BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Don A. Brown, Clerk
Illinois Pollution Control Board
State of Illinois Center
100 West Randolph, Suite 11-500
Chicago, Illinois 60601-3218

See attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Illinois Pollution Control Board APPEARANCES and a COMMENT SUBMITTED BY THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, copies of which are herewith served upon you along with this notice.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Nick M. San Diego
Nick M. San Diego
Deputy General Counsel
Division of Legal Counsel

DATED: June 2, 2022

1021 North Grand Avenue East
P.O. Box 19276
Springfield, Illinois 62794-9276
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APPEARANCE

The undersigned hereby enters his appearance as an attorney on behalf of the Illinois Environmental Protection Agency.

Respectfully submitted,

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APPEARANCE

The undersigned hereby enters his appearance as an attorney on behalf of the Illinois Environmental Protection Agency.

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ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ John M. McDonough II
John M. McDonough II
Assistant Counsel
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DATED: June 2, 2022

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COMMENT SUBMITTED BY
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES the Illinois Environmental Protection Agency ("Agency"), by and through its attorneys and, pursuant to the Illinois Pollution Control Board's ("Board") Hearing Officer Order of March 3, 2022, submits the following comment for the Board's consideration in the above-referenced proceeding. The Agency appreciates this opportunity to comment on the proposed rule text.

I. INTRODUCTION AND GENERAL COMMENTS[1]

In its March 3, 2022, Order, the Board presented rule text jointly proposed by the Environmental Law & Policy Center ("ELPC"), Little Village Environmental Justice Organization ("LVEJO"), Prairie Rivers Network, and Sierra Club (collectively "Environmental Groups"), which consist of a new Part 846 and amendments to Part 845 of Title 35 of the Illinois Administrative Code in relation to the management of coal combustion residual materials ("CCR").

Please note that the Environmental Groups' Public Comment dated August 3, 2021 ("PC 10"), from which the proposed rule text originates, fails to meet the standards for rulemaking

[1] In review of the existing Part 845 regulations in preparation of this Agency Comment, the Bureau of Water identified an error in 35 Ill. Adm. Code Section 845.170(a)(2)(C). For the Board's future consideration, the Agency provides further analysis in Appendix B, attached hereto.

proposals required by Section 28(a) of the Environmental Protection Act ("Act"), 415 ILCS 5/28(a), and 35 Ill. Adm. Code 102.202.[2] Therefore, such a proposed rulemaking is not ripe for consideration by the Board at this time. The proponents appear to be asking the Board to ignore its own requirements and unilaterally adopt rules to create a new program for the regulation of CCR outside of surface impoundments through this subdocket of the Part 845 rulemaking. The Environmental Groups' proposed Part 846 is not merely an extension of Part 845; it is a whole new set of Board regulations that would stand up a new program. This attempt to bootstrap the creation of a new historic ash fill program into the Part 845 rulemaking is outside of the Board's rulemaking directive to address CCR as set forth in Section 22.59 of the Act (415 ILCS 5/22.59).

As a general matter, the Agency supports rulemaking proposals intended to further the long-standing policy of the State to restore, protect, and enhance the environment, including the regulation of CCR surface impoundments. Rulemaking proposals, however, must be rooted in

[2] The Environmental Groups' proposal through PC 10 fails to comply with the Board's rules as follows:

1. The proposal was not accompanied by a petition signed by at least 200 persons (35 Ill. Adm. Code 102.202(g); see also 2 Ill. Adm. Code 2175.500(c) – must also include home addresses, unless waived by the Board);
2. The proposal was not supported by an adequate statement of reasons (35. Ill. Adm. Code 102.202 (b)), which must include:
    a. a statement of the facts that support the proposal;
    b. a statement of the purpose and effect of the proposal, including environmental, technical, and economic justification; and
    c. a discussion of the applicable factors listed in Section 27(a) of the Act.
3. Further, the statement must include, to the extent reasonably practicable, all affected sources and facilities and the economic impact of the proposed rule. Here, PC 10 identifies and describes eight (8) locations containing historic coal ash fills, but also expressly admits that "there are likely many more CCR fill sites that have not yet been identified…" (PC 10, page 4);
4. The proposal does not have a synopsis of all testimony to be presented by the proponent at hearing (35 Ill. Adm. Code 102.202(c)); and
5. The proposal lacks an electronic version of the proposed rule language in Microsoft Word per 35 Ill. Adm. Code 102.202(j).

statute, be cognizant of State regulatory initiatives and programs already in existence, and be accompanied by the resources necessary for Agency implementation, administration, and enforcement. Here, legislative action by the General Assembly is first needed to not only provide the necessary statutory basis and State policy for the regulatory program proposed in new Part 846, but also the revenue and appropriations required to fund the program's implementation, administration, and enforcement.

The proposed new Part 846, if adopted, would exceed the scope of the Board's directive under Section 22.59(g) of the Act, 415 ILCS 5/22.59(g), to adopt rules establishing requirements for CCR surface impoundments. Even if authorized by the Act, the new Part 846 proposes cleanup requirements inconsistent with existing federal and state laws and regulations; creates an entirely new regulatory program of unknown scope; and fails to identify a revenue source enabling Agency implementation, administration, and enforcement. With respect to the proposed amendments to Part 845, the proposed fugitive dust monitoring and mitigation plan provisions lack specificity and improperly apply the concepts of modeling and monitoring from a regulatory framework. With respect to environmental justice ("EJ") considerations, the proposed amendments introduce screening criteria that do not change the outcome relative to the categorization for the purpose of closure prioritization; such categorization has already been performed by owners and operators of CCR surface impoundments. More importantly, the proposed amendments to Section 845.700 distract from broader efforts to integrate uniform and comprehensive EJ requirements across permitting programs.

For the Board's reference, attached hereto as Appendix A are the Agency's line-by-line comments specific to the Environmental Groups' proposed rule text.

II. PROPOSED NEW PART 846

A. THE BOARD'S CURRENT DIRECTIVE FOR THE ADOPTION OF RULES ESTABLISHING REQUIREMENTS FOR CCR IS LIMITED TO CCR SURFACE IMPOUNDMENTS.

Through Public Act 101-171, the 101st General Assembly ("GA") declared its legislative intent to create a specific program for the regulation of CCR in the State of Illinois. The text of the CCR legislation, as initially introduced, included provisions addressing "CCR landfills", "CCR piles", and "CCR Units" in addition to surface impoundments.[3] As the bill worked through the GA and was amended, its language was narrowed to address only CCR surface impoundments. Therefore, the GA did at one point did consider, but ultimately did not include, non-surface impoundment CCR.

The final bill added a new Section 22.59 to the Act. Among other declarations, the 101st GA expressly found that: 1) it is the "long-standing policy [of the State] to restore, protect, and enhance the environment"; 2) "CCR generated by the electrical generating industry has caused groundwater contaminations and other forms of pollution at active and inactive plants"; and 3) "environmental laws should be supplemented to ensure consistent responsible regulation of all existing CCR surface impoundments."[4] Although Section 22.59(a) ends with a statement that "[t]he provisions of this Section shall be liberally construed to carry out the purposes of this Section," subsection (m) expressly provides that Section 22.59 applies only to the universe of existing and future CCR facilities categorized as "CCR surface impoundments."[5]

To further effectuate these statutory objectives, the 101st GA created new definitions for CCR (415 ILCS 5/3.142) and the type of structures containing CCR to be regulated, namely CCR

[3] See Senate Amendment No. 1 to SB 0009, filed on March 15, 2019, by Sen. Scott M. Bennett.
[4] 415 ILCS 5/22.59(a).
[5] 415 ILCS 5/22.59(m).

surface impoundments (415 ILCS 5/3.143). Within Section 22.59, the GA established regulatory program elements for all existing and future CCR surface impoundments in relation to: 1) the construction, permitting, modification, operation, and closure of these facilities;[6] 2) financial assurance requirements to ensure closure/post-closure care of CCR surface impoundments and remediation of releases;[7] 3) public availability of documentation related to CCR surface impoundment operations;[8] 4) funding mechanisms to provide the Agency with the financial resources to establish, administer, and enforce its regulatory program over CCR surface impoundments;[9] and 5) the Board's authority to adopt rules to effect these enumerated objectives as well as public policy procedures to identify areas of EJ concern in relation to CCR surface impoundments.[10]

Notably, the 101st GA provided no directive for the Board to adopt rules specifically addressing CCR other than CCR surface impoundments as set forth in Section 22.59. Even as various stakeholders urged the Board during the Part 845 rulemaking to expand the scope of CCR regulation to other CCR-containing areas, the Board affirmed in its February 4, 2021, Order, that its legislative direction to adopt rules regarding CCR is limited to CCR surface impoundments.[11] More recently, two bills were filed in the 102nd GA's Spring 2022 session to create a new program for the regulation of CCR located outside of surface impoundments;[12] ultimately, lawmakers

[6] 415 ILCS 5/22.59(b), (c), (d), and (e); 5/39(d) and (y).
[7] 415 ILCS 5/22.59(f) and (l).
[8] 415 ILCS 5/22.59(h) and (i).
[9] 415 ILCS 5/22.59(j) and (k).
[10] 415 ILCS 5/22.59(g).

[11] "The Board finds that regulation of these unconsolidated coal ash fills and piles is beyond the scope of Section 22.59(g) and therefore, on its own motion, directs the Clerk to open a sub-docket to explore the subject in detail using the Board's rulemaking authority under Sections 13(a) and 22(b) of the Act (415 ILCS 5/13(a), 22(b) (2018))." (February 4, 2021, Board Order, page 12).

passed no new legislation to extend the scope of CCR regulation as called for by the proponents for a new Part 846.[13] Absent such statutory authority, the Agency requests that the Board not proceed with the Environmental Groups' proposed rule text as it would only invite regulatory uncertainty and confusion. This is a running theme for the Agency's position related to the proposed Part 846 rules and is woven into the comments that follow.

B. THE PROPOSED CCR REGULATIONS DO NOT DOVETAIL WELL WITH EXISTING LAW AND ESTABLISHED AGENCY PROGRAMS.

Explicit scope, applicability, and defined terms are critical to formulate and integrate a new regulatory program into the existing compliance framework. Financial assurance mechanisms are also critical to ensure that regulatory objectives can be met in the event regulated entities become insolvent. Here, the proposed Part 846 regulations are deficient on both fronts. First, the extent of the universe of "CCR fill areas" subject to the rules is unknown. It certainly overlaps with areas already regulated under landfill rules. Second, the proposed rule text does not address how historic

[12] HB 4358 was introduced in the Illinois House of Representatives by Rep. Rita Mayfield on January 5, 2022. As introduced, the bill would amend the Environmental Protection Act to require the removal of all CCR at certain electric generating facilities, whether the CCR is in a surface impoundment, is the subject of an adjusted standard, or is outside of a surface impoundment. Although amended multiple times during session, HB 4358 was not called for a House Third Reading vote, and was re-referred to the House Rules Committee on March 4, 2022.

SB 3073 was introduced in the Illinois Senate by Sen. Adriane Johnson on January 11, 2022, with nearly identical language to that of HB 4358. Although SB 3073 passed the Senate on February 25, 2022, the bill failed to receive the requisite number of votes in the House, was placed on Postponed Consideration, and ultimately re-referred to the Rules Committee on April 11, 2022.

[13] **Public Act ("P.A.") 102-16**, eff. 6-17-21, only cleaned up references to P.A. 101-171 and its effective date.; **P.A. 102-137**, eff. 7-23-21, added training provisions to 415 ILCS 5/22.59(b) and cleaned up references to P.A. 101-171; **P.A. 102-309**, eff. 8-6-21, struck out 415 ILCS 5/22.59(c) in reference to RCRA Section 4005 permitting and cleaned up references to P.A. 101-171; **P.A. 102-558**, eff. 8-20-21, cleaned up references to P.A. 101-171; and **P.A. 102-662**, eff. 9-15-21, cleaned up P.A. 101-171 references and clarified 415 ILCS 5/22.59(g) to declare that the Board shall not be deemed in noncompliance with the rulemaking deadline due to delays in adopting rules as a result of the JCAR rulemaking process.

CCR fill areas are to be identified and regulated alongside established Agency Bureau of Land ("BOL") and Bureau of Water ("BOW") programs.

In terms of applicability and definitions, the proposal does not reconcile itself cleanly with Part 807's current regulation of CCR landfills and provisions addressing permit-exempt landfills under Part 815, which include those at power plants. Although the definition of "CCR fill areas" in Section 846.110 provides a carve-out for certain types of "existing CCR landfills," Section 846.100 says nothing about Part 807 CCR landfills that have been closed or Part 815 CCR landfills that are permit-exempt. Although the Agency assumes the proponents do not intend proposed Part 846 to apply to these examples, it is not clearly delineated in the proposed rule text.

Because proposed Section 846.100 lacks refinement, loopholes may exist in terms of scope and applicability that open the door to potential jurisdictional conflicts. As an example, how should the rules be applied to a CCR fill area that fits the proposed definition but has already been released by the Agency under a different program? Part 846, as proposed, would potentially require re-disturbance of areas already remediated to regulatory standards and deemed protective of human health and the environment pursuant to existing Board regulations. How would this conflict between two co-existing regulatory programs be resolved? The proposed rule text is silent on this issue and the GA has not yet spoken to set any new policy or guidance on CCR fill areas outside of surface impoundments.

At present, releases of contaminants from CCR are generally subject to cleanup under the Board's rules at Part 742 – Tiered Approach to Corrective Action Objectives ("TACO"), whether the cleanup is performed voluntarily under the Agency's Site Remediation Program ("SRP") per Part 740 or pursuant to an enforcement action. The proposed CCR fill area rules, however, ignore TACO and create inconsistency with existing remediation programs.

For example, the Crawford Station site – identified by the Environmental Groups as one of the eight (8) historic fill areas in their August 6, 2021, comments – received a No Further Remediation Letter ("NFR") from the Site Remediation Program on January 24, 2022, having fulfilled the requirements of 35 Ill. Adm. Code Parts 740 and 742. The Environmental Groups state that the site continues to threaten groundwater. However, sampling data and modeling have shown the following: 1) No groundwater impacts above Tier 1 groundwater remediation objectives for Class II groundwater; and 2) Compliance at the site boundaries for the soil component of migration to groundwater to Class II groundwater. Additionally, the NFR letter prohibits the installation of potable wells at the site. Having demonstrated compliance with SRP, should the Crawford site now be required to take further action under proposed Part 846? As proposed, Part 846 competes with Parts 740 and 742 and undermines the effect and meaning of the NFR letter, which is relied upon in the private sector as the standard for determining when a site has been adequately remediated.

In terms of groundwater quality, Section 620.420 currently assigns Class II Groundwater standards to all areas of fill within the State. In R89-14(B), the Board recognized that anthropogenic activities have altered many areas (including the Chicago lakefront and the riverfronts of many communities along the Illinois and Mississippi Rivers). Accordingly, the Board set a cut-off point of 1991 (the year Part 620 was adopted) for past fill areas, and areas being filled at that time, to have a different standard. Section 620.420 standards may be enforced under any existing Agency program. Therefore, investigation and remedial actions tailored to site specific conditions may already be implemented statewide, without the adoption of a new set of Board rules.

Additionally, the public participation requirements as proposed in Part 846 are inconsistent with existing Agency program requirements specific to notification deadlines and procedures for non-permit hearings (ref. 35 Ill. Adm. Code Part 164).

Without clear authority and a direct mandate from the GA, any such proposed rulemaking to further regulate CCR, particularly as proposed by the Environmental Groups through this subdocket, will only generate significant legal challenges for the Agency and disrupt the administration and enforcement of not only proposed Part 846, but also its other well-established programs.

C. THE AGENCY LACKS THE RESOURCES TO ADMINISTER NEW PART 846, AS PROPOSED.

The 2019 legislation to address CCR surface impoundments[14] resulted from a great deal of negotiation between and among the various affected parties. Part of those negotiations included complex discussions to determine the proper authorities and resources needed to administer the program being created. The same must be done here, first in the legislature, rather than through the Environmental Groups' request for the Board to unilaterally create a new program to regulate historical CCR fill areas. As discussed at length *supra*, such a program can only succeed with the proper statutory underpinnings as support.

As proposed, Section 846.180 requires owners and operators of active or inactive facilities to characterize "CCR fill areas" and notify the Agency as to the scope and extent of the CCR fill area. This is the type of information and data that the Agency should have *in order to develop* a regulatory program that manages "CCR fill areas" and not as a result of administering the program. Neither the Agency, nor the Board, nor the Environmental Groups can define the universe of CCR fill areas at this time because the GA has not expressed whether or how such areas should be

[14] P.A. 101-171, eff. 7-30-19.

regulated. Without first defining the universe of areas to be regulated, how would the Agency plan, equip, and execute a program efficiently and effectively? The proposed rules unilaterally create an entirely new regulatory regime and program related to CCR management for which the Agency has neither the staff nor the resources to administer.

Of great concern is the complete lack of a revenue source for the Agency to regulate historic CCR fill areas, i.e., no funding mechanism in the Act, nor an appropriation provided by the GA. When establishing a program for CCR surface impoundments, the 101st GA added Subsections 22.59(j) and (k) to the Act requiring industry fees to enable program administration, estimated to bring in approximately $5 million in revenue initially and then between $1.2 million and $1.8 million annually thereafter. Although the draft proposal places the burden on owners and operators to provide the Agency with information regarding the location and extent of CCR fill areas, the revenue problem for this program is compounded by the fact that the amount of revenue needed is unknown given the admitted unknown universe of sites or amounts of CCR that would be subject to the rules and the unknown timing of their entry into the program. Only the General Assembly has the authority to provide and establish these resources.

D. STATE LEGISLATIVE ACTION TO FURTHER REGULATE CCR SHOULD BE THE FIRST STEP.

Proposed Part 846 is intended to reach beyond even the federal CCR rules,[15] which address surface impoundments and landfills. So far in Illinois, the GA has acted only on CCR surface impoundments.[16]

Recent and unsuccessful GA action to expand state oversight of CCR is evidenced by bills introduced during the Spring 2022 legislative session to address CCR outside of CCR surface

[15] 40 C.F.R. Part 257, Subpart D. 80 Fed. Reg. 21302 (April 17, 2015).
[16] *See* Footnotes 13 and 14, *supra*.

impoundments: HB 4358 and SB 3073.[17] Note, these bills would have applied specifically to the Waukegan site which the Environmental Groups cite in their basis for the Part 846 proposal. These bills were introduced to require certain power plants to go beyond the requirements of Section 22.59 and address all CCR at their respective sites. The bills were vigorously debated in several committee hearings, but ultimately did not become law. While the Agency was consulted by and provided input to the bills' sponsors, some opponents of the bills noted that it would change the agreement reached in the legislation creating Section 22.59. To date, Section 22.59 of the Act is as far as the GA has gone to enact an Illinois counterpart to the federal CCR rules. As with CCR surface impoundments, and as was attempted via HB 4358 and SB 3073, any new program to regulate CCR outside of surface impoundments should be negotiated in the legislature and enacted into law rather than created unilaterally by the Board as the proponents are asking.

Based on the bills filed in the Spring session, some Illinois legislators, like the Environmental Groups, clearly have an interest in regulating CCR beyond the current statutory scheme. As was the case with the Spring legislative session, the Agency would welcome the opportunity to be part of discussions regarding any future legislative effort to further review and potentially expand the manner in which CCR should be regulated. The appropriate path forward is for the Environmental Groups to seek legislative action to amend the current statutory scheme rather than ask the Board to unilaterally regulate CCR fill areas through rules. Any rulemaking to create a program that regulates CCR fill areas, without statutory support, will only invite legal challenge to Board rules and to Agency implementation, administration, and enforcement of those rules.

[17] *See* Footnote 12, *supra*.

II. PROPOSED AMENDMENTS TO PART 845

A. THE PROPOSED FUGITIVE DUST MONITORING AND MITIGATION PLAN PROVISIONS LACK TECHNICAL SUPPORT AND THEREFORE CREATE AN UNWORKABLE REGULATORY FRAMEWORK.

The proposal requires that sources prepare and follow a "fugitive dust monitoring and mitigation plan," which entails the installation and operation of as many as twelve or more air monitors at each facility to monitor for PM_{10} and $PM_{2.5}$ fugitive dust. Additional monitors are to be installed at each facility depending on "appropriate" circumstances, as well as a weather monitoring device to obtain wind speed and direction. The monitors must record readings to attached data loggers, apparently on a continuous basis for an indefinite duration. Any maintenance and calibration actions with each monitor must be logged, while a broader recordkeeping system for inspections, testing, and maintenance for all monitors must be identified and must be accompanied by recordkeeping for inspection, testing, and maintenance of the monitoring devices. Reporting of the monitoring data is addressed by the proposal on a monthly basis for all hourly monitoring and weather-related data and, separately, on a 24-hour basis whenever any monitor exceeds a Reportable Action Level or has malfunctioned. Air quality modeling at each facility shall be conducted prior to installation of the monitors for the purpose of predicting fugitive dust emissions from a facility.

In the Agency's experience in monitoring various air emissions, including fugitive dust emissions, modeling and fence-line monitoring should only be required in situations in which off-site impacts are documented and indicate a need for additional measures, not required as a rule for every facility irrespective of impacts. The proposal seems to presuppose industry-wide impacts, treating modeling as more of an afterthought (i.e., to "predict" impacts), yet imposes monitoring in the first instance regardless of modeling outcomes.

Moreover, the emphasis on "mitigating" fugitive emissions in the "monitoring and mitigation plan" of the proposal overlooks the primary role that fugitive dust control plans, and enforcement of the same, are intended to play in the Board's adopted CCR rules. The current rules currently mirror the long-standing approach with operating programs in the Part 212 rules, which rely upon a source to identify and implement best management practices for controlling fugitive dust, subject to Agency review and periodic revisions. The Agency can confirm that the Part 212 operating plans undergo rigorous scrutiny in agency permit reviews and in enforcement cases, especially if the affected source is located in a designated EJ area. More importantly, these efforts are believed to be working, as they routinely tend to highlight things that affected sources can do better to minimize fugitive dust and ultimately act to reduce off-site impacts, even if only incrementally or one source at a time.

Unless or until there is technical support showing that CCR sources are causing or allowing off-site impacts from fugitive dust that cannot be remedied by control practices alone, the proposal aimed at requiring additional fence line monitoring, mitigation plans, and emissions modeling for predicting impacts should be declined. A better approach would be to allow the CCR fugitive dust control plans, which is the main construct of the Board's original rulemaking for addressing CCR-related air impacts, to be implemented as intended. If off-site impacts are documented from Agency investigations or third-party observations, notwithstanding the fugitive dust control plans put into place by a given facility, the Act's enforcement process, either governmental or third-party citizen suits, will potentially highlight and address site-specific problems at issue. For a facility posing off-site impacts that control plan implementation cannot affect or minimize, emissions modeling and fence line monitoring could be negotiated through settlement agreement or obtained as injunctive relief, if appropriate. On the other hand, if enforcement activities or other regulatory developments indicate a significant presence of off-site impacts caused by fugitive dust

at these sources, irrespective of implemented dust control plans, a future examination of this proposal could be warranted.

The proposed amendments to Section 845.500 also require the Agency to maintain an online public database for the purpose of posting monthly air monitoring reports submitted by owners/operators. These compliance reports should be obtained by interested parties through requests pursuant to the Freedom of Information Act consistent with general practice in other Agency programs.

If the provisions regarding fugitive dust monitoring and mitigation plans are not removed, as the Agency recommends, from any formally proposed rulemaking, interpretative issues related to Sections 845.500, 845.740, and 845.750 (further described in Appendix A to this Comment) will need to be addressed. More specifically, many of the terms or provisions appear to be ambiguous or vague and may involve questionable application of concepts, including modeling and monitoring. As an example, the proposed definition of "Reportable Action Level" in Section 845.120 is clearly ambiguous, as neither the threshold nor the process for arriving at a threshold are fleshed out in the Environmental Groups' proposal.

B. THE PROPOSED EJ SCREENING TOOLS DO NOT CHANGE THE OUTCOME IN REGARD TO CLOSURE PRIORITIZATION AND COMPLICATE EFFORTS TO INTEGRATE ENVIRONMENTAL JUSTICE ACROSS PERMITTING PROGRAMS.

The Board should decline the proposed revisions to Part 845 creating a third criterion for determination of areas of EJ concern because prioritization for impoundments that must undergo closure, which determines the date by which construction permit applications must be submitted, has already occurred; therefore, an additional EJ screening criterion will not impact the outcome. Furthermore, while the Environmental Groups' attorneys make strong arguments for an EJ screening methodology that incorporates additional data, nothing in the filing demonstrates that

the Agency's current methodology is flawed and fails to capture CCR surface impoundments in areas of EJ concern that would otherwise be captured by adding the suggested additional indicators in Sections 845.700(g)(6) and (g)(8). In fact, notwithstanding a self-designation process, an additional criterion may not add any more CCR surface impoundments to the number of EJ areas of concern than are already covered by the current methodology.

The proposed rule changes to Part 845 describe the addition of cumulative impacts assessment as a third criterion for determining areas of EJ concern. A cumulative impacts assessment approach is distinct from using data and a screening methodology to identify areas of EJ concern. In fact, tools such as the United States Environmental Protection Agency's ("USEPA") EJ Screen are designed to present data that may be utilized in analyzing potential impacts of existing or proposed sources. An expanded EJ screening methodology would be a useful data source in conducting a cumulative impacts assessment, but does not, in and of itself, equal a cumulative impacts assessment.

Note also that the specific indicators enumerated in proposed Sections 845.700(g)(6) and (g)(8) as additional screening criteria/data points are already outdated given USEPA's recent release of EJSCREEN 2.0 on February 18, 2022. There is significant overlap, but the terminology has changed in some instances and additional indicators have been added. To the extent practical, the Agency endeavors to utilize USEPA data sources for consistency and looks to USEPA data when mapping areas of EJ concern for use by the various regulatory programs at the Agency.

The Agency concurs with the spirit of the proposed additional criteria. That said, insofar as the consideration of additional socioeconomic indicators, inclusion of environmental indicators, and consideration of health disparities further the goals of delineating overburdened communities, the area of EJ concern definition found in the current CCR regulations in Part 845 is explicitly only applicable within the context of the prioritization of CCR surface impoundments.

The Environmental Groups do an excellent job of highlighting various EJ screening tools utilized in Illinois, other states, and at the federal level. However, any changes to the Agency's EJ screening methodology should be applied across Agency programs, not just to the prioritization of CCR surface impoundments. The EJ screening criteria originally put forth by the Agency in the Part 845 regulations mirrors its existing methodology providing consistency across state regulatory programs.

EJ conversations are indeed happening at all levels of government locally, in the State of Illinois, and nationally, which will likely result in new tools to identify and support overburdened and vulnerable communities. The Agency remains committed to advancing EJ in its administration of environmental protection as evidenced by its participation in ongoing discussions regarding possible legislative changes to formalize various EJ actions in permitting transactions, including the exploration of an expanded EJ screening tool of general applicability.

III. CONCLUSIONS

The Agency thanks the Board for this opportunity to comment on the Environmental Groups' proposed rule text. Further, the Agency appreciates their initiative to mitigate environmental damages related to CCR in the State and to expand the reach of EJ tools to address the unfair exposure of poor and marginalized communities to harms associated with pollution. For the reasons stated herein, to be fully effective and provide the resources necessary to implement them, such proposals must first be rooted in statutory authority and provide a workable, regulatory framework.

The Agency reserves the right to respond to additional suggestions and/or comments filed in this subdocket.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Nick M. San Diego
Nick M. San Diego
Deputy General Counsel
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DATED: June 2, 2022

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COMMENT SUBMITTED BY
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

APPENDIX A

N.B.: Page numbers indicated herein refer to the corresponding page number(s) in the Board's March 3, 2022, Order.

I. AMENDMENTS TO PART 845

General Comments

Many of the provisions relative to fugitive dust and air emissions are ambiguous, and involve questionable application of concepts including modeling and monitoring.

Section 845.120 Definitions

Page 14 - The proposed definition of "Reportable Action Level" in Section 845.120 is ambiguous. Neither the threshold nor the process for arriving at a threshold are fleshed out in the proposal.

Section 845.500 Air Criteria

1. Page 30, Section 845.500(c)(1) provides, *"At least six monitors for PM10 and six monitors for PM2.5 shall be located at or near the boundaries of the facility to monitor for fugitive dust in the ambient air around the facility, with monitor locations subject to approval of IEPA and consistent with the most recent U.S. EPA protocols and guidance for ambient air quality monitoring siting criteria."* The term "near" is ambiguous. It is unclear if that term means one foot, ten feet, half a mile, etc.

This subsection provides, "At a minimum, one monitor shall be located at each cardinal point (north, south, east, west) of the facility, and two monitors shall be located at downwind locations." This provision is broad and ambiguous. It does not address situations in which there is not an acceptable location at a cardinal point (such as if the cardinal point is in a body of water). It is also unclear what exactly "downwind" means. Language should be added indicating that it means the predominant wind direction, which can change with the seasons. The proposal should also clarify whether both downwind monitors must be placed in the same predominantly-downwind direction or should be in two different directions to represent different seasons. The Agency would suggest the latter but either way, flexibility is needed.

2. Page 31, Section 845.500(c)(3) requires that air samples test for "metals" but then only identifies hexavalent chromium as one that must be included. It is unclear what other metals are intended. Further, the Agency does not have experience testing for radionuclides; it has no experience working with the monitors/labs that would be required to test for their presence.

3. Page 31, Section 845.500(c)(5) - It is unclear who at the Agency is required to be notified every time there is an exceedance of the RAL or anytime there is a malfunction.

4. Page 31, Section 845.500(c)(8) - FOIA is sufficient as with all other compliance reports. This is a manual operation unless the Illinois Department of Innovation and Technology provides a workaround, every month for every site would be overly burdensome and quickly make the CCR page unwieldy for visitors.

5. Page 31, Section 845.500(c)(8) - It is unclear who at the Agency is going to receive and handle the monthly data files addressed by this subsection and post them to a public website.

6. Page 32, Section 845.500(c)(9)(B) - It is unclear if this subsection implicates just off-site or on-site as well.

7. Page 32, Section 845.500(c)(10) provides, "*Prior to the installation of the monitors required by this subsection, the owner or operator shall conduct air modeling to predict fugitive dust emissions caused by a facility's operations."* This subsection should arguably come before the discussion of placement of monitors. It should also specify that sources are required to actually utilize the results of the modeling to aid in placement of the monitors. Whether this can or should even be modeled is a threshold question in that the Agency is not even convinced that this is a situation/scenario/activity that can be modeled. If this is about fugitive dust, there either should not be any or it would not be possible to anticipate what it would be if there is some; furthermore, if there are noncompliant fugitive emissions, those do not get modeled. It is unknown how there would be values or inputs for any of this. Modeling and monitoring are being conflated in this rulemaking with an attempt to apply/utilize these concepts/tools in scenarios to which they should not be applied/utilized.

Section 845.680 Implementation of the Corrective Action Plan

Page 32-33, Section 845.680(a)(3) adds utilization of silt curtains as an option for interim corrective action measures. This is outside the scope of the categories offered by the Board in the sub-docket. It is unclear if the proposal is referring to silt curtains for stormwater runoff control, or slurry walls or grout curtains for control of groundwater pollutant migration. If the proposal is referring to silt curtains for the purpose of controlling silt or sediment in stormwater runoff during construction, remediation, or other corrective action activities, the facility would already be required to obtain coverage under the general NPDES permit for Stormwater Associated with Construction Activities. Coverage under this general permit requires the preparation and implementation of a Stormwater Pollution Prevention Plan.

Section 845.700 Required Closure or Retrofit of CCR Surface Impoundments

1. Page 39, Section 845.700(g)(6) – Amendment adds new (C) and, therefore, three (3) criteria are applicable. Should delete "either" and change to "any"; should delete the "or" after subsection (g)(6)(A) and add it after subsection (g)(6)(B) as "; or".

2. Page 39-40, Section 845.700(g)(6)(C) - Adds a third EJ screening criteria. A third EJ screening criteria would not change the outcome in regard to closure prioritization as closure prioritization has been completed. In addition, it purports to be a "cumulative impacts

assessment". While the suggested expanded criteria would be useful in conducting a cumulative impact analysis but would not in and of itself be cumulative impact assessment.

Furthermore, the specific indicators enumerated as additional screening criteria/data points are already outdated given USEPA's recent release of EJ Screen 2.0. There is significant overlap, but terminology has changed in some instances and additional indicators have been added. To the extent practical, Illinois EPA endeavors to utilize USEPA data sources for consistency and looks to USEPA data when mapping areas of EJ concern for use by the various regulatory programs at the Illinois EPA.

The refences are mixed up in the paragraph below the list of indicators. Demographic (socioeconomic) indicators are 1, 14-17. Health disparities are 18 and 19. Environmental (pollution and sources) are 2-12.

3. Page 40, Section 845.700(g)(8) - Use of a three-mile buffer not justified especially in light of expected off-site impacts from CCR impoundments.

Section 845.710 Closure Alternatives

Page 43, Section 845.710(c)(3) and (4) - These seem to predispose an outcome; not sure why they are here.

Section 845.740 Closure by Removal

1. Page 46, Section 845.740(c)(3) adds additional fugitive dust and mitigation plan requirements for CCR surface impoundments ("CCRSIs") closing by removal. There are several data submissions to the Agency, which go beyond BOW, including:

- Page 46, Section 845.740(c)(3)(A) and (B): Air monitoring locations
- Page 46-47, Section 845.740(c)(3)(C): video logs and database of video of CCR transport
- Page 47, Section 845.740(c)(3)(E): CCR transport complaint database.

2. Page 46, Section 845.740(c)(3)(A) provides, "*The project-specific CCR fugitive dust monitoring and mitigation plan shall describe the placement, operation, and maintenance of continuous FEM real-time PM10 and PM2.5 monitors located in close vicinity to the surface impoundments at which closure activities are occurring, and at any transfer point, with monitor locations subject to approval of IEPA and consistent with the most recent U.S. EPA protocols and guidance for ambient air quality monitoring siting criteria."* First, as with "near" earlier, "in close vicinity" is undefined. More importantly, it may not be possible to require sources to put monitors "in close vicinity" while also following "guidance for ambient air quality monitoring siting criteria;" such guidance usually indicates that ambient air monitors should not be placed in close vicinity to activities generating the material they are sampling. As an example, 40 C.F.R. § 58 Appendix E (3)(a), which discusses Probe and Monitoring Path Siting Criteria for Ambient Air Quality Monitoring, contains the following language in the discussion of spacing from minor sources:

> *(a) It is important to understand the monitoring objective for a particular location in order to interpret this particular requirement. Local minor sources of a primary pollutant, such as SO_2, lead, or particles, can cause high concentrations of that particular pollutant at a monitoring site. If the objective for that monitoring site is to investigate these local primary pollutant emissions, then the site is likely to be properly located nearby. This type of monitoring site would in all likelihood be a microscale type of monitoring site. If a monitoring site is to be used to determine air quality over a much larger area, such as a neighborhood or city, a monitoring agency should avoid placing a monitor probe, path, or inlet near local, minor sources. The plume from the local minor sources should not be allowed to inappropriately impact the air quality data collected at a site. Particulate matter sites should not be located in an unpaved area unless there is vegetative ground cover year round, so that the impact of wind blown dusts will be kept to a minimum.*

Put more basically, if the intent is indeed to measure the impact of these activities, then it is fine to put a monitor nearby, but it should not be labeled "ambient" monitoring because that implies air quality over a larger area, and as discussed here, placement of a monitor near an activity generating that pollutant would not be appropriate. Federal regulations at 40 C.F.R. § 50.1(e) define "ambient air" as "that portion of the atmosphere, external to buildings, to which the general public has access."

3. Page 46-47, Section 845.740(c)(3)(C) - To the facility's website or the Agency's website?

4. Page 47, Section 845.740(c)(3)(D) - Why all of this? Why not just make it a report subject to Illinois Emergency Management Agency ("IEMA") reporting?

5. Page 47, Section 845.740(c)(3)(E) - Is this a company or ILEPA number and website? We do not have such a publicly facing database. FOIA is how they should get the records as none of this is automated.

6. Page 47-48, Section 845.740(c)(4)(A) requires the Agency to include closure construction permit limits on volume of CCR storage piles generated during removal, not to exceed a 3-month estimate. While the desire to control the size of the pile is understandable (to reduce fugitive dust and runoff potential), putting an arbitrary limit on pile size would not account for site specific considerations or seasonal construction schedules and may unintentionally delay closure by removal. There does not appear to be allowance for any other amount.

7. Page 48, Section 845.740(c)(4)(B)(vii) requires storage piles to be located as far as feasible from surface waters, which is a vague and unenforceable requirement.

8. Page 49, Section 845.740(c)(4)(G) requires silt curtains during removal at CCRSIs located adjacent to surface waters. BOW objects to the inclusion of just one of many erosional control measures available, and already covered by the construction stormwater permit.

Section 845.750 Closure with a Final Cover System

Page 53, Section 845.750(e)(1) - The Agency has similar concerns as set forth above with regard to the fugitive dust monitoring and mitigation plans discussed in this Section.

II. PROPOSED NEW PART 846

General Comments

1. As described supra in the Agency's Comment, the Environmental Groups, in proposing Part 846, are essentially asking the Board to unilaterally create a program for the regulation of any CCR located outside of surface impoundments. This not only exceeds the statutory directives of Section 22.59 of the Act but also the scope of the federal CCR program, which is limited to surface impoundments and landfills. Furthermore, proposed Part 846 ignores existing state programs and requirements, as well as the fact that there are no resources provided for the Agency's implementation of the rules. As was the case with the Spring legislative session, the Agency would welcome the opportunity to be part of discussions regarding any legislative effort to further review and potentially expand the manner in which CCR should be regulated.

The Agency does not agree with the Part 846 rules a proposed. If Section 22.59 had included a directive for the adoption of rules to address CCR landfills, the Agency would have proposed a different approach. The Agency does not do so here, as such rules are not called for in the CCR rulemaking directive from the General Assembly. However, the Agency provides some comment below to further illustrate issues with the proposed Part 846. The Agency reserves the right to provide additional comments on the proposed rules, and potentially a wholly alternative draft, should the Board decide to accept the Environmental Groups' Part 846 proposal and initiate the process for adopting such rules.

2. What is the expected universe of sites subject to 846? The definition of "CCR fill area" would include CCR storage and CCR disposal operations. However, the definition also appears to be aimed at sweeping in any other CCR located outside a surface impoundment (e.g., scattered ash; ash placed on the land surface; any CCR accumulation).

AUTHORITY:

Page 58 - Please note the specific reference to Section 22.59 of the Act, which is limited to CCR surface impoundments.

Section 846.100 Scope and Applicability

1. Page 58-59, Section 846.100 - No statutory authority to regulate "CCR fill areas" as defined in proposed Section 846.110.

2. Page 58-59, Section 846.100 - This Section does not exclude existing landfills permitted to dispose of coal combustion wastes pursuant to 35 Ill. Adm. Code Part 807. Such landfills are certified by the Agency to be closed and covered. Furthermore, many of these landfills have completed the regulatory post closure care period and have been released from the Part 807

permit. Given the definition "CCR fill area" in Section 846.110 at (1) "scattered ash and any ash that was placed on the surface of the land" and (2) "any area holding an accumulation of CCR," it would appear that such CCR fill areas would be regulated by the proposed Part 846. The BOL Permit Section has identified the following landfills that fall into this category:

Site No.	Site Name	County	Current Status
1358090001	Donley Inc	Montgomery	Closed, but not certified
1350150002	White & Brewer Trucking	Montgomery	In post closure care
1358030006	White & Brewer Trucking Cell A-D	Montgomery	In post closure care
1790205004	CILCO/RS Wallace Power Plant LF	Tazewell	Completed post closure care

3. Page 58-59, Section 846.100 - This Section does not exclude those existing and future CCR landfills that are exempt from permits pursuant to 35 Ill. Adm. Code 815.101(a). Given the definition "CCR fill area" in Section 846.110 at (1) "scattered ash and any ash that was placed on the surface of the land" and (2) "any area holding an accumulation of CCR," it would appear that such CCR fill areas would be regulated by the proposed Part 846. The BOL/Permit Section has identified the following landfills that fall into this category:

Site No.	Site Name	County	Current Status
1270100001	Electric Energy Inc	Massac	As of 9/3/2019 inspection, had not accepted waste
1358030005	Illinois Power Generating Co.	Montgomery	Operating as of 8/10/2018 inspection
1550105012	Dynegy Midwest Generation LLC Hennepin Power Station	Putnam	As of 3/11/2021 IFR closed, had Not accepted waste
1898995007	Prairie State Generating	Washington	Operating as of 9/11/2019 inspection

4. Page 58-59, Section 846.100 - However, it does appear that based on the following exclusion (3) in the definition of "CCR fill area" at Section 846.110 and the definition "existing CCR landfill" at 40 CFR 257.53, the landfills identified in Comment 2 and 3 above are not subject to the requirements of Part 846:

a. Exclusion (3) refers to any area meeting the definition of "existing CCR landfill" under the federal Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments, 40 C.F.R. 257.53

b. *Existing CCR landfill* means a CCR landfill that received CCR both before and after October 19, 2015, or for which construction commenced prior to October 19, 2015, and receives CCR on or after October 19, 2015. A CCR landfill has commenced construction if the owner or operator has obtained the federal, state, and local approvals or permits necessary to begin physical construction and a continuous on-site, physical construction program had begun prior to October 19, 2015.

5. Page 58, Section 846.100(a) - As written, Part 846 would apply to CCR fill anywhere, not only at the site of the generation. How is a demonstration made to prove CCR came from a utility or independent power producer, as opposed to a smelter or cement kiln? What if a site has multiple sources of CCR? Why limit it to power production and how?

6. Page 58, Section 846.100(b) states: "This Part does not apply to CCR fill areas permitted under Part 811 prior to the effective date of these regulations."

a. The language of 846.100(b) infers that Part 846 would apply to CCR landfills permitted after the effective date of Part 846. There is an existing set of regulations that govern the location, development, and operation of CCR landfills at Parts 810 through 813.

b. The correct citation is Part 813 "Procedural Requirements For Permitted Landfills," not Part 811 "Standards For New Solid Waste Landfills."

7. Page 58, Section 846.100(b) - The reference to "CCR fill areas" in Section 846.100(b) and the definition of "CCR fill area" in Section 846.110 – Definitions, infers that an existing CCR landfill permitted pursuant to Part 811 (should read Part 813) is a "CCR fill area" as are the sites identified in Comments 2, 3, and 4 above. Subsection 846.100(b) should also state: "This Part does not apply to landfills that receive CCR."

Section 846.110 Definitions

1. Page 59, Section 846.110 - "CCR fill area" definition basically would include the entire facility property since the definition includes scattered ash. The entire facility would likely have some scattered ash and would have to have a cover or be removed. No minimum amount is noted.

2. Page 59, Section 846.110 - The definition of "CCR fill area" is too vague. "Scattered ash" and "an accumulation of CCR" should be quantified.

3. Page 59, Section 846.110 - "Inactive facility" is not defined. Is the intent to use the definition of "inactive facility" in 845.120 and apply it to all subsequent property owners – entities who may be unassociated with historic coal-fired power plant operations?

4. Page 59, Section 846.110 - Includes "uppermost zone of saturation" which is not defined or included in Part 845 and is much broader than "uppermost aquifer" as defined in Part 845. Uppermost aquifer is used but not defined in Part 846.

Section 846.130 Characterization of a CCR Fill Area

1. Page 60-61, Section 846.130 - This Section does not include a provision for the Agency to deny a Characterization Plan or to otherwise determine that a suspected historic fill area is not subject to these regulations.

As an example, the Crawford Station site – identified by the Environmental Groups as one of the eight (8) historic fill areas in their August 6, 2021, comments – received a No Further Remediation ("NFR") Letter from the Site Remediation Program ("SRP") on January 24, 2022, having fulfilled the requirements of 35 Ill. Adm. Code Parts 740 and 742. The Environmental Groups state that the site continues to threaten groundwater, however sampling data and modeling have shown:

- No groundwater impacts above Tier 1 groundwater remediation objectives for Class II groundwater
- Compliance at the site boundaries for the soil component of migration to groundwater to Class II groundwater
- Additionally, the NFR letter prohibits the installation of potable wells at the site.

2. Page 60-61, Section 846.130 - Having demonstrated compliance with SRP, should the Crawford site now be required to take further action under proposed Part 846? As written, Part 846 competes with Parts 740 and 742 and undermines the effect of the NFR letter.

3. Page 60-61, Section 846.130 – The Agency cannot quantify its resource needs for the public participation requirements without some estimate of the number of CCR fill areas subject to the proposed regulation and the anticipated pace of entry of sites into the program.

4. Page 60, Section 846.130(a)(1) – "immediately submit notification" is not reasonable, should be 24 or 48 hours.

5. Page 60, Section 846.130(a)(1) - Regulatory requirements are to be initiated "whenever evidence indicates the presence of a CCR fill area." What constitutes evidence? Would the 8/6/21 filing to the Board by the Environmental Groups identifying eight sites be sufficient evidence to require CCR Fill Characterization Plans? While notification must be made by the fill area owner/operator, the proposed regulation does not specify a deadline for doing so. The regulation also lacks an initial deadline for owners and operators to gather and review evidence to determine the applicability of Part 846. How would the Agency enforce Section 846.130(a)(1)?

6. Page 60, Section 846.130(a)(1) - "Immediate" notification to Agency unclear where owners and operators would have knowledge of areas at the time of enactment.

7. Page 60, Section 846.130(b)(1) - A 24-hour posting is not reasonable or needed for a Characterization Plan. The typical 14 days is sufficient.

8. Page 60, Section 846.130(b)(2) - Two (2) business days is not a reasonable amount of time to provide receipt and notification. A week or 10 days would be more appropriate.

9. Page 60-61, Section 846.130 (b)(2) through (b)(5) - Public Notice is not warranted for a Characterization Plan. The Agency should have 90 days to respond to any proposed Characterization Plan and will consider public comments for 14 days after such a Plan is posted to the facility's website.

10. Page 61, Section 846.130(b)(4) - Typical Agency review time is 90 days.

11. Page 61, Section 846.130(b)(5) - This should be changed to provide notice to commentors that a response has been issued. To get the response via FOIA is sufficient. E-mail should just go to commentors and not the whole listserv.

Section 845[sic].150 Incorporations by Reference

Page 61, Title of this Section should be "Section 846.150…"

Section 846.200 Permit Requirements and Standards of Issuance

Page 62-63, Section 846.200(b) - There are two 1's and 2's. The second "1" and "2" allow the Agency to impose additional conditions and take history into account when making decisions for applicants.

Section 846.210 General Provisions

1. Page 64, Section 846.210(d) - This could reasonably include notices to commentors and would prohibit the use of e-mail notification. It should be modified to clarify that it is talking about notification to the facility/owner.

2. Page 64, Section 846.210(h)(2) - Why "notify in writing?" Should say that the Agency shall specify how interested persons may join the listserv."

3. Page 64, Section 846.210(h)(3) - Again, two (2) business days is too short. Five (5) to 10 business days is more appropriate.

Section 846.220 Construction Permits

1. Page 66, Section 846.220(b) - It is mentioned in Section 846.220(b) that any corrective action required to be performed must also contain information regarding groundwater modeling, including contaminant transport modeling, fate and transport modeling, capture zone modeling, etc. If this is a requirement, the Groundwater Unit will need to hire more geologists that are experienced in groundwater modeling (which means possible posting EPG III positions to get the experience needed).

2. Page 67, Section 846.220(b)(6) - Post-cover system care plan requirement should be in Subsection (c) (cover system) and not in Subsection (b) (corrective action).

3. Page 67, Section 846.220(b)(7) - Location standards documentation not applicable to this section on corrective action; it is located in Subpart C. This documentation is also not required in the Part 845 regs for construction permits.

4. Page 68, Section 846.220(c)(4) - Location standards documentation not applicable to this section on cover system; it is located in Subpart C.

Section 846.230 Pre-Application Public Notification and Public Meeting

Page 68-70, Section 846.230 - Definition of CCR fill area has no minimum amount of CCR.

Section 846.250 Draft Permit Public Notice and Participation

1. Page 71, Section 846.250(a) - The Agency should not need to do this as the owner has already had a meeting wherein the public is put on notification that an application is to be submitted.

2. Page 71, Section 846.250(b)(2)(E) - What does "procedures for the formulation of final determination" mean?

3. Page 72, Section 846.250(b)(2)(G) - What is the definition of significant population?

4. Page 72, Section 846.250(b)(3)(A) - "all" needs to be removed.

5. Page 72, Section 846.250(b)(3)(B) - Should be limited to "mail" and should direct clerk what to do with the notice.

6. Page 72, Section 846.250(b)(3)(C) - Strike this. The Agency would need to verify so will not require.

7. Page 72, Section 846.250(c)(1) - Should be 30 days.

8. Page 72, Section 846.250(c)(2) - Remove applicant.

9. Page 72, Section 846.250(c)(3) and (5) - No need for (3) and (5); the Agency is required to keep records and we consider comments.

10. Page 72 - Section 846.250(c)(5) is redundant to subsection (c)(3) and is not needed.

11. Page 73, Section 846.250(d)(1) - Should be "shall."

12. Page 73, Section 846.250(d)(3) - "Geographical area" would not allow for virtual hearings. Many towns outside of metropolitan areas do not have public transportation. All of this should be struck and the procedures for non-permit hearings 35 Ill. Adm. Code Part 164 should be used.

13. Page 73, Section 846.250(e) - All of this should be struck and the procedures for non-permit hearings per 35 Ill. Adm. Code Part 164 should be used.

14. Page 74, Section 846.250(f) - Again, 35 Ill. Adm. Code Part 164 should be used instead.

Section 846.260 Final Permit Determination and Appeal

Page 74, Section 846.260(c) - Notice should be provided to those who participated only. 35 Ill. Adm. Code Part 164 already contains a requirement. Third party appeals in alignment with Section 40 of the Act but broader than 35 Ill. Adm. Code Section 845.40(g).

Section 846.280 Construction Quality Assurance Program

Page 78, Section 846.280(b)(5)(A) requires a CQA officer to be present to provide supervisions and assume responsibility for performing inspections of the "Compaction of the subgrade and foundation to design parameters." However, there is no system proposed for the monitoring, closure, and remediation of a CCR fill area that requires the compaction of a subgrade or foundation. This appears to be a remnant of Section 845.290(b)(5)(A).

Section 846.310 Unstable Areas and Floodplains

1. Page 79, Section 846.310(a) requires that a CCR fill area not be located in an "unstable area" unless it is demonstrated that the design of the CCR fill area has been designed to ensure the integrity of the "structural components" of the CCR fill area will not be disrupted. Neither "unstable area" and "structural components" are defined in Section 846.110 – Definitions. Both terms are defined in Part 845.

2. Page 79, Sections 846.310(c)(1) through (c)(3) should be in Section 846.110.

Section 846.320 Public Notice and Agency Approval of Location Demonstration

1. Page 80, Section 846.320 - No reason to expedite notification for location demonstration. Should follow Section 846.710. The notification requirements for Part 845 are not expedited.

2. Page 80, Section 846.320(b) - Again two (2) days is not reasonable; five (5) to 10 business days is more appropriate.

3. Page 80, Section 846.320(e) - Strike "and supplied a mailing or email address and to the listserv for the facility."

Section 846.330 Failure to Meet Location Standards

Page 81, Section 846.320(b) - Subsection (b) requires an owner or operator of a property or facility with a CCR fill area which fails to meet the location requirements at Section 846.300 (Placement Above the Uppermost Aquifer or Uppermost Saturated Zone) and Section 846.310 (Unstable Areas and Floodplains) to submit a construction permit application pursuant to Subpart

B. However, it is unclear as to what the subject application is to contain given that subsection (a) requires the removal of the CCR fill area.

Section 846.400 Groundwater Protection Standards

1. Page 81, Section 846.400(a) - The reference should be 845.600(a)(1). Should say "meet" instead of "be" in (1) and (2).

2. Page 81, Section 846.400(b), among other things, prohibits the owner or operator of a property or facility with a CCR fill area from obtaining alternative groundwater quality standards "before the end of groundwater monitoring under Section 846.640(b), when removing." It is noted that Section 846.640(b) addresses the extension of timeframes for the removal of CCR. It does not address groundwater monitoring of CCR fill areas.

3. Page 81, Section 846.400(b) - "when removing" at the end should be "when closing by removal."

Section 846.405 General Requirements and Removal Exemption

1. Page 81, Section 846.405(b) allows for a CCR fill area to be removed if it meets the following conditions:

   a. The CCR fill (area) does not violate the location restrictions in Subpart C.
   b. The CCR fill area is not located within 2,500 feet of potable water wells.

It is unclear why a CCR fill area that meets the aforementioned location restrictions would be prohibited from removal. This subsection is problematic. First, it is unclear if only one or both conditions must be met (missing the "or" or "and"). Second, the wording is unclear. But the purpose appears to be allowing a fill area to be removed without instituting groundwater monitoring and corrective action as long as it is not violating locating restrictions or near a well.

2. Page 81-82, Section 846.405(c) requires an owner or operator electing to remove (the CCR fill area) pursuant to Section 845.405(b) to submit a notification to the Agency within 30 days of the Agency rendering a decision pursuant to Section 846.320. It is unclear as to the Agency decision that is being referenced in Section 846.320.

3. Page 81-82, Section 846.405(b) and (c) - It is unclear as to the purpose of subsections (b) and (c).

Section 846.410 Required Submissions and Agency Approvals for Groundwater Monitoring

1. Page 82-85, Section 846.410 - Notification is covered in Section 846.710. No reason for expedited timeframe. According to the timeframes set forth in Section 846.410(c), the Agency may have as little as 46 days to review this submittal per the following:

   a. Page 83, Section 846.410(c)(2) provides two (2) business days to email a public notice.

   b. Page 83, Section 846.410(c)(3) provides 14 days for public comment.

c. Page 83, Section 846.410(c)(4) provides 30 days for the Agency to provide a written response to the owner or operator.

2. Page 82, Section 846.410(a) also references the Agency rendering a decision pursuant to Section 846.320. Again, it is unclear as to the Agency decision that is being referenced in Section 846.320. Delete section. The plan seems like an unnecessary step in the process. This is not required in Part 845.

3. Page 82, Section 846.410(a) - Agency review periods for certain submittals are extraordinarily short. As an example, the submittal required by Section 846.410(a) requires a hydrogeologic site characterization, design and construction plans of a groundwater monitoring system, and a groundwater sampling and analysis program. According to the timeframes set forth in Section 846.410(c), the Agency may have as little as 46 days to review this submittal.

4. Page 83, Section 846.410(c)(2) - Two days is not reasonable; 5 - 10 business days is more appropriate.

5. Page 83, Section 846.410(c)(5) - Strike "and supplied a mailing or email address and to the listserv for the facility."

Section 846.430 Groundwater Monitoring System

1. Page 87-89, Section 846.430 - Is there any criteria or method to determine appropriate groundwater monitoring well spacing? For landfill regulated under Part 811, groundwater impact assessments and groundwater modeling are conducted to determine appropriate well spacing.

2. Page 87-89, Section 846.430 - Groundwater monitoring system would require off-site wells if the entire property were deemed a CCR fill area if the current definition remains.

3. Page 87, Section 846.430(a)(1) requires the owner or operator of a property or facility to install a groundwater monitoring system that will yield samples that accurately represent the quality of background groundwater that has not been affected by "CCR fill," leakage from any "CCR fill area," or leakage from a "CCR surface impoundment." There are no definitions of "CCR fill" or "CCR surface impoundment" in Part 846. Also, "CCR fill" is referenced in Sections 846.430(c)(1) and (c)(2).

4. Page 87, Section 846.430(c)(1) requires, among other things, the completion of a monitoring well "within the CCR fill to monitor groundwater/leachate quality within the central CCR fill area." An identical requirement is specified at Section 846.430(d)(3). It is unclear why this monitoring well is needed inasmuch as upgradient and downgradient groundwater monitoring of a CCR fill area is specified at Section 846.430(c)(1). Furthermore, installation of a groundwater monitoring well through the bottom of a CCR fill area and into the underlying uppermost aquifer or saturated zone would provide a contaminant pathway.

5. Page 88-89, Section 846.430(f), it is stated that the owner/operator must obtain certification from a "qualified professional engineer stating that the groundwater monitoring

system has been designed and constructed to meet the requirements of this Section." A qualified professional geologist should be doing this work.

Section 846.440 Groundwater Sampling and Analysis

1. Page 89, Section 846.440(a) - What parameters are required to be monitored at these sites? In 846.440(a), it states that the groundwater monitoring program "must include consistent sampling and analysis procedures that are designed to ensure monitoring results that provide an accurate representation of groundwater quality at the background and downgradient wells…." However, there is no mention of what parameters should be monitored first to determine what is accurate. Should the parameters listed in 35 Ill. Adm. Code 620.410 be monitored, at a minimum? Or what about the 40 CFR 258 Appendix II parameters (which is an extensive list of inorganic and organic parameters that are monitored when a Part 811/814 facility undergoes assessment monitoring)? Or what about the list of parameters required to be monitored routinely at Part 811/814 facilities?

2. Page 89, Section 846.440(c)(3) requires the measurement of groundwater elevations in wells that monitor the same "CCR management area." This term is not defined in Section 846.110. Neither is it used elsewhere in Part 846.

3. Page 90-91, Section 846.440(f) - The statistical methods mentioned in Section 846.440(f) do not correlate with the statistical methods used at solid waste landfills. For example, there is mention of the use of a control chart. Control charts can mask potential issues at a facility because they take all of the data and continue to add data to develop a new background standard with each sampling event. It is difficult to determine if there is potential contamination at the facility if the comparison value continuously changes, especially if the background values increase over time. It would be better to have calculated statistical values for comparison, which will help determine if a significant change in groundwater quality has occurred.

4. Page 91, Section 846.440(f)(3) references the submittal to the Agency of a "hydrogeologic assessment plan." This term is not defined in Section 846.110. Neither is it used elsewhere in Part 846, with the exception of Section 846.450(a).

Section 846.460 Assessment of Corrective Measures

Page 94-95, Section 846.460 - Unlike Section 845.660 entitled "Assessment of Corrective Measures" applicable to CCR surface impoundments, Section 846.460 does not allow for preparation, submittal, and review of an alternate source demonstration.

Section 846.470 Corrective Action Plan

1. Page 96, Section 846.470(b), among other things, requires a submittal to the Agency of a "*corrective action assessment* (emphasis added) required by [*sic*] 846.460(a)(2)." Section 846.460(a)(2) requires the completion of an *assessment of corrective measures* (emphasis added). Identical terms should be used to avoid confusion and misunderstanding.

2. Page 96, Section 846.470(b), among other things, requires the owner or operator of the CCR fill area to submit a corrective action plan that identifies the selected corrective action remedy in the form of a construction permit application to the Agency within 180 days of

completing corrective action assessment required by Section 846.460(a)(2). A similar provision for CCR surface impoundments at Section 845.670(b) allows for one year.

3. Page 96-99, Section 846.470(g) is a repeat of Section 846.470(d) and so (g) can be deleted.

Section 846.480 Implementation of Corrective Action Plan

Page 100, Section 846.480(b) requires the owner or operator to implement the corrective action "remedy" approved by the Agency under Section 846.470. It would be more appropriate to reference "plan" rather than "remedy" inasmuch as Section 846.470 is entitled "Corrective Action Plan."

Section 846.490 Completion of Corrective Action

1. Page 102-104, Section 846.490 - Among other things, a corrective action plan must attain the groundwater protection standards specified in Section 846.400 pursuant to Section 846.470(d)(2) and 846.480(c)(1). However, it appears that Section 846.490 establishes timeframes during which corrective action must be completed with limited opportunity for extensions of the corrective action completion timeframes. See Section 846.490(c)(1) and (2). There does not appear to be an identified alternative for those CCR fill areas that have not met the groundwater protection standards at Section 846.400 and have exhausted the specified number of time extensions.

2. Page 103, Section 846.490(c)(1) and (2) establish maximum time extensions for CCR fill areas of 40 acres or smaller and larger than 40 acres, respectively. The basis for the differing maximum time extensions based on the 40 acre threshold is not presented.

3. Page 104, Section 846.490 (g)(2)(B) – Do the restrictions last in perpetuity?

Section 846.500 Cover System Plan

1. Page 105-106, Section 846.500 does not identify or reference "procedures" for an installation of a cover system. Also, the phrase "cover system on the CCR fill area" should be "cover system over the CCR fill area" throughout.

2. Page 105, Section 846.500(a)(3)(B) states that the cover system plan must include, among other things, "A description of the procedures to install a cover system CCR fill area in accordance with Section 846.520." A "cover system CCR fill area" is not defined in Section 846.110. Also, Section 846.520 does not identify or reference "procedures" for the installation of a cover system.

3. Page 105-106, Section 846.500(a)(3)(B) is redundant to Section (a)(3)(C). Section (a)(3)(D) – "ash" should be "CCR." Section (a)(3)(E) – part of the second sentence should read "cover system over the CCR fill area."

4. Page 105, Sections 846.500(a)(3)(B) and (C) - It is noted that Sections 846.500(a)(3)(B) and 846.500(a)(3)(C) both reference the use of "procedures" to install a "cover system" or "cover," respectively. It is unclear as to the intent of both subsections referencing "procedures" to install a cover or cover system.

5. Page 105, Section 846.500(a)(3)(D) requires that the Cover System Plan include "An estimate of the maximum inventory of CCR ever on-site in the ash fill area." It is unclear why this requirement is included in the Cover System Plan inasmuch as it is unrelated to the design, installation and monitoring of a cover system. The term "ash fill area" is not defined in Section 846.110.

6. Page 105-106, Section 846.500(a)(3)(E) references the installation of a cover system "at the CCR from the fill area."

7. Page 105-106, Section 846.500(a)(3)(E) states, in part, "When preparing the cover system plan, if the owner or operator of a property or facility with a CCR fill area estimates that the time required to complete installation of a cover system will exceed the timeframes specified in Section 846.540(a), the preliminary written cover system plan must include the site-specific information, factors, and considerations that would support any time extensions sought under Section 846.540(b)."

a. Page 112, Section 846.540(a) does not address the timeframes for installation of a cover system. Rather it addresses timeframes for submittal of a construction permit application containing a cover system plan.

b. Page 112-113, Section 846.540(b) does not address time extensions for installation of a cover system. Rather, it appears to address, in part, the timeframe for resubmittal of a construction permit application containing a cover system plan that had been previously denied by the Agency.

Section 846.510 Cover System

1. Page 106, Section 846.510(a) - Why reference the three years of groundwater monitoring in the first sentence? If these areas are discovered, they have to be covered or removed.

2. Page 106, Section 846.510(b) identifies certain minimum criteria that a proposed cover system is required to address. Item (b)(2) is: "Preclude the probability of future impoundment of water, sediment, or slurry." Item (b)(2) appears to be an unnecessary remnant of Part 845.

Section 846.520 Required Steps to Meet Cover System Requirements

1. Page 108-109, Section 846.520(a) through (c) - Delete subsections (a) through (c). They are not needed. Delete subsections (d), (e), and (h). They are groundwater requirements, not cover requirements.

2. Page 109 – Section 846.520(c)(2) requires individual NPDES Permits for CCR runoff. Even if the Agency agreed with requiring an individual NPDES permit, such a requirement does not belong in this section. In addition, a blanket requirement for an individual NPDES permit any time stormwater contacts CCR is overly broad and does not allow the Agency to consider any site-specific characteristics or operations, nor does it take any other site permitting scenarios into account.

3. Page 109, Section 846.520(g) requires that upon completion of a CCR cover system of the CCR fill area under subsection (a), the owner or operator of the property or facility with a CCR fill area must submit to the Agency a completion of the CCR cover system report and a certification from qualified professional engineer that the cover system has been completed in accordance with this Section. It is not clear whether the references to "subsection (a)" and "this Section" are the appropriate references.

4. Page 109-110, Section 846.520(h) addresses the completion of groundwater monitoring and subsequent submittal to the Agency of a completion of groundwater monitoring report and certification. This subsection (h) does not appear to belong in Section 846.520 entitled "Required Steps to Meet Cover System Requirements."

Section 846.530 Post-Cover System Care

1. Page 110, Section 846.530(c)(1) - In Subsection (c)(1) – The last part of (1) repeats as (A).

2. Page 111, Section 846.530(d)(1)(C) requires that the owner or operator of a property or facility with a CCR fill area prepare a written post-cover system care plan which, among other things, requires a demonstration that disturbances of the final cover liner, or other component of the containment system, including any removal of CCR, will not increase the potential threat to human health or the environment. The underlined reference appears to be an unnecessary remnant of Part 845.

Section 846.540 Cover System Application Schedule

1. Page 112, Section 846.540(b), among other things, identifies steps that are to be undertaken, in the event the Agency denies a construction permit application submitted pursuant to Section 846.470(b). It is noted that Section 846.470 is entitled "Corrective Action Plan" and subsection (b) addresses submittal of a completed "corrective action assessment." Subsection (b) does not address the CCR fill area cover system.

2. Page 113, Section 846.540(b) - The last sentence of Section 846.540(b) and Page 114, Section 846.610(d) state: "The Agency may extend the deadline as necessary." It is not clear from the quoted narrative of Section 846.540 and 846.610 the deadline that is referenced.

Section 846.600 Groundwater Protection Standards

Page 113, Section 846.600(a): contains a strict requirement for removal where noncompliance with location restrictions that does not allow for any other site-specific

considerations, including stability of nearby CCR surface impoundments or other structures, and may make removal more of an environmental risk that leaving in place or some other hybrid option.

Section 846.610 Removal Schedule

1. Page 113, Section 846.610(a) is unclear.

2. Page 114, Section 846.610(d) identifies steps that are to be undertaken, among other things, in the event the Agency denies a construction permit application submitted under Section 846.470(b). It is noted that Section 846.470 is entitled "Corrective Action Plan" and subsection (b) addresses submittal of a completed "corrective action assessment." Subsection (b) does not address the removal of a CCR fill area.

Section 846.620 Removal Plan

Page 114-115, Section 846.620(f) and (g) - Delete Subsections (f) and (g). Requirements are arbitrary. Timeframe for removal is required in Subsection (c)(4) of this section.

Section 846.630 Required Steps to Meet Cover System Requirements

1. Page 115-116, Section 846.630(a), as written, is unclear; needs restructuring. Subsections (b) and (c) are groundwater requirements, not removal requirements.

2. Page 116, Section 846.630(d) belongs in Subsection 846.620 (Removal Plan). Delete from Page 117, Subsection 846.630(d)(4) "but not limited to." Delete second sentence in Subsection (d)(4)(A). Superfluous and references impoundments.

3. Page 117, Section 846.630(d)(4)(A) references a "final closure construction permit." There is no definition of this term in Section 846.110.

4. Page 118, Section 846.630(d)(4)(B)(i) – Delete language after "drainage" as it regulates storage piles by requiring inspections. Delete language from Page 119, Section 846.630(e) referring to storage piles as it is superfluous. References are incorrect. Delete Page 119, Subsection 846.630(e)(2). Regulates storage piles and references impoundments.

5. Page 119, Section 846.630(e)(2) references a "final closure permit." There is no definition of this term in Section 846.110.

Section 846.640 Completion of Removal

1. Page 120, Section 846.640(b)(4), requires the owner or operator (of a CCR fill area) that is requesting an extension of a CCR removal timeframe to make a demonstration to the Agency that removal is not feasible within the required timeframe due to factors beyond the facility's control. One of those factors that may support such a demonstration is identified at Subsection 846.640(b)(4)(B), which states: "Time required to dewater a fill area due to the volume of CCR contained in the CCR fill area or the characteristics of the CCR fill area."

2. Page 120, Section 846.640(c) - Delete last sentence of subsection (c). No maximum time can be dictated to fit all situations. Title should be Time Extensions.

3. Page 121, Section 846.640(e) - Delete "but not limited to" in 1 and 1.A. Regulations should specifically define what is required.

4. Page 121, Section 846.640(e)(1)(A) and (B) require that the (CCR fill area) removal report contain supporting documentation, including but not limited to:

a. Engineering and hydrogeology reports, including but not limited to monitoring well completion reports and boring logs, all CQA reports, certifications, and designations of CQA officers-in-absentia required by Section 846.280.

Comment: All of these documents should have been submitted with previously submitted construction permit applications required to be submitted to the Agency by Section 846.220.

b. Photographs, including time, date, and location information of the photographs of the final cover system and groundwater collection system, if applicable, and any other photographs relied upon to document construction activities.

Comment: Given that the intent of the removal report is to document the removal of a CCR fill area or areas, there is little value in requiring photographs of the identified systems.

5. Page 121, Section 846.640(e)(1)(B), delete "of the photographs of the final cover system and groundwater collection system, if applicable, and any other photographs relied upon" and add a comma. There is no cover system after removal, and it is unknown to what the groundwater collection system refers.

6. Page 122, Section 846.640(h)(2) - Are the restrictions in subsection (h)(2) in perpetuity? References in subsection (h)(2)(B) are for Part 845 sections.

Section 846.700 CCR Fill Area Record

Page 122-124, Section 846.700 - Why are hard copy paper files not acceptable?

Section 846.710 Publicly Accessible Internet Site Requirements

Page 125, Section 846.710(f) - Why is this language repeated?

COMMENT SUBMITTED BY
THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

APPENDIX B

The Agency has identified a cross-reference error in 35 Ill. Adm. Code 845.170, which is the list of requirements for inactive closed CCR surface impoundments, specifically in Section 845.170(a)(2)(C). Subsection (a)(2)(C) incorrectly refers to Section 845.220(a), (c), and (f)(1). There is no Section 845.220(f)(1) in the promulgated regulations. The correct reference should be Section 845.220(g)(1). During the rulemaking process for Part 845, proposed Section 845.220 was modified to add the language in subsection (e), however the references in Section 845.170 did not get changed accordingly.

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, state the following:

I have electronically served the attached APPEARANCES and COMMENT SUBMITTED BY THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY upon the following:

See attached Service List

I affirm that my e-mail address is nick.m.sandiego@illinois.gov; the number of pages in the e-mail transmission is 44; and the e-mail transmission took place before 5:00 p.m. on June 2, 2022.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Nick M. San Diego
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DATED: June 2, 2022

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