'l Groups Post-Hearing Comments at 92-93; *see also* Ex. 51, Envt'l Groups' Attachments 1-6 of Prefiled Questions to Sharene Shealy, Attach. 1, Letter from William Naglosky to Jennifer Cassel (Sept. 6, 2019).
[216] *See* Envt'l Groups Post-Hearing Comments at 87-89, 91.
[217] *See* CWLP Post-Hearing Comments at 19.
[218] *See* Dynegy Final Post-Hearing Comments, Att. A at 15.
[219] Tr. Public Comments Aug. 13, 2020 32:5-10.

CWLP's proposition, which has the potential to exclude residents, the notice should go to both the property owner and whoever resides at the address to ensure that there is meaningful public participation. For those reasons, we also oppose Dynegy's proposition to exclude neighboring residents from receiving a mailed or hand-delivered notice.

- CWLP Proposal: Section 845.240 (b)(2) post the notice on all of the owner or operator's appropriate social media outlets; and [220]

- Dynegy Proposal: Section 845.240 (b)(2) post the notice on the website required pursuant to Section 845.810 ~~all of the owner or operator's social media outlets; and~~[221]

The Environmental Groups oppose striking the requirement to post the notice on social media outlets. In order to reach community members, the owner or operator should utilize several avenues to ensure there is meaningful public participation.[222] Social media has become an important way that the public consumes information. The use of social media to inform the public about permits is not a novel idea. IEPA, for instance, posts on its Twitter notices for permit applications in environmental justice communities

The Environmental Groups agree with including the notice on the publicly available website. However, this should not be the only option for the public to see the notice. We cannot see how community members will know to check the website—let alone know the address for the website—if the public never receives notice. The website would be the earliest place that the public can see the notice if the other notices, as suggested in Dynegy's edits, are only sent to the Agency or other governmental entities. If the public must wait for the city or the Agency to share the notice, this reduces the already short time that the public has to review documents in preparation for the pre-application public meeting. The public should not be kept in the dark. These edits do not comport with the Coal Ash Pollution Prevention Act's mandate for public participation, let alone meaningful public participation. Dynegy cites Part 845.260 for this limitation in notice. Instead, the Board should expand methods of notice as indicated in the Environmental Groups Post-Hearing Comments.[223]

- CWLP Proposal: Section 845.240 (b)(3) post the notice in conspicuous locations throughout villages, towns, or cities within 10 miles of the facility or publish in a newspaper of general circulation in such communities at least 14 days in advance of the public meeting, or use appropriate broadcast media (such as radio or television).[224]

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[220] *See* CWLP Post-Hearing Comments at 19.
[221] *See* Dynegy Final Post-Hearing Comments, Att. A at 15.
[222] *See* Tr. Public Comments Aug. 13, 2020 32:5-10.
[223] *See* Envt'l Groups Post-Hearing Comments at 87-91, 93-94.
[224] *See* CWLP Post-Hearing Comments at 19.

- Dynegy Proposal: Section 845.240 (b)(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 cit~~y~~ies within 10 miles of the facility, or use appropriate broadcast media (such as radio or television).;[225]

The Environmental Groups agree that newspaper should be added as a method of notice. However, there should still be multiple avenues to provide notice. In order to reach "potentially affected community residents," the owner or operator should recognize that people consume information in different ways. While we agree that there should be notice in a newspaper of general circulation in the communities, the rules should not mandate publication in a newspaper in lieu of posting and posting in conspicuous locations. There are likely many residents who do not subscribe to the newspaper. If participation is to be meaningful as mandated by the Act, then the owner or operator should be obligated to provide more than one form of conspicuous posting.

The Environmental Groups do not oppose Dynegy's addition of Proposed Section 845.240 (b)(4) to include emailing the notice to the Agency's listserv, as it will facilitate meaningful public participation and support mailing the notice to the clerk of the city, town, or village located within 10 miles of the facility. We do oppose the deletion of the requirement to post the notice and replacing it with mailing the notice to the locality. Simply mailing it does not assure that the public sees the postings, which is the purpose of posting it in multiple conspicuous locations, as noted in our Post-Hearing Comments.[226]

- CWLP Proposal: Section 845.240 (c) When a proposed project requiring a construction permit from the Agency ~~construction project or any related activity~~ is located in an area with a significant proportion of non-English speaking residents, the notification must be circulated, or broadcast, in both English and the appropriate non-English language, and the owner or operator must provide translation services ~~during the public meetings~~ required by Section 845.240(a), if requested by non-English speaking residents~~speakers.~~[227]

Environmental Groups oppose these edits to the language on translation. We address the importance of translation services for non-English speakers in our Post-Hearing Comments.[228] In accordance with the Coal Ash Pollution Prevention Act, the non-English speaker should be able to understand what is going on at the public meeting. Furthermore, the non-English speaker should be able to understand the documentation going into the public meeting, so there should be translated materials available ahead of time. There should not be a requirement for a translation request to be made by the non-English speaker because a non-English speaker may rely upon an English speaker to make the request for them. Therefore, the language should just say "if

[225] *See* Dynegy Final Post-Hearing Comments, Att. A at 15.
[226] *See* Envt'l Groups Post-Hearing Comments at 87-89, 91.
[227] *See* CWLP Post-Hearing Comments at 19.
[228] *See* Envt'l Groups Post-Hearing Comments at 94-95.

requested" without any further limitation, which was addressed in our initial set of Post-Hearing Comments.[229]

- CWLP Proposal: Section 845.240(e) At least 14 days prior to a public meeting, the owner or operator of the CCR surface impoundment must make all reasonable, good faith efforts to post on the owner or operator's publicly accessible internet site all available documentation the owner or operator intends to submit in support of the project requiring a permit from the Agency ~~relied upon in making their tentative construction permit application.~~.[230]

Environmental Groups oppose these edits to Proposed Section 845.240(e). We reiterate our concerns above giving discretion to the regulated entity on matters that affect community member's ability to participate in a meaningful way.[231] There should not be wiggle room for the amount of time that the public has to view documents to view documents. This puts the community at a disadvantage because they will not be able to participate in an informed way, rendering participation at the pre-application meeting far less meaningful. We also note that there should be at least 30 days prior to a public meeting to review this documentation.[232]

- CWLP Proposal: Section 845.240 (g) ~~Fourteen (14) days following the public meetings required pursuant to Section 845.240, the~~ The owner or operator shall post on its publically 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 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.[233]

Environmental Groups oppose some of CWLP's proposed revisions to Proposed Section 845.240(g). While we agree with posting a summary of the issues raised by the public and believe it helpful facilitate meaningful public participation, we do not think that it should be limited to the selection of alternatives for the project because there are other relevant

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[229] *See* Envt'l Groups Post-Hearing Comments at 95.
[230] *See* CWLP Post-Hearing Comments at 19-20.
[231] *See* Envt'l Groups Post-Hearing Comments at 92-93; *see also* Ex. 51, Envt'l Groups' Attachments 1-6 of Prefiled Questions to Sharene Shealy, Attach. 1, Letter from William Naglosky to Jennifer Cassel (Sept. 6, 2019).
[232] *See* Envt'l Groups Post-Hearing Comments at 91, 99.
[233] *See* CWLP Post-Hearing Comments at 20.

requirements that a proposal must comply with and appropriate comments or questions on those requirements, and more, that could arise in discussion at the pre-application public meeting.

We also oppose limiting sending this information via email. It assumes that all residents have access to email and the internet. If a community member attends a meeting and wishes to receive the summary via snail mail, then they should have that option, especially given the potential limitation of broadband access. Therefore, the owner or operator must ask the members of the public at the meeting their preferred method of delivery and receive express approval in writing. In order to ensure that the information arrives prior to the submittal of the final permit application to the Agency, the owner or operator should send the summary via certified mail.

- IERG Proposal: Section 845.250: Add "if applicable" at the end of Section 845.250(b)(1) so that it would read as follows: "If the determination is to issue the permit, the Agency must notify the applicant in writing of the content of the tentative determination and draft permit and of its intent to circulate public notice of issuance in accordance with Section 845.260, if applicable."[234]

- IERG Proposal: Section 845.250: Add "if applicable" to Section 845.250(b)(2) so that it would read as follows: "If the determination is to deny the permit, the Agency must notify the applicant in writing of the tentative determination and of its intent to circulate public notice of denial, in accordance with Section 845.260, if applicable. . . ."[235]

The Act calls for meaningful public participation. To include the language "if applicable," insinuates that there are instances in which there would not be notice needed to be given to the public. Adding this language provides more confusion than the clarity IERG aims to provide. IERG points to Proposed Section 845.170 to state that Proposed Section 845.260 should not apply to inactive CCR ponds because it is not listed. However, the Proposed Section 845.250(b) does not indicate that the whole of Section 845.260 should apply to inactive CCR ponds. Rather, that when there is a tentative permit determination, there should still be notice that falls in accordance with Section 845.260.

- IERG Proposal: Section 845.270: Add "if applicable" to Section 845.270(a) so that it would read as follows: "The Agency shall not make a final permit determination until the public participation process in Section 845.260, if applicable, has concluded."[236]

Environmental Groups oppose this edit because it again implies that there are instances in which there should not be public participation. Meaningful public participation calls for the inclusion of potentially affected community members in the decision-making process. A permit

[234] IERG Post-Hearing Comments at 3-4.
[235] IERG Post-Hearing Comments at 4.
[236] IERG Post-Hearing Comments at 5.

application that is processed without meaningful public participation would be a violation of the Coal Ash Pollution Prevention Act.

CWLP also proposes that there should be reports under Proposed Sections 845.440, 845.450, and 845.460 should be conducted and provided less often.[237] CWLP cites the Part 257 rules as being less frequent, however, the mandate of CAPPA is for the Illinois regulations to be "at least as" protective as the federal rules.[238] There is no such mandate that they be the same.

CWLP's proposal not only would hinder public participation, but also would be a potential hazard to the safety of the nearby community and the groundwater. Conditions at an impoundment can change as erosion, flooding, and infrastructure around the pond occurs.[239] Without the adequate information about the conditions of the surface impoundment, the Agency and the public are left in the dark. The reporting requirements for the Safety Factor Assessment, the Structural Stability Assessment, and the Hazard Potential Classification should still be conducted annually.

## VI. The Rules Should Not Unduly Delay Closure or Cleanup of CCR Impoundments.

The rules should not unduly delay closure or corrective action by adopting extensions of certain deadlines in the closure or corrective action process suggested or proposed by Midwest Generation and the Agency.

### A. The Deadlines for Operating Permit Applications and Establishing Background Groundwater Quality Should Not be Extended by Eighteen Months.

The operating permit application deadline for coal ash impoundments not regulated by the federal rule should not be extended for approximately eighteen months as proposed by Midwest Generation.[240] Midwest Generation states that the operating permit application deadline for coal ash impoundments not regulated under Part 257 should be extended from September 30, 2021, until March 31, 2023, because according to Midwest Generation, the current deadline is "infeasible" and does not allow for any "breathing room."[241] Moreover, Midwest Generation

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[237] IERG Post-Hearing Comment at 22-24.
[238] 415 ILCS5/22.59(g)(1).
[239] *See* Ex. 18, *Cap and Run Report*; Ex. 16, Rehn Test., Attachs. 41, 42 (Aug. 27, 2020); *see also* Ex. 15, Hutson Answers at 51; Ex. 28, Pre-filed Answers of Melinda Hahn, 10 and 11 (Aug. 27, 2020) ("f. Are there factors that could change at a surface impoundment or with groundwater flow that would alter that risk? RESPONSE: Installation of new extraction wells or changes in pumping rates in existing extraction wells could potentially change the direction of groundwater flow."); Tr. Sept. 29, 2020 204:15-23 ("So the extent to which a well could be impacted depends on the location, the depth, the pumping rate of the extraction well. So in the sense that it is possible, you can draw groundwater in a different direction other than natural direction on flow. I would say that's the factor that could change this assessment is the – some of the manmade interventions of extraction wells.").
[240] Midwest Generation Post-Hearing Comments at 23.
[241] *Id.* at 23-24.

believes that "[p]ublic health will not be jeopardized by extending the deadlines to ensure accurate data and complete permit application packages."[242] Alternatively, Midwest Generation suggests that the Board could "include language in Subpart A that would allow an owner or operator to request an extension of time for any requirement in Part 845, which the Agency is authorized to approve and its approval shall not be unreasonably withheld."[243]

Contrary to Midwest Generation's claim that the current deadline is infeasible because operating permit applications will include "a substantial amount of information,"[244] there is nothing in the record that supports an extension of specifically eighteen months. Furthermore, contrary to Midwest Generation's assertion, public health and the environment will be threatened by such an extension. As noted in the Environmental Group's post-hearing comments, groundwater and surface water contamination from coal ash in Illinois is well-documented and is compounded by ash in contact with groundwater, flooding, and unlined impoundments.[245] There are also structural stability threats at several impoundments in Illinois that are only increasing with time, and some are moving at a much more rapid pace than others, such as the eroding river banks adjacent to the Vermilion Power Station.[246] Undue delays in the operating permit process will only delay commencement of corrective action, among other protections, and place public health and the environment even more at risk than they already are.

Relatedly, Midwest Generation also suggests extending the deadline to establish background groundwater quality for existing coal ash impoundments not regulated by the federal rule.[247] Midwest Generation claims that the current deadline of 180 days after the effective date of the rules is insufficient to develop background data by collecting "eight independent samples" for impoundments that do not have existing groundwater monitoring under the federal rule,[248] asserting that limiting the timeframe for developing background data to 180 days prevents the collection of independent data and data representative of seasonal variations.[249] As support for its suggested modification, Midwest Generation cites the federal rule's timeframe of two years to develop background data for existing impoundments.[250]

Extending the deadline to establish background groundwater quality for existing coal ash impoundments not regulated by the federal rule is, in many cases, unnecessary and unwarranted. An extension of this deadline would delay the operating permit application process, which is why Midwest Generation is also suggesting an 18-month extension of that deadline, as noted above. An extension of the deadline to establish background data would also unduly delay groundwater monitoring and corrective action and put public health and the environment at risk.

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[242] *Id.* at 24.
[243] *Id.*
[244] *Id.* at 23.
[245] Envt'l Groups Post-Hearing Comments at 4.
[246] *Id.* at 7.
[247] Midwest Generation Post-Hearing Comments at 3-4.
[248] *Id.* at 3-4.
[249] *Id.* at 4.
[250] *Id.* at 3.

As Midwest Generation notes, the rules allow an owner or operator to use pre-existing background data, as long as it comports with the rules' standards.[251] Many coal ash impoundments in Illinois not thus far regulated by the federal rule, including but not limited to ash ponds at Vermilion, Venice, and Hutsonville, have already been conducting groundwater monitoring for the Agency for years.[252] Therefore, it is unclear which coal ash impoundments would require any extension.

A short extension of the deadline for operating permit applications or the deadline for establishing background groundwater quality for coal ash impoundments not thus far regulated by the federal rule may be warranted in the limited circumstances where appropriate background data has not already been collected. However, the rules should limit any extensions to far shorter than the 18-month extensions proposed by Midwest Generation.

B. The Deadlines for Construction Permit Applications Should Not be Extended.

Midwest Generation also proposes extending the deadlines for construction permit applications for the closure or retrofit of several different categories of coal ash impoundments.[253] Midwest Generation claims that the deadline in Proposed Section 845.700(h) to submit construction permit applications for Category 1, 2, 3, and 4 coal ash impoundments within nine months is unreasonable.[254] Specifically, for Category 1, 2, and 3 impoundments, Midwest Generation suggests extensions from January 1, 2022, until January 31, 2022; for Category 4 impoundments, an extension from January 1, 2022, until March 30, 2022; and for Category 5 impoundments, an extension from July 1, 2022 until September 30, 2022.[255]

The only support that Midwest Generation cites for these requested extensions is that one of its witnesses, Sharene Shealey, testified that "it would take at least nine and a half months just to prepare all of the documentation required."[256] This limited support might excuse a 30-day extension of the deadlines for Category 1, 2, and 3 impoundments, but there is no basis for Midwest Generation's proposed 90-day extensions for Category 4 and 5 impoundments. The Board should therefore reject Midwest Generation's suggested extensions of the deadlines for construction permit applications for Categories 1 through 5 coal ash impoundments.

C. The Rules Should Not Unduly Delay the Deadline for Ash Ponds to Cease Operation and Commence Closure.

The deadline for impoundments to cease operation and commence closure should not be extended to reflect USEPA's poorly supported and legally suspect revisions to 40 C.F.R. § 257.103(f). The Agency is proposing revisions to Proposed Section 845.700(d)(2) that would

[251] *Id.*
[252] *See* Ex. 16, Rehn Test., Attachs. 20, 21, 23; Ex. 34, Hagen Test.
[253] Midwest Generation Post-Hearing Comments at 25-26.
[254] *Id.* at 25.
[255] *Id.* at 25-26.
[256] *Id.* at 25.

adopt provisions of the Trump Administration's "Part A" rollbacks to the federal rule that delay closure and allow impoundments to continue to accept waste as long as they demonstrate that they lack alternative disposal capacity for non-CCR waste streams or that the associated coal plant is planning to retire.[257] The Agency's proposed revisions would delay the deadline for ceasing receipt of waste and commencement of closure of unlined coal ash impoundments and those that do not comply with location restrictions if the owners or operators receive an extension from USEPA.[258]

As the DC Circuit explained in USWAG, unlined impoundments and those that violate location standards pose an ongoing risk to human health and the environment.[259] Moreover, USEPA did not a have a lawful basis to adopt these closure deadline extensions and failed to adequately evaluate the risks associated with doing so. Therefore, the Board should reject the Agency's proposal to adopt the closure deadline extensions in the "Part A" rollbacks to the federal rule. Rather, Illinois should retain the closure application schedule the Agency originally proposed and require owners and operators to close impoundments as soon as the closure construction permit has been issued under these rules.

## VII. The Board Should Reject Attempts to Limit the Scope of the Proposed CCR Rules.

### A. The Board Should Not Make Site-Specific Determinations on the Applicability of the Coal Ash Pollution Prevention Act or the Agency's Proposed Part 845 Rules.

We agree with the Illinois Attorney General's Office that the Board should not make any site-specific adjudications to the applicability of either the Coal Ash Pollution Prevention Act[260] or the Agency's proposed Part 845 rules.[261] Applicability of either the Coal Ash Pollution Prevention Act or the Agency's proposed Part 845 rules can be decided in adversarial adjudications where parties to that adjudication have the ability to, among other things, conduct discovery, which is not available in the present rulemaking setting.[262] For transparency's sake, we request that the Agency provide a list on its website of all of the CCR surface impoundments subject to the final Part 845 rules.

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[257] IEPA Final Post-Hearing Comments at 80.
[258] *Id.* at 81-82.
[259] *USWAG*, 901 F.3d 414, 421-22 (D.C. Cir. 2018), Attach C. to IEPA Statement of Reasons.
[260] 415 ILCS 5/22.59.
[261] *See* Post-Hearing Comments of the Illinois Attorney General's Office at 1-4.
[262] *Id*. at 4 ("Accordingly, to the extent that any participant asks the Board for a determination on the applicability of Section 22.59 of the Act and the proposed Part 845 Regulations to any particular sites, the Board should decline any such overtures, as such questions are more appropriately resolved in an adjudicatory forum.").

B. The Board Should Reject Ameren's Proposal to Exclude Some of Its CCR Surface Impoundments from the Scope of the Agency's Proposed Part 845 Rules.

We agree with the Illinois Attorney General's Office that the Board should not adopt Ameren's proposal to limit the scope of the Agency's proposed Part 845 rules as they relate to some of Ameren's CCR surface impoundments.[263] The Coal Ash Pollution Prevention Act requires that Illinois CCR rules "be at least as protective and comprehensive as the federal regulations or amendments thereto promulgated by the Administrator of the United States Environmental Protection Agency in Subpart D of 40 CFR 257 governing CCR surface impoundments."[264] Nevertheless, Ameren proposes to limit the scope of the Illinois CCR rules in a manner that is less protective and comprehensive than the federal CCR rules by exempting certain impoundments from the scope of the Part 845 rules, even though those impoundments would be covered by the federal CCR rules. As the Illinois Attorney General's Office aptly explained:

> Part 845 must at least regulate all of the impoundments covered by the federal regulations. If Part 845 did not, then it would be neither as "protective," nor as "comprehensive," as the federal regulations, and accordingly would be inconsistent with the Act.
>
> To determine which impoundments are covered by the federal regulations, the only applicable temporal frame of reference is October 19, 2015 – i.e., the date on which "Subpart D of 40 CFR 257" became effective. See 80 Fed. Reg. 37988, 37989 (July 2, 2015). The Agency's proposal to use October 19, 2015 throughout the definitions in Section 845.120 as a cut-off date in determining the CCR surface impoundments covered by the State's rules is therefore not just appropriate, but required by the General Assembly's mandate in Section 22.59(g)(1) of the Act.[265]

Ameren notes that it spent money on its closure of the contested CCR surface impoundments,[266] but costs are not relevant to whether the proposed Part 845 rules are applicable to those contested CCR surface impoundments. Costs are also not relevant to whether or not the Part 845 rules must include those contested CCR surface impoundments, which they must if they are to be at least as protective and comprehensive as the federal CCR rules and, thus, comply with the Coal Ash Pollution Prevention Act. Lastly, as the D.C. Circuit held in the context of the federal CCR rules, costs are not allowed to be considered,[267] therefore they should also not be considered in the context of the Illinois CCR rules.

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[263] *Id*. at 4-7.
[264] 415 ILCS 5/22.59(g)(1).
[265] Post-Hearing Comments of the Illinois Attorney General's Office at 5.
[266] *See* Ameren's Post-Hearing Brief at 6-7 (Oct. 30, 2020).
[267] *USWAG*, 901 F.3d 414, 449-50.

At least some of the Ameren CCR surface impoundments at issue are still contaminating groundwater. As admitted by Ameren's witness Gary King, "ground water exceedances of the Part 620 groundwater standards have been identified and reported to the Agency authorized groundwater monitoring network in place at the Hutsonville and Meredosia facilities."[268] The existence of ongoing groundwater contamination bolsters the need for those facilities to be included within the Agency's proposed CCR surface impoundment regulatory scheme.

C. The Board Should Reject Dynegy's Proposal to Change the Definition of "Inactive CCR Surface Impoundment."

We agree with the Agency that Dynegy's proposal to redefine "Inactive CCR Surface Impoundment" should be rejected.[269] Dynegy argues that the Agency's definition of "inactive CCR surface impoundment" must be amended to comport to the definition of CCR surface impoundment in the Coal Ash Pollution Prevention Act,[270] but Dynegy's argument rests on the flawed proposition that there is a conflict between the two definitions.

The Coal Ash Pollution Prevention Act defined CCR surface impoundment as "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR." The Agency's proposed definition of "inactive CCR surface impoundment" reads:

> "Inactive CCR surface impoundment" means a CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains CCR on or after October 19, 2015. Inactive CCR surface impoundments may be located at an active facility or inactive facility.[271]

The Agency's definition of "inactive CCR surface impoundment" refers to "CCR surface impoundment," which the Agency separately defined by reference to and incorporation of the Legislature's definition in the Coal Ash Pollution Prevention Act.[272] Therefore, there is no conflict between the two, and there is no reason to amend the definition of "inactive CCR surface impoundment" as a result. There cannot be a conflict when the Agency's definition of "inactive CCR surface impoundment" incorporates by reference the Legislature's definition of CCR surface impoundment.

Dynegy contends that the missing word "liquid" in the Agency's proposed definition of "inactive CCR surface impoundment" creates the conflict.[273] However, a commonsense interpretation of the definition supports the Agency's proposal. The Coal Ash Pollution

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[268] Prefiled Answers of Gary King at 4 (Sept. 24 2020).
[269] IEPA Final Post-Hearing Comments at 32-33.
[270] *See* Dynegy's First Post-Hearing Comment at 7-9.
[271] Proposed Section 845.120.
[272] *See* Proposed Section 845.120. (defining "CCR surface impoundment" in the exact same way as the Coal Ash Pollution Prevention Act and citing to 415 ILCS 5/3.143).
[273] Dynegy's First Post-Hearing Comment at 8.

Prevention Act's definition of CCR surface impoundment only requires that it be "designed to hold an accumulation of CCR and liquids."[274] Notably, the Act does not create any temporal limitation on the definition. Therefore, an impoundment that was designed to hold an accumulation of CCR and liquids does not suddenly cease to be a CCR surface impoundment merely because it no longer contains CCR or liquids. Dynegy's semantics create more confusion than clarity and do not support altering the Agency's definition of "inactive CCR surface impoundment." For the same reason a bathtub is still a bathtub even if there is no water in it, a CCR surface impoundment that no longer contains liquids does not negate the fact that it was "designed to hold an accumulation of CCR and liquids" and, thus, does not negate that it is still subject to the Agency's proposed rules, consistent with the Coal Ash Pollution Prevention Act.

We also agree with the Agency's reasons for rejecting Dynegy's proposal. As the Agency aptly explained:

> [I]n its experience with closing a number of CCR surface impoundments prior to the adoption Sections 3.143 and 22.59 of the Act, the Agency has found that many unlined CCR surface impoundments constructed in permeable sediments are unable to retain liquids discharged into them. The impoundments were designed (i.e. intended) to the hold CCR, liquids and other wastes sent there as part of plant operations. These impoundments are permitted as water treatment units, designed to settle suspended solids from the wastewater. Therefore, the design requires that liquids accumulate in a relatively still condition to allow the CCR to precipitate from suspension (with an accumulation left behind), prior to discharge of the wastewater in compliance with an NPDES permit. The design does accumulate CCR and liquids to the degree necessary to meet NPDES permit limits, but the design in many cases has not been adequate to prevent wastewater from leaking into the underlying groundwater, in some instances leaving the impoundments dry once the impoundment was no longer in use (i.e. inactive).[275]
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> ***
>
> Some owners and operators routinely remove the accumulated CCR (i.e. stored) from their CCR surface impoundments and transport it off-site for disposal or beneficial use. In order to remove the CCR for transport, the CCR must be dewatered, by either setting the CCR aside to dry, or removing accumulated liquids from within the CCR surface impoundment. Removing the accumulated liquids from a CCR surface impoundment, prior to removing the accumulated CCR, does not end that impoundment's status as a CCR surface impoundment. Therefore, the Agency maintains that an inactive CCR surface impoundment from which the liquid has leaked over time, leaving behind only CCR, is still a CCR surface impoundment. Such an impoundment meets the definition of Section 3.143 of the

[274] 415 ILCS 5/3.143; Proposed Section 845.120.
[275] IEPA Final Post-Hearing Comments at 32.

> Act because it is designed to hold an accumulation of CCR and liquids while operational, and still stores CCR after the liquids have leaked away into groundwater.[276]

For the foregoing reasons, Dynegy's proposal to redefine "inactive CCR surface impoundment" should be rejected.

D. The Board Should Reject Dynegy's Proposed De Minimis Exception.

Nor should the Board adopt Dynegy's proposed de minimis exception to the definition of "CCR surface impoundment."[277] The board should instead maintain the scope of "CCR surface impoundment" as defined by both USEPA and the Illinois legislature. In Part 257, USEPA specifically declined to adopt a de minimis exception, on the basis that the definition of "CCR surface impoundment" in the final rule made clear which ponds are covered,[278] as Dynegy and its witness Ms. Bradley acknowledge.[279] As quoted in Ms. Bradley's testimony, USEPA did consider concerns from commenters "that the proposed definition could be interpreted to include downstream secondary or tertiary surface impoundments, such as polishing, cooling, wastewater, and holding ponds that receive only de minimis amounts of CCR."[280] To address this concern, USEPA revised its proposed definition, now defining "CCR surface impoundment" as "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR."[281] USEPA concluded that this definition – the exact same definition later adopted by the Illinois legislature in passing the Coal Ash Pollution Prevention Act[282] and by the Agency in its proposed rules[283] – addressed commenters' concerns about ponds containing only de minimis amounts of CCR. USEPA noted:

> The final definition makes extremely clear the impoundments that are covered by the rule, so an owner or operator will be able to easily discern whether a particular unit is a CCR surface impoundment. CCR surface impoundments do not include units generally referred to as cooling water ponds, process water ponds, wastewater treatment ponds, stormwater holding ponds, or aeration ponds. These units are not designed to hold an accumulation of CCR, and in fact, do not generally contain significant amounts of CCR.[284]

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[276] *Id*. at 32-33.
[277] Dynegy First Post-Hearing Comment at 14-16.
[278] Ex. 5, 80 Fed. Reg. 21,302, 21,357 (Apr. 17, 2015).
[279] *See* Dynegy First Post-Hearing Comment at 14-15; Ex. 23, Prefiled Testimony of Lisa Bradley at 32-33 (Aug. 27, 2020).
[280] Ex. 5, 80 Fed. Reg. at 21,357.
[281] 40 C.F.R.§ 257.53; Ex. 5, 80 Fed. Reg. at 21,357.
[282] 415 ILCS 5/3.143.
[283] Proposed Section 845.120.
[284] Ex. 5, 80 Fed. Reg. at 21,357.

Thus, the definition of "CCR surface impoundment" in the federal rule, and now in both the Illinois Environmental Protection Act and the Proposed Rule, already excludes impoundments that contain only de minimis amounts of CCR, making Dynegy's proposed exception unnecessary.

Moreover, adding an explicit de minimis exception to the definition of CCR impoundment is not only unnecessary, it is impermissible. Because the Proposed Rule adopts the definition of "CCR surface impoundment" used by USEPA, adding an exception to the definition that is not present in the federal rule would presumably – as every provision is presumed to have an effect[285] – exempt certain impoundments from regulation by Illinois where they would be regulated under the federal rule. The exemption would narrow the coverage of Illinois's rule and render it less comprehensive, as well as less protective, than the federal CCR rule, in violation of the Coal Ash Pollution Prevention Act.[286]

The Illinois legislature gave a clear directive regarding the definition of "CCR surface impoundment."[287] The Board should follow that directive and decline to adopt the exception proposed by Dynegy.

E. The Board Should Consider the Environmental Harms Caused by CCR Landfills.

We disagree with CWLP's position that CCR landfills should not be considered in this rulemaking.[288] As the Agency noted in its comments, the U.S. EPA "conclude[d] that current management practice of placing CCR waste in surface impoundments and landfills poses risks to human health and the environment within the range that OSWER typically regulates."[289] In addition, the Agency also noted that David Nielson, one of MWG's witnesses, relied on the U.S. EPA's risk assessment supporting its 2015 CCR rules, and that risk assessment stated: "The vast majority of damage cases were associated with unlined surface impoundments and landfills."[290] Our initial comments filed on October 30, 2020, contained more examples of the harms caused by CCR surface impoundments and why they should be considered in this rulemaking.[291]

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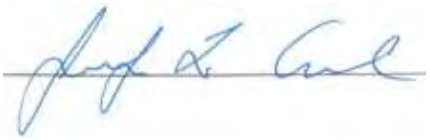
[285] *See Arnold v. Bd. of Trustees of Cty. Emp. Annuity & Ben. Fund of Cook Cty.*, 84 Ill. 2d 57, 62 (1981) (presumption against finding language to be mere "surplusage").
[286] 415 ILCS 5/22.59(g)(1) ("The rules must, at a minimum . . . be at least as protective and comprehensive as the federal regulations or amendments thereto promulgated . . . in Subpart D of 40 CFR 257 governing CCR surface impoundments . . . .").
[287] 415 ILCS 5/3.143.
[288] *See* CWLP Post-Hearing First Notice Comments at 3-5.
[289] IEPA Final Post-Hearing Comments at 30.
[290] *Id*. at 45 (citing Ex. 50 at 35).
[291] *See* Envt'l Groups Post-Hearing Comments at 50-60.

## VIII. Conclusion

For the reasons explained in Environmental Groups' Final Post-Hearing Comments and these Response Comments, we respectfully request that the Board adopt rules that will provide permanent protection to Illinois' communities and environment, with robust, meaningful public participation, comprehensive Agency oversight, and proper protections for workers and communities. We appreciate your attention and consideration.

Dated: Nov. 6, 2020

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

The undersigned, Jennifer Cassel, an attorney, certifies that I have served by email the Clerk and by email the individuals with email addresses named on the Service List provided on the Board's website, *available at* https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16858, a true and correct copy of the **ENVIRONMENTAL LAW & POLICY CENTER, PRAIRIE RIVERS NETWORK, SIERRA CLUB, AND LITTLE VILLAGE ENVIRONMENTAL JUSTICE ORGANIZATION'S FINAL RESPONSE COMMENTS**, before 5 p.m. Central Time on November 6, 2020. The number of pages in the email transmission is 59 pages.

Dated: November 6, 2020

Respectfully Submitted,

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