

ILLINOIS POLLUTION CONTROL BOARD  
April 15, 2021

IN THE MATTER OF: )  
)  
STANDARDS FOR THE DISPOSAL OF ) R20-19  
COAL COMBUSTION RESIDUALS IN ) (Rulemaking - Land)  
SURFACE IMPOUNDMENTS: PROPOSED )  
NEW 35 ILL. ADM. CODE 845 )

Adopted Rule. Final Order.

OPINION AND ORDER OF THE BOARD (by B.F. Currie):

Today, the Board adopts a new Part 845 of its waste disposal regulations, creating Illinois' first Statewide standards for the disposal in surface impoundments of coal combustion residuals (CCR), commonly called "coal ash," which is generated by coal-fired power plants. In doing so, the Board fulfills one of the main objectives of the Coal Ash Pollution Prevention Act, which the General Assembly passed and Governor JB Pritzker signed into law in 2019 as Public Act 101-171. These rules of general applicability provide for the protection of public health and the environment in Illinois by establishing a comprehensive State permitting program to govern all aspects of CCR surface impoundments. For example, Part 845 regulates the location, design, construction, operation, closure, and post-closure care of CCR surface impoundments, as well as the remediation of releases from those impoundments. Part 845 also requires that impoundment owners or operators supply financial assurance to ensure payment of closure, post-closure care, and remediation costs. In addition, Part 845 provides for meaningful public participation in the permitting process, along with requirements to prioritize CCR surface impoundment closures in areas of environmental justice concern.

The Board's adoption of Part 845 also allows the Illinois Environmental Protection Agency (IEPA) to pursue United States Environmental Protection Agency (USEPA) approval of these rules to operate in lieu of the federal CCR surface impoundment rules in Illinois. As adopted, new Part 845 reflects changes agreed to with the Joint Committee on Administrative Rules (JCAR) at second notice.

The Board's second-notice opinion reviews the rulemaking record and discusses contested issues. Rather than reproduce those sections of the opinion today, the Board recommends that readers wishing to review them consult that opinion. The second-notice opinion can be viewed from the Clerk's Office On-Line (COOL) on the Board's website ([pcb.illinois.gov](http://pcb.illinois.gov)) under this docket number, R20-19. See [Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 \(Feb. 4, 2021\)](#) (CCR Second Notice).

Today's opinion begins with an abbreviated procedural history of this rulemaking. The Board then briefly reviews changes to its second-notice proposal as agreed to with JCAR. Next, the Board addresses economic reasonableness and technical feasibility, after which the Board

adopts Part 845. Lastly, the Board issues its order, directing the Clerk to submit the adopted rules to the Secretary of State for publication in the *Illinois Register*. Part 845 itself is in the addendum to this opinion and order.

### **ABBREVIATED PROCEDURAL HISTORY**

On March 30, 2020, IEPA filed its rulemaking proposal to add new Part 845 to the Board's waste disposal regulations. Accompanying the proposal was IEPA's Statement of Reasons.

On April 16, 2020, the Board issued a first-notice order accepting IEPA's proposal for hearing without commenting on the substantive merits of the proposal. The proposed first-notice rules were published in the *Illinois Register* on May 1, 2020, 44 Ill. Reg. 6696 (May 1, 2020).

The Board held two sets of hearings in this rulemaking. The first set of hearings were held on August 11, 12, 13, and 25, 2020. The second set of hearings were held on September 29 and 30, 2020. In addition, due to the ongoing COVID-19 pandemic, the Board allowed remote participation by video or telephone using WebEx. The Board received 120 oral comments from members of the public and 138 written public comments at the time the record closed on November 6, 2020.

On February 4, 2021, the Board proceeded to second notice and filed proposed rules with JCAR. On February 11, 2021, JCAR accepted the proposed rules for second notice and scheduled the rulemaking for consideration at its March 16, 2021 meeting, setting the second-notice period to end by March 26, 2021. At its March 16, 2021 meeting, JCAR requested, and the Board agreed, to extend the second-notice period for up to an additional 45 days, *i.e.*, until May 10, 2021. *See* 5 ILCS 100/5-40(c) (2018). JCAR asked for further time to examine the proposed rules and, specifically, the Board's reliance on the October 19, 2015 effective date of the corresponding federal rules in delineating the universe of CCR surface impoundments subject to Part 845. At its April 13, 2021 meeting, JCAR issued a certification of no objection to this rulemaking.

### **DISCUSSION**

#### **Public Comments During Second Notice**

The Board received three public comments during the second-notice period, each of which had first been submitted to JCAR. Those comments were from the Environmental Law and Policy Center, Prairie Rivers Network, Sierra Club, and Little Village Environmental Justice Organization (collectively, Environmental Groups) (PC 145), USEPA (PC 146) and Dynegy Midwest Generation, LLC, Electric Energy Inc., Illinois Power Generating Company, Illinois Power Resources Generating, LLC, and Kincaid Generation, LLC (collectively, Dynegy) (PC 147).

The Board also received correspondence during the extended second-notice period that were comprised of copies of materials submitted to or discussed with JCAR. The Board

docketed these emails and memorandums as public comments. Those comments were from Dynegy (PC 148), IEPA (PC 149, 150), and AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri (collectively, Ameren) (PC 151). These comments raised issues relating to the use of the October 19, 2015 effective date of the corresponding federal rules as well as the effect of the extension of the second-notice period.

In addition, IEPA filed a memorandum to Michelle Casey, Executive Ethics Commission, Executive Director, concerning potential *ex parte* discussions with JCAR and other interested persons, but not including the Board (docketed as PC 152). Ameren filed a motion to strike IEPA's PC 152 on April 2, 2021. On April 5, 2021, the hearing officer set a deadline of April 12, 2021, to respond to Ameren's motion. The Board did not receive any responses, and on April 14, 2021, the hearing officer issued an order denying Ameren's motion to strike.

Two additional public comments were received as well. On April 6, 2021, IEPA filed a public comment addressing Ameren's requested change (PC 153) and on April 7, 2021, the Office of the Illinois Attorney General filed a public comment also addressing Ameren's request (PC 154).

When at second notice, the Board can make substantive changes only if requested by JCAR. 5 ILCS 100/5-40(c) (2018). Therefore, only those changes agreed to by the Board and JCAR are reflected in the final order.

### **Changes Suggested by JCAR and Agreed to by the Board**

JCAR requested that the Board adopt a number of non-substantive changes. While they are not specifically discussed in this opinion, they are reflected in the Board's adopted rules.

As indicated above, several participants sought changes in the rules before JCAR. Below we discuss those changes.

### **Environmental Groups PC 145**

The Environmental Groups' PC 145 requested that JCAR make several changes to the second-notice proposal. PC 145 at 1. JCAR requested, and the Board agreed to, the following changes. First, the Environmental Groups requested a language change in Section 845.260(d)(1) to strengthen the public hearing provision of the rules. The agreed-to change is as follows:

#### **Section 845.260 Draft Permit Public Notice and Participation**

...

#### d) Public Hearing

- 1) The Agency must ~~may~~ hold a public hearing on the issuance or denial of a draft permit whenever the Agency determines that there exists a significant degree of public interest in the proposed permit.

Secondly, the Environmental Groups requested that Section 845.260(f) be changed to clarify that IEPA must prepare a responsiveness summary if written comments are submitted, whether or not a public hearing is held. JCAR requested, and the Board agreed to, the following changes to Section 845.260(f):

**Section 845.260 Draft Permit Public Notice and Participation**

...

- f) When the Agency receives written comments or holds a public hearing under this Section, the Agency must prepare a responsiveness summary that includes:

...

- 4) A summary of all significant comments, criticisms, and suggestions, whether written or oral, submitted during the public comment period at the hearing, or during the time the hearing record was open;

Additionally, the Environmental Groups noted that while the Board's second-notice opinion and order found that the time frame in Section 845.240(e) should be changed from 14 days to 30 days, the text of the rules proposed at second notice failed to make that change. JCAR requested, and the Board agreed to, the following change to Section 845.240(e):

- e) At least ~~30~~4 days before a public meeting, the owner or operator of the CCR surface impoundment must post on the owner's or operator's publicly accessible internet site all documentation relied upon in making a tentative construction permit application.

**Use of October 19, 2015 Date**

Ameren requested that JCAR make two changes to the proposed rules at second notice. PC 151. This was a renewal of an argument Ameren had made at multiple points during the rulemaking. The argument was raised in its pre-filed questions, pre-filed testimony, testimony at hearing and in post-hearing comments. At second notice, Ameren requested the following changes:

**845.100 Scope and Purpose**

“A former ash pond that was closed by removal of CCR pursuant to a state-approved closure plan prior to the effective date of this Part is not a surface impoundment as defined in Section 3.143 of the Act, and is not subject to this Part.”

**845.120 Definitions**

“Inactive Closed CCR surface impoundment” means an inactive CCR surface impoundment that completed closure before ~~October 19, 2015~~ the effective date of this Part with an Agency-approved closure plan.” PC 151 at 1.

As discussed in the Board’s second-notice opinion, these are rules of general applicability and it is inappropriate to carve out exceptions for individual ash ponds as Ameren here requests. CCR Second Notice at 17. “Maintaining October 1[9], 2015, the effective date of the federal rule, as the cutoff date for completing closure activities at inactive CCR surface impoundments is equitable to all participants.” *Id.* To eliminate that date would endanger USEPA approval of these State rules, an argument made by IEPA throughout this rulemaking, most recently in PC 152. However, Ameren has potential avenues for relief, as described in the Board’s second-notice opinion. “To address site-specific issues, an affected entity may avail itself of relief mechanisms, such as an adjusted standard or a variance.” *Id.* Through testimony in this rulemaking, as well as the site-specific rulemaking that created Part 840 of the Board’s rules, the Board is aware that Ameren’s multiple CCR surface impoundments are in various states of closure.

JCAR inquired about whether any rule language might be added to emphasize that owners and operators would not have to “start from scratch” if they had previously completed an IEPA-approved closure. The Board appreciates JCAR’s thoughtful inquiry and adopts the following rule changes agreed to with JCAR:

#### **Section 845.100 Scope and Purpose**

...

- i) If a CCR surface impoundment has completed an Agency-approved closure before April 21, 2021, this Part does not require the owner or operator of the CCR surface impoundment to resubmit to the Agency any closure plan, closure report, or closure certification for that completed closure.
- j) Upon completion of an Agency-approved closure, the CCR surface impoundment is considered a CCR surface impoundment that has completed closure for purposes of fee applicability under Section 22.59(j) of the Act.

#### **Other Changes**

Additionally, there were other significant changes requested by JCAR as well as by participants at second notice that resulted in substantive changes to the proposed rules.

JCAR requested that the phrase “the effective date of this Part” be changed to a specific date. The Board agreed to this change and due to the extended second-notice period, sets April 21, 2021, as the effective date of Part 845. *See* 5 ILCS 100/5-40(d) (2018).

In public comment 153, IEPA noted an inconsistency in the Board’s second-notice opinion. In discussing Section 845.660, the opinion mistakenly refers to “845.860” and

mentions changes to the rule which did not appear in the rule text that followed the second-notice opinion. CCR Second Notice at 81. IEPA says, “Illinois EPA believes that the Board intended what is in the rule language of Addendum A, which is to require initiation of corrective action measures or submission of an ASD [Alternative Source Demonstration] based on one quarter of monitoring showing exceedance above the groundwater protections standard.” PC 153, Att. A at 2. IEPA is correct. The Board’s opinion accurately described the result in a different passage addressing Sections 845.650(d) and 845.660(a), “the Board declines to make Midwest Generation’s suggested changes to require two quarters of monitoring to initiate an assessment of corrective action measures or submit an ASD.” CCR Second Notice at 76. While Section 845.650(d) describes the procedures to be followed when there is an exceedance of the groundwater protection standards in Section 845.600, Section 845.660(a) provides for the initiation of an assessment of corrective measures.

Due to the extended second-notice period, Dynegy requested that specified compliance dates be extended. PC 148. JCAR requested, and the Board agreed to, the following changes:

### **Section 845.230 Operating Permits**

...

- d) Initial Operating Permit for Existing, Inactive and Inactive Closed CCR Surface Impoundments
  - 1) The owner or operator of an existing, inactive or inactive closed CCR surface impoundment who has not completed post-closure care must submit an initial operating permit application to the Agency by October 31 ~~September 30~~, 2021;

### **Section 845.500 Air Criteria**

...

- b) ...
  - 4) The owner or operator of a CCR surface impoundment must prepare an initial CCR fugitive dust control plan for the facility by October 31 ~~September 30~~, 2021, or by initial receipt of CCR in any CCR surface impoundment at the facility if the owner or operator becomes subject to this Part after October 31 ~~September 30~~, 2021.

### **Section 845.520 Emergency Action Plan**

...

- c) The owner or operator of a CCR surface impoundment must prepare an initial Emergency Action Plan for the facility by October 31 ~~September 30~~, 2021, or by initial receipt of CCR in any CCR surface impoundment at the facility if the

owner or operator becomes subject to this Part after ~~October 31~~September 30, 2021.

### **Section 845.540 Inspection Requirements for CCR Surface Impoundments**

- a) ...
- 3) The owner or operator of a CCR surface impoundment must initiate the inspections required by subsection (a) by ~~March 30, 2021~~, or by initial receipt of CCR in an CCR surface impoundment if the owner or operator becomes subject to this Part after ~~April~~March 30, 2021. The inspections required by subsection (a) must continue until the completion of closure by removal or the completion of post-closure care.

### **Section 845.700 Required Closure or Retrofit of CCR Surface Impoundments**

...

- h) Application Schedule
- 1) Category 1, Category 2, Category 3, and Category 4 CCR surface impoundment owners or operators must submit either a construction permit application containing a final closure plan or a construction permit application to retrofit the CCR surface impoundment in accordance with the requirements of this Part by ~~February~~January 1, 2022.
- 2) Category 5 CCR surface impoundment owners or operators must submit either a construction permit application containing a final closure plan or a construction permit application to retrofit the CCR surface impoundment in accordance with the requirements of this Part by ~~August~~July 1, 2022.
- 3) Category 6 and Category 7 CCR surface impoundment owners or operators must submit either a construction permit application containing a final closure plan or a construction permit application to retrofit the CCR surface impoundment in accordance with the requirements of this Part by ~~August~~July 1, 2023.

## **ECONOMIC REASONABLENESS AND TECHNICAL FEASIBILITY**

### **Economic Impact Study**

As required by Section 27(b) of the Environmental Protection Act (Act) (415 ILCS 5/27(b) (2018)), the Board requested in a letter dated April 16, 2020, that the Department of Commerce and Economic Opportunity (DCEO) conduct an economic impact study of the proposed rules. The Board requested that DCEO determine by June 1, 2020, whether it would conduct such a study. The Board received no response to this request.

### **Affected Facilities**

Power-generating facilities with CCR surface impoundments may be affected by Part 845. IEPA provided a list of 74 facilities in the State that have existing, inactive, or inactive closed CCR surface impoundments that could be affected by these rules. IEPA Pre-Filed Answers at 181, 182 (Aug. 3, 2020).

### **Technical Feasibility**

The Coal Ash Pollution Prevention Act (Public Act 101-171, eff. July 30, 2019) added Section 22.59 to the Act. It requires that the rules the Board adopts “must, at a minimum be at least as protective and comprehensive as the federal regulations ... promulgated by the Administrator of the United States Environmental Agency in Subpart D of 40 CFR 257 governing CCR surface impoundments.” 415 ILCS 5/22.59(g)(1). In its Statement of Reasons (SR), IEPA said that new Part 845 is technically feasible as well as economically reasonable for several reasons. “Since owners and operators of CCR surface impoundments are already subject to 40 CFR 257, many of the technical and economic requirements applicable to owners and operators in the proposed Part 845 are already required under federal law.” SR at 33.

As proposed, many of the technical elements required of owners and operators of CCR surface impoundments are already required under federal law. Under both 40 CFR 257 and Part 845, owners and operators are required to install groundwater monitoring systems, conduct periodic groundwater monitoring, create closure and post-closure care plans, and, if necessary, conduct corrective action. The owners and operators are required under both the federal rule and Part 845 to follow design criteria for newly constructed CCR surface impoundments and maintain publicly available records. Today’s rules also include design standards for final cover, and leachate collection and removal systems that are more stringent than those under Part 257. The final cover standards are based on Illinois’ landfill standards under 35 Ill. Adm. Code 811.314, which were found to be appropriate for the closure of Hutsonville Power Station’s Ashpond D under 35 Ill. Adm. Code 840.126. The leachate collection and removal systems are also similar to those required for solid waste landfills under Part 811. Both Parts 811 and 840 have been found to be technically feasible. During the process of completing an alternatives analysis for corrective action and closure, both the federal rule and Part 845 require that a facility-specific determination be made based on multiple factors, including constructability, long and short term effectiveness, reliability and protection of human health and the environment. In addition, certain technical aspects of these rules that differ from the federal rules are based on existing regulations for landfills and site-specific rulemaking for CCR surface impoundments. Therefore, the Board finds that Part 845 is technically feasible.



### **Economic Reasonableness**

The Coal Ash Pollution Prevention Act mandated the collection of fees and included provisions for financial assurance for all CCR surface impoundments that would be regulated by Part 845. The fee system is designed to support IEPA's administrative work in reviewing submittals and permitting surface impoundments. Higher initial fees are set for CCR surface impoundments that have not completed closure and lower fees for surface impoundments that have completed closure. Annual fees are required by the Coal Ash Pollution Prevention Act in addition to initial fees. The annual fees are lower for surface impoundments that have completed closure and higher for those that have not completed closure.

The financial assurance requirements also create economic considerations in Part 845 that are not present in the federal rules. Part 845 requires that each CCR surface impoundment have and maintain financial assurance to cover the costs of corrective action, closure, and post-closure care. Financial assurance is required to guarantee that in the event of financial default by the owner or operator, adequate funds will be available to complete corrective action, closure, and post-closure care, and the burden of those costs do not fall on the State. Finally, as noted above, while many of the technical elements of Part 845 are already required under federal law, others are consistent with the Board's existing waste disposal regulations under Parts 811 and 840 that have been found to be economically reasonable. Accordingly, the Board concludes that its adopted rules are economically reasonable.

### **CONCLUSION**

The Board adopts new Part 845, Illinois' first Statewide CCR rules. These rules meet and, where warranted, exceed USEPA's CCR surface impoundment rules. Part 845 includes changes suggested by JCAR during its second-notice review. The Board has reviewed the record in this proceeding and finds that the adopted rules are technically feasible and economically reasonable and that they will not have an adverse impact on the citizens of Illinois. The adopted rules for Part 845 appear in the order below.

The Board previously directed the Clerk to open a sub-docket in this matter. At a later date, the Board will issue an order detailing the Board's procedures in that sub-docket.

### **ORDER**

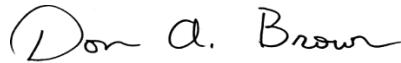
The Board adopts new Part 845 and directs the Clerk to submit the adopted rules to the Secretary of State for publication in the *Illinois Register*. In the addendum to this opinion and order, changes to the rules proposed at second notice appear with additions underlined and deletions stricken through.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2018); *see also* 35 Ill. Adm. Code 101.300(d), 101.906, 102.706.

Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on April 15, 2021, by a vote of 3-0.

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above the printed name and title.

Don A. Brown, Clerk  
Illinois Pollution Control Board