

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

**IN THE MATTER OF:** )  
 )  
**COAL COMBUSTION ASH PONDS** )  
**AND SURFACE IMPOUNDMENTS AT** ) **R14-10**  
**POWER GENERATING FACILITIES:** ) **(Rulemaking – Water)**  
**PROPOSED 35 ILL.ADM. CODE PART 841:** )

**NOTICE OF FILING**

TO: John Therriault, Assistant Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, IL 60601

PLEASE TAKE NOTICE that I have today filed with the Illinois Pollution Control Board Midwest Generation, L.L.C.'s Post Hearing Comments, copies of which are herewith served upon you.

Dated: October 20, 2014

MIDWEST GENERATION, L.L.C.

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One of Its Attorneys

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Midwest Generation, L.L.C.'s Post Hearing Comments were filed electronically on October 20, 2014 with the following:

John Therriault, Assistant Clerk  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
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and that true copies were mailed by First Class Mail, postage prepaid, on October 20, 2014 to the parties listed on the foregoing Service List.

/s/ Susan M. Franzetti

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<b>COAL COMBUSTION ASH PONDS</b>	)	
<b>AND SURFACE IMPOUNDMENTS AT</b>	)	<b>R14-10</b>
<b>POWER GENERATING FACILITIES:</b>	)	<b>(Rulemaking – Water)</b>
<b>PROPOSED 35 ILL.ADM. CODE PART 841</b>	)	

**MIDWEST GENERATION, LLC’S POST-HEARING COMMENTS**

**I. Introduction**

Midwest Generation, LLC (“Midwest Generation”)<sup>1</sup> has been an active participant in this rule-making proceeding because its interests will be directly and significantly affected by the proposed 35 Illinois Administrative Code Part 841 rules regulating “Coal Combustion Ash Ponds and Surface Impoundments at Power Generating Facilities” which the Illinois Environmental Protection Agency (“Illinois EPA” or the “Agency”) has proposed to the Board (the “Proposed CCW Rules”). Midwest Generation commends the Illinois EPA for the work it has done to prepare the Proposed CCW Rules, including the stakeholder process it initiated and shepherded prior to commencing this rulemaking proceeding. Midwest Generation actively participated in that pre-rulemaking stakeholder process and generally found the Proposed CCW Rules to be satisfactory, with limited exception. In the course of this rulemaking, however, several changes to the Proposed CCW Rules have been suggested, some by the Agency but the majority by the Environmental Groups.<sup>2</sup> Many of these suggested changes are objectionable because they are unreasonable or unnecessary from a technical or scientific perspective or are contrary to Illinois law. Accordingly, the majority of Midwest Generation’s post-hearing comments address the suggested changes to the Proposed CCW Rules by the Environmental Groups.

Midwest Generation’s concerns relating to the Agency’s proposed rules language are primarily related to (1) the proposed applicability of the rules to inactive CCW Units and to stormwater collection areas at coal-fired generating stations that are more properly excluded from their scope; and (2) the inappropriate exclusion of the Tiered Approach to Corrective Action (“TACO”) standards under Part 742 of 35 Ill. Adm. Code.

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<sup>1</sup> On April 1, 2014, NRG Energy, Inc. (“NRG”) acquired certain of the subsidiaries of Edison Mission Energy, including Midwest Generation, LLC.

<sup>2</sup> The term “Environmental Groups” refers to the following entities: Environmental Law & Policy Center, Environmental Integrity Project, Sierra Club, and Prairie Rivers Network.

For inactive CCW Units, the proposed inclusion of all CCW Units that are alleged to be causing groundwater exceedances is extends beyond the permissible scope of retroactive regulations under Illinois law. For stormwater collection areas, the proposed exclusion of only those stormwater collection areas that contain less than one cubic yard (cu.yd.) of CCW is too limited and would extend the reach of the Proposed CCW Rules to areas at a facility that do not warrant such stringent and burdensome regulation. The limited stormwater collection area exclusion also runs afoul of equal protection rights under Illinois law because there is no rational basis for singling out stormwater collection areas at CCW-generating facilities for such regulatory burdens when no other regulated industrial activity stormwater collection areas are subject to the same or substantially equivalent requirements.

Finally, because it is consistent with both Illinois legislative intent and the Board's prior precedent for addressing impacts to the environment from industrial operations, the TACO regulations should be incorporated into the CCW rules adopted by the Board. The incorporation of the TACO risk-based standards is authorized under applicable Illinois law. Allowing the TACO risk-based standards to be used as the basis for pursuing appropriate corrective action in the event of a release from a CCW Unit is the appropriate and reasonable course of action for the Board to follow. If the TACO risk-based standards are excluded from the scope of the corrective action requirements in the Proposed CCW Rules, the rules will be more stringent and burdensome than is justified, particularly when it is considered that releases from other equally or more threatening industrial operations are governed by the TACO standards.

## **II. Relevant Background Information**

Midwest Generation's concerns regarding the Proposed CCW Rules are largely based on its knowledge and experience gained from operating, maintaining and evaluating the ash ponds or basins located at its stations, which are referred to as "Surface Impoundments" or "Units" under the Proposed CCW Rules. These include the following CCW Units located at Midwest Generation's electric generating stations:

- Joliet 29 Station: It has three active ash ponds. The three active ash ponds are lined with a High Density Polyethylene (HDPE) liner. Coal ash is routinely removed from the ash ponds by Lafarge North America.

- Powerton Station: It has three active ash ponds, a historical ash pond, and uses one basin as a temporary holding spot. The three ash ponds and the basin are lined with a HDPE liner. Coal ash is routinely removed from the ash ponds by Harsco Minerals and Capital Minerals.
- Waukegan Station: It has two active ash ponds, both of which are lined with a HDPE liner. Coal ash is routinely removed from the ash ponds by Lafarge North America.
- Will County Station: It has two active ash ponds and two inactive ash ponds. The two active ash ponds have a HDPE liner. Coal ash is routinely removed from the ash ponds by Lafarge North America.<sup>3</sup>

The active ash ponds are part of the wastewater treatment process at the Midwest Generation stations. As such, they are subject to the terms and conditions of the NPDES permits issued to these stations. The operation of the ash ponds and outfall discharges have been carried out in accordance with those permit terms and conditions.

For the above ash ponds, Midwest Generation cooperated with Illinois EPA's prior requests in 2009 to perform a hydrogeological investigation, which included the installation and quarterly sampling of groundwater monitoring wells. Impacts to groundwater were detected in certain of these monitoring wells which may or may not have been associated with the operation of the ash ponds prior to the installation of the HDPE liners. In any event, under Compliance Commitment Agreements between the Illinois EPA and Midwest Generation, Midwest Generation agreed that for its active ash ponds that did not yet have HDPE liners, it would replace the existing liners with HDPE liner. MWGen also agreed to add additional groundwater monitoring wells, continue quarterly groundwater monitoring, and implement a Groundwater Management Zone. In some instances, Midwest Generation also recorded institutional controls in the form of Environmental Land Use Agreements ("ELUCs") on those portions of its property potentially affected by the groundwater impacts.

Since the fourth quarter of 2010 to the present, Midwest Generation has conducted quarterly sampling of its ash pond monitoring wells for all of the Part 620 groundwater parameters required by the Agency. Both the hydrogeological investigation and the subsequent years of quarterly groundwater monitoring have established that to the extent that historical

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<sup>3</sup> During its February 26, 2014 hearing testimony, the Agency confirmed that the Midwest Generation active ash ponds have been relined with the installation of appropriate liners consisting of a high density polyethylene liner with a conductivity of  $1 \times 10^{-7}$  or less centimeters per second. (See 2/26/14 Hearing Testimony at pp. 106-107).

operations at the Midwest Generation stations may have impacted groundwater, those impacts have not affected any drinking water receptors and are being adequately addressed by the corrective actions Midwest Generation has taken and continues to take.

### **III. Comments on Specific Provisions of the Proposed CCW Rules**

For ease of the Board's reference and review, Midwest Generation's comments are generally organized and presented by referencing and following the order in which the numerical sections of the rules are presented. In some instances, the comments address an issue that is common or related to more than one section of the Proposed CCW Rules. In such instances, the relevant sections of the Proposed CCW Rules are either addressed in concert or cross-references to comments are included to avoid repetition.

#### **A. Section 841.110: Environmental Groups' Proposed Definition of "Operate" is Overly Broad, Vague and Unlawfully Retroactive.**

The Environmental Groups propose that a definition of "operate" should be included in the Proposed CCW Rules. The proposed definition includes "receiving waste or stormwater flow. A surface impoundment that is open to receive stormwater as direct precipitation, runoff, or process water is "receiving waste or stormwater flow." If the proposed definition of "operate" were limited to a surface impoundment that is "receiving waste" or is otherwise still in active use to receive CCW, Midwest Generation would not raise an objection. However, the proposed definition is far broader in scope. It includes any receipt of "stormwater flow." Hence, the definition is so broad, that it could include any area at a coal-fired generating station through which stormwater passes. When combined with the proposed definitions of "Surface Impoundment" and "Unit," a person could be deemed to "operate" a Unit subject to the Proposed CCW Rules for any earthen "topographical depression" or "man-made excavation" which is "open to receiving stormwater flow" and in which any amount of CCW, no matter how small, is or was located. As the Environmental Groups explained to the Board, they do intend to define "operate" broadly. They stated that the intent of the proposed definition of "operate" is to

include in the scope of the Proposed CCW Rules any inactive CCW impoundment that is “open to the atmosphere” and has not yet been closed under proposed Section 841.420.<sup>4</sup>

The Environmental Groups attempt to justify their proposed definition of “operate” by citing to the definition of “disposal” in 35 Ill. Admin. Code 810.103. But Section 810.103 is not nearly as broad as the Environmental Groups suggest. Under Section 810.103, “disposal” occurs where “the solid waste is accumulated and not confined or contained to prevent its entry into the environment, or there is no certain plan for its disposal elsewhere.” 35 Ill. Adm. Code 810.103. As described in Section II above, Midwest Generation’s ponds have been lined for years (and for any of its active ponds, relined with HDPE liners within the recent past) and hence, they are “confined or contained to prevent entry [of CCW] into the environment.” Also, Midwest Generation has routinely removed CCW from its active ash ponds. Hence, both the active and inactive ash ponds at Midwest Generation’s stations do not constitute “disposal” sites for which the broad definition of “operate” proposed by the Environmental Groups may be justified.

The proposed definition of “operate” is not only too broad, it is also impermissibly vague and would not withstand scrutiny under due process principles. The definition of “operate” does not provide adequate notice to the regulated party of what area(s) at a coal-fired generating station are or are not regulated by the Proposed CCW Rules. As a matter of due process, the language of the proposed definition is so vague that persons of “common intelligence must necessarily guess at its meaning and differ as to its application.” *Ardt v. Illinois Department of Professional Regulation*, 154 Ill. 2d 138, 156-57, 607 N.E.2d 1226, 1234 (1992) (internal quotations omitted).

In addition to violating principles of due process, the proposed definition of “operate” is also contrary to Illinois law on the retroactivity of regulatory requirements. Retroactivity is the process of applying laws to events that took place earlier, *i.e.*, before the law was passed. Illinois jurisprudence does not favor retroactivity. Generally, rules and regulations are not retroactive and their applicability is limited to the time following their passage into law.<sup>5</sup> Here, the legal

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<sup>4</sup> See *Post Hearing Comments of the Environmental Integrity Project, Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club, filed August 19, 2014*, (“August 19, 2014 Environmental Groups’ Post-Hearing Comments”), Response to No. 14, at p. 9. See also Exhibit 57, *Environmental Groups’ Answers to the Illinois Pollution Control Board’s June 11, 2014 Questions for the Environmental Groups and the Illinois Environmental Protection Agency’s June 11, 2014 Questions for the Environmental Groups*, filed July 17, 2014 (“Ex. 57 - 7/17/14 Env. Groups’ Answers”), Answer to Board Question 11 at p. 1 and Illinois EPA Question 7.1 at p. 4.

<sup>5</sup> The principles governing whether an Illinois law applies retroactively were summarized by the Illinois Supreme Court in *Allegis Realty Investors v. Novak*, 223 Ill. 2d 318, 330-32 (2006). As discussed in that opinion, the Illinois

basis for the Proposed CCW Rules is found in the provisions of the Illinois Groundwater Protection Act (the "IGPA"), 415 ILCS 55/1, *et seq.*, which became effective on September 24, 1987. 1987 Ill. Laws 3624.<sup>6</sup> Section 14.4 of the Illinois Environmental Protection Act (the "Act"), ch. 111½, par. 1001 *et seq.*, was enacted as part of the Illinois Groundwater Protection Act. Section 14.4(a)(1) of the Act in relevant part provides for the adoption of regulations relating to the "surface impounding...of wastes would could cause contamination of groundwater." Section 14.4(b) expressly refers to the adoption of regulations relating to water quality monitoring, remedial measures, requirements for closure, *etc.* for "existing activities" and Sections 14.4(c) and (d) expressly refer to the adoption of such regulations for "new activities." Conducting the required threshold inquiry regarding the retroactivity of a statute under Illinois law, the Illinois legislature expressly specified and limited the temporal reach of the IGPA's provisions regarding wastes placed in surface impoundments. It expressly limited the IGPA's provisions to "existing activities" at the time of the IGPA's enactment (effective on September 24, 1987) and to "new activities" thereafter. The mere fact that an area at a CCW facility is "receiving stormwater flow" does not make that area either an "existing" or "new" activity within the meaning of Section 14.4 of the Act.

The Environmental Groups' proposed definition of "operate" violates Illinois law by making the Proposed CCW Rules illegally retroactive. A current owner or operator of a coal-fired generating station may not legally be required to comply with these rules for a former "unit" or "surface impoundment," as defined under the Proposed CCW Rules, which is "open to the atmosphere" or through which "stormwater may flow" even though that unit or impoundment has not "operated" since the enactment of the IGPA in 1987. Therefore, the proposed definition of "operate" violates Illinois law against such an expansive, retroactive application of the Proposed CCW Rules.

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Supreme Court adopted the approach set forth by the United States Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994). Under *Landgraf*, the threshold inquiry is whether the legislature has expressly prescribed the temporal reach of a statute. If it has, the expression of legislative intent must be given effect absent a constitutional prohibition. If the Illinois legislature has not expressly indicated the temporal reach of the change to the law, then a court will default to the legislature's intent as found in Section 4 of the Illinois Statute on Statutes (the general savings clause), 5 ILCS 70/4, which the Illinois Supreme Court has found prohibits retroactive application of substantive changes to statutes. *Caveney v. Bower*, 207 Ill. 2d 82, 95, 797 N.E.2d 596, 601 (2003). Under this judicial default rule, a court must determine whether the change to the law is procedural or substantive in nature. *Caveney*, 207 Ill. 2d at 95. If the change is procedural, it may be applied retroactively; if the change is substantive, it may not.

<sup>6</sup> Sections 1 – 9 of Public Act 85-863 are now codified as the Illinois Groundwater Protection Act, 415 ILCS 55/1 *et seq.*

**B. Sections 841.105(a)(2) Agency Proposal and 841.105(b)(2) Environmental Groups' Proposal - Applicability to Inactive Ash Ponds: Inactive Ponds should be Excluded from the Proposed CCW Rules.**

Both the Agency and the Environmental Groups have proposed language to exclude certain “inactive” CCW surface impoundments from the applicability of the CCW rules. The Agency’s proposal, in Section 841.105(a)(2), excludes those CCW surface impoundments “not operated after the effective date of these rules, and whose coal combustion waste or leachate from coal combustion waste does not cause or contribute to an exceedance of the groundwater quality standards.” Under the Agency’s proposal, an inactive CCW surface impoundment would only be excluded from these rules if it satisfies two conditions: (1) it is not operated after the rules’ effective date; and (2) it is not causing or contributing to an exceedance of groundwater quality standards. Thus, if a surface impoundment has not been operated for decades, but is alleged to be “contributing to an exceedance of groundwater quality standards,” it would be subject to the Proposed CCW Rules.<sup>7</sup>

In their proposed Section 841.105(b)(2), the Environmental Groups’ also have included language to address the Proposed CCW Rules’ applicability to an inactive CCW surface impoundment.<sup>8</sup> Consistent with their definition of “operate,” the Environmental Groups propose that every inactive CCW surface impoundment, whether or not it is causing an exceedance of an applicable groundwater standard, should be subject to the Proposed CCW Rules unless the surface impoundment was closed in accordance with the requirements of the rules before their effective date.

In the case of inactive surface impoundments, the Board should reject both the Agency and Environmental Groups proposals. The Board should exclude all such impoundments from the scope of applicability of the Proposed CCW Rules. The proposed definition of “surface impoundment” is extremely broad because it includes, in relevant part, any “natural topographical depression” or “man-made excavation” for which “earthen materials provide

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<sup>7</sup> The Agency’s hearing testimony confirmed that there is no temporal limitation on the scope of applicability of proposed Section 841.105(a)(2). It is intended to apply to all inactive CCW Units, regardless of when they became inactive or closed, if the CCW Unit contains any amount of CCW or leachate from CCW and the Agency believes the CCW Unit is causing or contributing to an exceedance of groundwater standards. See 2/26/14 Hearing Transcript at pps. 51-54.

<sup>8</sup> *Environmental Groups' Proposed Amendments to Proposed New 35 Ill. Adm. Code Part 841*, filed July 21, 2014 (“July 21, 2014 Environmental Groups’ Proposed Rules”) at p. 4; see also *August 19, 2014 Environmental Groups’ Post-Hearing Comments* at p. 9.

structural support for the containment of liquid waste containing free liquids.” (See Agency’s Proposed Section 841.110 definition of “Surface Impoundment.”) Any naturally depressed earthen area or man-made excavation on the grounds of a coal-fired generating station where CCW may have come to be located, such as through historical stormwater runoff, could arguably qualify as an inactive “surface impoundment” or “unit” which is subject to these rules. This is true whether or not the area was ever purposefully used by the facility as a means to contain CCW. If in such cases, this type of historical situation may be deemed to have contributed to an exceedance of a groundwater standard, the Proposed CCW Rules would impose not simply corrective action to address the groundwater impacts, but also the creation and implementation of closure and post-closure plans. There is no precedent under Illinois law for imposing this kind of regulatory burden upon a current owner or operator of any commercial or industrial facility where historically a contaminant was deposited that is now discovered to be causing or contributing to a groundwater quality standard exceedance.

It defies logic to single out CCW for such draconian regulatory treatment. In particular, the closure and post-closure requirements of the CCW Proposal Rules would impose an unreasonable burden. These requirements could lead to “capping” or “excavating” multiple areas at a coal-fired generating facility in order to satisfy the closure requirements under the Proposed CCW Rules. In all other circumstances of historical groundwater contamination, except regulated landfills, a current owner or operator of a facility is allowed to utilize the Illinois Tiered Approach to Corrective Action (“TACO”) in 35 Ill. Adm. Code Part 742 regulations, in conjunction with a remediation program, such as under the Site Remediation Program (Part 732) or the Resource Conservation and Recovery (“RCRA”) programs (Parts 724 and 725), to address groundwater impacts using the TACO risk-based cleanup standards and/or appropriate institutional controls. In none of these instances are owners or operators also required to satisfy closure and post-closure regulatory requirements like those contained in the Proposed CCW Rules. Neither the Agency nor the Environmental Groups has provided any persuasive justification for treating historical CCW impacts so much more rigorously than other chemical impacts to groundwater caused by other industrial operations, many of which involve

acutely hazardous substances that present far more serious environmental consequences (e.g., chlorinated solvents).<sup>9</sup>

It is also unnecessary to so broadly expand existing regulations to cover CCW-related historical activity because the Illinois Environmental Protection Act (the “Act”) already provides the Agency (and citizens) with enforcement authority to pursue injunctive or other relief necessary to address the impacts of historical CCW activity that may cause or contribute to “water pollution” (see Section 12(a) of the Act) or “water pollution hazards” (see Section 12(d) of the Act), both of which statutory prohibitions address historical impacts to groundwater causing exceedances of the Part 620 groundwater quality standards.

Further, both the Agency’s and the Environmental Groups’ limited exclusions for inactive CCW surface impoundments violate Illinois law on the permissible retroactivity of these regulations, as discussed in Section III.A above. At a minimum, to address this legal flaw, the Agency’s proposed language must be expanded to properly exclude CCW surface impoundments that were not operated after the September 24, 1987 enactment of the IGPA, regardless of whether the surface impoundment may be contributing to an exceedance of a groundwater standard after the effective date of these rules. The mere existence of an exceedance is not sufficient to overcome the prohibition against retroactive application of these proposed rules to surface impoundments that have not been operated since the 1987 enactment of the IGPA.

The Environmental Groups’ proposal is even more fundamentally flawed. If an inactive surface impoundment is not causing an exceedance of a groundwater quality standard, then there is no reasonable technical or legal basis to require the former impoundment to be closed in accordance with these rules. The Board should decline to adopt the Environmental Groups’ proposal.

**C. Section 841.105(b)(5) Limited Exemption for Stormwater Retention Basins:  
An Unreasonably Burdensome and Impractical Requirement.**

For similar reasons to those discussed in Section III. B. above, the Agency’s proposed Section 841.105(b)(5) which provides a limited exclusion for surface impoundments that collect stormwater runoff is unreasonably burdensome and unworkable in its application. The Agency’s

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<sup>9</sup> The Agency witness Richard P. Cobb testified that it chose not to incorporate the TACO Part 742 regulations because it thought its approach was “more protective” and “in concert with the nondegradation provisions in Section 12” of the IGPA. See 2/26/14 Hearing Transcript at pp. 151-152. Mr. Cobb also relied upon the view that most releases to which TAC) applies are not being cleaned up under a specific permit program. *Id.* at p. 153.

proposed Section 841.105(b)(5) proposes to exclude a surface impoundment unit: “that does not contain more than one cubic yard of CCW and is used to only collect stormwater runoff, which does not contain leachate.” This language appears to include any earthen depression or man-made excavation at a facility used for stormwater collection – whether the stormwater collects by design or not. In addition to its broad application to potentially any area of “standing water” that may accumulate after a rain event in various earthen areas of a coal-fired generating station, it does not provide any means for determining whether the stormwater retention area may have received “more than one cubic yard of CCW.” How is this to be determined? Coal fines may contain constituents that are similar to those found in CCW – such as boron, sulfate, *etc.* Will the mere presence of constituents that are common to both coal products and CCW result in regulation under these proposed rules of every area in which stormwater “collects” at a coal-fired generating facility?

As discussed in Section III.B. above, there is no precedent under Illinois law for singling out such stormwater retention areas at coal-fired generating facilities for regulation as if they were a waste storage or disposal area. Other types of industrial facilities throughout the state of Illinois certainly have earthen stormwater collection areas and the Agency has not pursued regulating those industries. No evidence has been presented in this rulemaking showing that the threats presented by stormwater retention areas at coal-fired generating stations are unique or otherwise distinguishable from other industrial uses such that they warrant imposing a regulatory program like this one that requires not only corrective action, but also the installation and monitoring of groundwater wells, extensive reporting requirements, and closure and post-closure activities. Rather, the hearing record shows no evidence that any releases from CCW Units have threatened offsite potable water supply wells or caused other significant impacts that would justify imposing these extensive regulatory burdens.<sup>10</sup> Out of all the many CCW surface impoundments in Illinois, the Agency identified only two that it believe may have a “potential” to impact off-site drinking water based on the presence of Class I groundwater in the vicinity of these impoundments.<sup>11</sup>

In attempting to regulate all earthen stormwater collection areas, other than those where it can somehow be established have less than one cubic yard of CCW in them, the Agency simply

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<sup>10</sup> See, *e.g.*, 2/26/14 Hearing Transcript at pp. 94-95 (referencing Agency’s Response to Midwest Generation Question No. 6 to Richard P. Cobb).

<sup>11</sup> See 2/26/14 Hearing Testimony at pp. 241-245; see also Agency Response to Env. Groups’ Question 10 in Ex. 5.

goes too far. The evidence presented in this proceeding does not support such a broad sweep. No information was presented showing that CCW when present in an earthen stormwater collection area in a quantity of more than one cubic yard causes significant impacts to groundwater that justifies imposing the proposed requirements to perform hydrogeologic investigations, to install a groundwater monitoring network around these areas, and to monitor those wells forever, particularly when there is no evidence that groundwater impacts have occurred.

Like the inactive CCW surface impoundments proposal discussed above, the proposed selective treatment of stormwater collection areas at coal-fired generating stations versus other types of Illinois facilities that handle materials or wastes containing some of the same or more harmful constituents poses equal protection concerns under Illinois law. Recognizing that in the area of legislative or regulatory classifications, it is permissible to address problems “that may be of different dimensions and reform may take place one step at a time” (*Illinois Coal Operators Assn. v. PCB*, 59 Ill.2d 305, 319 N.E.2d 782, 786 (1974)), but there must be “a reasonable basis for differentiating between the class to which the law is applicable and the class to which it is not.” (*Id.* at 785). No “reasonable basis” has been presented in this record for differentiating between coal-fired generating stations and other industrial activity which is regulated under the Clean Water Act because of the potential environmental impacts. The facts in this record do not support regulating every earthen stormwater collection area containing more than one cubic yard of CCW when CCW does not present any unique threats nor does it have unique attributes to distinguish it from every other industrial facility whose stormwater is also regulated under the Clean Water Act. Unless the Board intends to impose similar requirements on all facilities whose industrial activities come into contact with stormwater and are regulated under the Clean Water Act, there is no justification here for singling out earthen depressions or man-made excavations which collect stormwater at coal-fired generating stations.

Midwest Generation submits that proposed Section 841.105(b)(5) should be revised to provide:

“This Part does not apply to any surface impoundment unit:

(5) that is designed and used for the purpose of collecting stormwater runoff.”

**D. Section 841.105(c) Environmental Groups' Proposal: Required and Repeated Submissions Justifying a Unit's Exempted Status are Unprecedented and Unreasonable.**

Section 841.105 of the Agency's Proposed CCW Rules includes a "Board Note" which provides:

A unit not subject to this Part should maintain records demonstrating how the exemption in subsection (b) applies or how the unit is outside the scope of application set forth in subsection (a).

The Environmental Groups propose to convert this "Board Note" into a regulatory requirement by including it in their proposed Section 841.105(c). The Environmental Groups' proposal would require every hydrogeologic investigation, groundwater monitoring plan and each unit's statistical analysis include the justification for the exemption. They also propose that even exempted units must comply with the closure requirements in Part D of the Proposed CCW Rules.<sup>12</sup> For the same reasons discussed in Section III.B above, the Board should decline to adopt the Environmental Groups' proposed requirement that inactive, exempt CCW units should be subjected to the closure requirements under these rules.

The Environmental Groups' also propose that an operator must make a submission to the Illinois EPA showing that an otherwise unregulated CCW unit is covered by a regulatory exemption. This suggested regulatory concept is both unprecedented and unnecessarily burdensome. The Illinois air, land and water pollution regulations in 35 Ill. Adm. Code contain numerous provisions exempting various activities or conditions from the scope of a regulation without imposing the additional obligation upon an owner or operator to demonstrate affirmatively that it is covered by the exemption.<sup>13</sup> A regulatory exemption either applies or does not apply to a given situation. The Environmental Groups have not identified any legal precedent for singling out a CCW unit operator to demonstrate that a regulatory exemption applies, let alone to be required to repeatedly include that demonstration in multiple submissions to the Illinois EPA. The proposal would result in illogical and arbitrary enforcement situations.

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<sup>12</sup> See Ex. 57 - 7/17/14 Env. Groups' Answers, Answer to the Illinois Pollution Control Board's June 11, 2014 Question No. 11, at p. 1.

<sup>13</sup> Examples of such regulatory exemptions codified in 35 Ill. Adm. Code include: Section 201.146 *Exemptions from State Permit Requirements*; Section 203.211 *Permit Exemption Based on Fugitive Emissions*; Section 225.250(b) *Initial Certification and Recertification Procedures for Emissions Monitoring – Exemption*; and 237.120[*Open Burning*] *Exemptions*;

For example, a CCW unit operator with an exempt unit who inadvertently neglects to submit the required exemption justification in one of the specified Agency submissions could be subject to an enforcement action simply for its failure to do so, even though the subject unit is in fact exempt from the regulations.

Moreover, the contention that the Agency may not know about the existence of unregulated, inactive CCW units is not a sufficient reason to impose an affirmative burden on a current owner or operator of demonstrating that it is covered by the exemption. Lack of Agency knowledge concerning unregulated activities is not a sufficient justification for imposing this additional demonstration requirement.

The proposed affirmative demonstration requirement showing that the exemption applies has the potential to be particularly burdensome to relatively recent owners or operators. In Midwest Generation's case, it has only owned and operated its stations since 1999. It does not have knowledge of every possible former CCW unit that may have existed at its stations since they began operating decades before Midwest Generation's ownership and operation began. If this proposal were adopted, it could be interpreted to require Midwest Generation to conduct some sort of site-wide investigation of all of its stations to try to determine if any unregulated units or stormwater surface impoundments are present. And, merely determining the presence of such historical units or impoundments may not be enough under the Environmental Groups' proposal. The investigation also may have to include installing groundwater monitoring wells in any location where such units or impoundments may have been previously located in order to "justify" under the proposed exemption language that the former unit or surface impoundment is not causing or contributing to an exceedance of any of the Part 620 groundwater quality standards.

There are many instances under Illinois environmental regulations where various types of unregulated, past industrial activity, even those having the potential to cause environmental impacts to groundwater, are not required to be "justified" to the Illinois EPA to show they are either expressly covered by a regulatory exemption or otherwise beyond the scope of a regulatory program. The proposed regulatory burden to justify a CCW Unit's exempt status is particularly unreasonable because it applies in the absence of any evidence indicating that such past operations are causing groundwater impacts today. As has been discussed above, the alleged environmental concerns presented by former CCW units do not rise to such a level that

they can be lawfully distinguished from so many other former industrial activities involving the use of similar or more threatening chemicals to which such proposed regulatory burdens do not apply. Under both Illinois and federal law, there exist regulatory programs, such as the federal “Superfund” program under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601–9675, and its Illinois equivalent under the Act, and the Resource Conservation and Recovery Act (RCRA) program for dealing with historical impacts to groundwater caused by activities that no longer continue today. These long-established programs for dealing with historical impacts to the environment from former industrial operations are sufficient to address even the unsubstantiated concerns raised here regarding former, inactive CCW units or stormwater impoundments “containing more than one cubic yard of CCW.” There is simply no just or reasonable cause to impose a mandatory requirement that an owner or operator to “justify” that inactive units are covered by one of the exemption to these regulations.

**E. Sections 841.130(b) and 841.410: Environmental Group’s Compliance Period Proposal to Require Closure and Post-Closure Plans Submission Within One-Year is Unreasonable and Ineffective.**

The Environmental Groups’ proposal that Sections 841.130(b) and 841.410 require an owner or operator to submit both closure and post-closure plans for all of its CCW units within one-year of the Proposed CCW Rules effective date is unreasonable.<sup>14</sup> Until and unless an owner or operator is contemplating closure of a CCW Unit, it is unreasonable to require the preparation and submission of a closure and post-closure plan. As described in Section II above, Midwest Generation does not use its ash ponds as disposal sites. It routinely removes CCW from its active ash ponds. The ash removed is used for beneficial uses. Contrary to the Environmental Groups contention, the ash is not “disposed” while in the pond or upon its removal..

Based on how Midwest Generation operates its ash ponds, it may decide to close its ash ponds either by leaving CCW in place or by removing CCW that remains at the time of closure. Both the timing of the decision to cease operating the CCW units and the existing market and regulatory conditions regarding beneficial use of the CCW are relevant factors to how this

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<sup>14</sup> July 21, 2014 *Environmental Groups’ Proposed Rules* at pp. 12 and 47-49.

decision will be made. To compel preparation of closure and post-closure plans within one year of the Proposed CCW Rules' effective date is unreasonable because of the likelihood that the resources spent to prepare these plans are wasted because changing conditions between the plans' preparation and when a decision to close is made will require revising and resubmitting those plans for another round of Agency review and approval. The end result is a waste of both the owner/operator's and the Agency's resources - - all to no true environmental purpose or value. The Board should decline to accept the Environmental Groups' proposal.

**F. Section 841.145: Agency's Proposal on Previous Investigations, Plans and Programs should be revised to Require Approval of Compliant, Previous Submittals to the Agency.**

To date, a significant effort and expense has been invested by Midwest Generation, in cooperation with the Agency's prior requests, to voluntarily develop hydrogeologic characterizations associated with the ash ponds located at each of its facilities. Based on these hydrogeologic characterizations, after the Agency's review and approval, Midwest Generation developed and implemented groundwater monitoring networks at each of its facilities. These groundwater monitoring networks are specifically designed to assist in determining whether an impoundment, or impoundments, may have leaked and resulted in an exceedance of an applicable groundwater quality standard under 35 Ill. Adm. Code § 620.210. Midwest Generation also has Agency-approved groundwater management zones (GMZs) for those ash ponds which may have impacted groundwater (even if the cause is a source other than these ash ponds), along with Environmental Land Use Controls (ELUCs) restricting use of the impacted groundwater. The language of proposed Section 841.145 provides that all of this extensive work "may," not "must" or "shall" be accepted by the Agency if it satisfies the requirements of the Proposed CCW Rules.

Midwest Generation submits that the use of the word "may" in proposed Section 841.145 is inappropriate. Midwest Generation agrees that if prior work does not satisfy the requirements of the CCW rules ultimately enacted here, then it will have to supplement that work to do so. However, if a previous investigation, plan and/or program implemented by Midwest Generation satisfies the CCW rules adopted by the Board, the Agency should not have the discretion, as contemplated by the use of the term "may" in proposed Section 841.145, to require more.

Simply stated, the Agency must accept prior work that satisfies the requirements of the final rules. Regulated parties, like Midwest Generation, should reasonably be entitled to regulatory certainty that prior work which satisfies the requirements of the final CCW rules will not need to be repeated. Otherwise, the proposed language wrongly implies that the Agency has the authority and discretion to require all or any part of such work to be performed again after the enactment of the Proposed CCW Rules. Accordingly, Midwest Generation requests that the Board revise proposed Section 841.145 to substitute the words “must” or “shall” for the word “may.”

**G. Section 841.200(b) and (c) Hydrologic Site Characterization: Certain of the Agency’s Modified Provisions are Unnecessary or Threaten Further Environmental Impacts.**

Midwest Generation’s concerns regarding the Agency’s proposed section 841.200(c) are limited to only a few of the sixteen requirements the Agency’s modified language includes in this section, all of which were added towards the end of the public hearings phase of this proceeding. Midwest Generation’s concerns relate to subparagraphs 12, 13 and 14(C) of proposed Section 841.200(c).

With the Agency’s review and approval, to characterize the relevant hydrogeologic and groundwater quality conditions for its ash ponds, Midwest Generation voluntarily developed a hydrogeologic assessment and a groundwater monitoring program for each of its four facilities. In Section 841.200(c) of the Agency’s modified Proposed CCW Rules, it has included a number of additional requirements that must be satisfied as part of the hydrogeologic characterization of a site. Certain of the Agency’s proposed additions to Section 841.200(c) appear to significantly and unnecessarily expand the scope of the site hydrogeologic characterization work. These additional requirements are not necessary to determine whether a particular unit may be leaking. Further, in some instances, the proposed requirement actually threatens to create a vertical migration pathway for impacted groundwater that would not otherwise exist.

Specifically, the three objectionable requirements included in the Agency’s modified Section 841.200(c) language are set forth and explained further below.

**1. Proposed Section 841.200(c)(12) – Delineation of the Vertical and Horizontal Extent of Geologic Layers to a Minimum Depth of 100 feet Below Ground Surface (“bgs”).**

This proposed requirement wrongly assumes that there will not be a confining layer that separates a shallow and deeper aquifer present below and in the vicinity of existing ash ponds at depths less than 100 feet below ground surface (or “bgs”). Accordingly, where such a confining layer is present, an unintended consequence of this proposed requirement is to require penetrating the confining layer in order to satisfy the site characterization requirement to determine the vertical and horizontal extent of geologic layers “to a minimum depth of 100 feet below ground surface.” Where confining layers are present at a depth less than 100 feet bgs, this requirement has the potential to create a vertical migration pathway to what would otherwise be an isolated aquifer unit below the confining layer. In those instances where groundwater in the aquifer above the confining layer has been impacted, the need to drill through the confining layer to reach the required 100 ft. depth threatens to allow the impacted groundwater to migrate to the deeper aquifer, thus expanding the vertical extent of the impacted groundwater and unnecessarily expanding the extent of any corrective actions to address groundwater impacts.

The imposition of this absolute and unconditional requirement to characterize the geologic layers down to a depth of 100 feet is not scientifically defensible. It carries with it the risk of exacerbating existing impacts to groundwater by allowing those impacts to spread to deeper, confined aquifers. The proposed requirement is contrary to the fundamental principle that site characterization work should assist in protecting groundwater, rather than exposing groundwater to greater risks. It is particularly unreasonable to require this type of site characterization when the record fails to show that it is necessary in order to determine whether there has been a release from a regulated CCW Unit. Accordingly, the Board should decline to adopt the Agency’s modified language in Section 841.200(c)(12).

**2. Proposed Section 841.200(c)(13) – Identification of the Chemical and Physical Properties of the Geologic Layers to a Minimum Depth of 100 feet below ground surface.**

The Agency modified proposed Section 841.200(c) to add the requirement in subparagraph (13) that the hydrogeologic site characterization include identifying the chemical and physical properties of the geologic layers at a site. Midwest Generation’s concern is that the

record does not identify or explain why this additional information is needed in order to adequately characterize site hydrogeology. Proposed Section 841.200(c)(14) already requires that the site characterization work include the “hydraulic characteristics of the geologic layers., ” specifically including the “hydraulic conductivities” of the geologic layers. (See proposed Section 841.200(c)(14)(B). Thus, hydraulic conductivity estimates of the aquifer will be provided as part of the site characterization work. The hydraulic conductivity estimates of the aquifer provide the information necessary to develop an appropriate and adequate groundwater monitoring network for a site. It is unnecessary to provide the additional chemical and physical properties of the geologic layers when the hydraulic characteristics of the aquifer are a required element of the site characterization work.

### **3. Proposed Section 841.200(c)(14)(C) - Porosity**

Midwest Generation does not object to providing, as part of the hydraulic characteristics of the geologic layers, information on “porosities” as proposed in Section 841.200(c)(14)(C). However, literature reference values are typically used and accepted for identifying the porosity of materials found in geologic layers, rather than conducting site specific testing to determine the porosities. Because either literature reference values or testing are accepted means for identifying porosities of geologic layers, the language of proposed Section 841.200(c)(14)(C) should be clarified to state that either literature reference values or physical testing are acceptable means for identifying porosities.

Midwest Generation appreciates that the Agency modified its proposed language in Section 841.200(c) in an attempt to address concerns raised by the Environmental Groups regarding the adequacy of the site characterization work set forth in the Agency’s original proposal. For the most part, the Agency’s expansion of the requirements for an acceptable site characterization goes beyond what is truly necessary to develop an adequate groundwater monitoring network for a site. Hence, this expanded list of required elements of an initial site characterization imposes more than of a burden upon an owner or operator regulated by the Proposed CCW Rules than is reasonably justified under the circumstances. In this regard, the Board needs to consider that unless and until exceedances of a groundwater standard under Part 620 due to a release from a CCW Unit are documented, all of this additional information to be collected in the initial site characterization is unnecessary. Even where such groundwater

impacts are identified, if such additional information is necessary to address the release and to formulate the appropriate corrective action, the collection of such additional information is appropriately included in the development of the corrective action plan. The problem with the proposed broad scope of the initial site characterization work is that it is based on the unjustified assumption that every CCW Unit is causing an exceedance of a groundwater standard and hence, all of this information has to be collected before a groundwater monitoring network is even installed at a site. Moreover, even where groundwater impacts due to CCW Units are identified, in many instances, modeling can provide the additional information necessary to formulate appropriate corrective action. For these reasons, Midwest Generation requests that the Board revise the Agency's modified proposed language in Section 841.200(c) as requested in these comments.

**H. Sections 841.200(b) and (c): The Environmental Group's Proposed Exclusion of Modeling to Assess Surface Water Impacts is Unpersuasive.**

The Environmental Groups proposed Sections 841.200 (b) and (c) include additional requirements for initial hydrogeologic site characterization work regarding impacts to "surface water quality." In its hearing testimony, the Agency has explained that the information required to be collected during a hydrogeologic site characterization allows for the use of modeling to determine any potential impacts to surface water quality. [transcript citation needed] The Environmental Groups oppose the Agency's approach based on their general, unsupported contention that modeling is insufficient. However, at least one Illinois court has considered and rejected the Environmental Group's position on modeling. In the context of the Illinois landfill regulations, where the use of modeling is allowed, a similar argument that modeling of groundwater is an inexact science, because results may vary widely based on judgments made by modelers and input data selected for use in the model, was flatly rejected by the court in *Waste Management of Illinois, Inc. v. PCB*, 231 Ill.App.3d 278, 595 N.E.2d 1171 (1st Dist. 1992). Even twenty years ago when the *Waste Management* case was decided, before the advancements made in modeling over the intervening years, the *Waste Management* Court found that contrary evidence showed modeling allows the operators of a landfill to anticipate serious environmental problems and that groundwater flow and contaminant transport modeling have been successfully used in other cases and studies.

The Board should follow the lead of the *Waste Management* Court's decision and findings regarding the use of modeling and decline to accept the Environmental Groups' proposed revisions to the language of Sections 841.200(b) and (c).

**I. Sections 841.205(c)(5) and (6) and 841.210(b)(4), (7): Environmental Groups' Proposal to Expand the Scope of Groundwater Monitoring System and Plan Requirements is Unreasonably Broad and Unduly Burdensome.**

Requirements to include water level measurements, assess overall groundwater flow and direction and identify any changes in the flow regime are accepted elements of standard groundwater monitoring and reporting. However, the Environmental Groups' proposed language for Sections 841.205(c)(5) and (6) and Sections 841.210(b)(4) and (7) includes requirements that go well beyond the standard and reasonable scope of groundwater monitoring and reporting for structures like a CCW Unit. Their proposal includes establishing an additional "hyporheic zone" monitoring component as part of a standard groundwater monitoring network and requires that the hyporheic zone include multiple sampling points at multiple depths.<sup>15</sup>

Monitoring of the hyporheic zone should not be required as part of the basic monitoring requirements for CCW Units. It does not provide any additional information necessary to determine whether constituents are migrating from a CCW Unit. The main purpose of a groundwater monitoring network is to identify whether a release from a regulated unit has occurred. Hyporheic zone monitoring does not add any additional information that is not provided by a standard groundwater monitoring network to determine whether there may have been a release from a regulated unit.

The added effort and expense of identifying and monitoring the hyporheic zone may only be necessary where all of the following conditions are present: (i) a release to groundwater has been identified; (ii) the release threatens to impact a local surface water body; and (3) the additional information to be obtained from hyporheic zone monitoring is necessary to assess the impact on the surface water body. However, even in such situations, hyporheic zone monitoring is not the exclusive means of assessing impacts on surface water bodies. Many groundwater transport models in use today can estimate potential contaminant loading rates into receiving

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<sup>15</sup> See Ex. 57 - 7/17/14 Env. Groups' Answers, Answers to the Illinois Pollution Control Board's Question 11.

surface waters for the purposes of evaluating remedial alternatives without the need to collect hyporheic zone monitoring data. Hyporheic zone studies and monitoring are generally only used when model sensitivity analysis suggests that small changes in these parameters can significantly impact model results.

For the above reasons, a requirement to identify and monitor the hyporheic zone is not appropriately or reasonably included in the establishment of the groundwater monitoring system for CCW Units.

**J. Section 841.225: Environmental Groups' Proposal to Require Statistical Comparison With Each New Data Point is a Redundant and Unnecessary Addition.**

The Agency's proposed Section 841.225 includes both the requirement to calculate statistical background values for upgradient versus downgradient wells (*i.e.*, an interwell statistical background calculation) and also to conduct this statistical analysis for each well individually (*i.e.*, an intrawell statistical background calculation). Intrawell statistics are only necessary where the constituent(s) data set for an individual well location at a site is such that it makes interwell comparisons inadequate or insufficient to identify a statistically significant increase in a given chemical. In such circumstances, the use of intrawell statistics may be necessary to determine whether a statistically significant increase has occurred.

As revised by the Agency, proposed Section 841.225 correctly sets forth this established and accepted statistical evaluation process. Under the Environmental Groups' proposed Section 841.225, each new data point collected is to be compared to the established background value (interwell vs. intrawell) to provide the necessary statistical comparison per data set. This proposed addition is unnecessary and redundant because such a comparison is already routinely done as part of the statistical analysis once the comparison statistics are calculated.

The Environmental Groups' propose to add language to Section 841.225(c) that requires the sample size to be considered when choosing and justifying a specific statistical test for use in evaluating groundwater monitoring well data. This is also an unnecessary and redundant addition to the Proposed CCW Rules. It is already an established step in the selection of an appropriate statistical evaluation method, as set forth in the Unified Guidance document which is

referred to and incorporated into the Proposed CCW Rules at proposed Section 841.120 “Incorporations by Reference” and proposed Section 841.125(d) “Groundwater Quality Standards.”

**K. Section 841.230(c): Environmental Groups’ Proposed Sampling Frequency Restrictions are Unreasonably Restrictive and Unduly Burdensome.**

The Agency’s proposed Section 841.230(c) language allows for the reduction of the analytical frequency of a parameter to once every five years only when the parameter has not been detected within the last five consecutive years of monitoring. The Environmental Groups’ propose that section 841.230’s reduced five-year monitoring frequency should be further restricted to instead require annual monitoring of any such parameters. The Environmental Groups further propose that arsenic, boron, manganese, sulfate and total dissolved solids (“TDS”) monitoring can never be reduced to less than a quarterly frequency. The Environmental Groups contend that this far more burdensome monitoring requirement will provide for “early detection” of any contaminants migrating from a CCW Unit.<sup>16</sup>

The Environmental Groups’ proposal is unduly burdensome. The Agency’s proposed Section 841.230 already requires monitoring of almost all of the chemicals for which groundwater quality standards are established in section 620.210 even though many of these parameters are not typically associated with CCW. Further, the frequency of monitoring for this extensive list of parameters cannot be reduced until at least every sampling event for these parameters over five years of quarterly monitoring all show non-detectible results. Particularly for ash ponds like Midwest Generation’s which have been lined with HDPE liners meeting the current “state of the art” standards for CCW Unit liners, the Agency’s proposed requirement for such extensive monitoring is already more than sufficient to detect constituents migrating from CCW Units.

The Agency’s proposal, without the more restrictive and onerous monitoring provisions proposed by the Environmental Groups, is already far more expansive than what the U.S. EPA’s proposed CCR Rule requires. See 75 Fed. Reg. 35128, 35206 (June 21, 2010). The U.S. EPA

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<sup>16</sup> See Environmental Groups’ response to Board Question No. 17.

has proposed that CCW Units be monitored only for those chemicals that are both present in CCW and “would rapidly move through the subsurface and thus provide an early detection as to whether contaminants were migrating from the disposal unit.” (*Id.*) These “release indicator parameters” are: boron, chloride, conductivity, fluoride, pH, sulfate, sulfide, and total dissolved solids (TDS).

No persuasive evidence has been presented by the Environmental Groups to justify continued monitoring requirements for a subset of parameters and annual monitoring for parameters that have not been detected for five consecutive years of monitoring. Midwest Generation’s ash ponds, like those of other Illinois owners and operators, have been in existence for decades. If migration of contaminants were going to occur, it would be detected during the minimum five years of monitoring that the Agency’s proposal requires. Under the Proposed CCW Rules, the obligation to install and monitor an adequate groundwater monitoring system is more than sufficient to detect any release from a CCW Unit. If the initial five years of monitoring does not show any detection of these parameters, there is no reasonable basis on which to assume that suddenly they will subsequently be detected.

The Environmental Groups’ proposal will impose an undue burden on owners and operators of CCW Units. Under their proposal, not only are there added monitoring costs, there are also added reporting, recordkeeping and statistical evaluation requirements that must be satisfied for each of the monitored parameters for each sampling event.<sup>17</sup> While non-detectable results may be more readily addressed in these reporting activities, they still add more time, effort and expense than can reasonably be justified.

For all of the above reasons, Midwest Generation urges the Board to accept the Agency’s proposal for sampling frequency and reduced monitoring set forth in proposed section 841.230.

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<sup>17</sup> 2/16/14 Hearing Transcript (Testimony of Richard P. Cobb) at p. 72.

**L. Section 841.235(a) and (c): Environmental Groups' Proposed Annual Statistical Analysis Requirements add Unnecessary, Additional Statistical Analyses.**

The Environmental Groups' proposed revision to Section 841.235(a) would increase the frequency of the proposed annual requirement for conducting a statistical comparison of groundwater monitoring data to conducting that comparison "every time that monitoring is conducted." In other words, along with the required calculation of background values, this statistical comparison would have to be conducted on a per sampling event basis. The proposed increased frequency for conducting statistical comparisons is unduly burdensome and unnecessary to achieve the purpose of identifying statistically significant increases in the constituent concentrations in groundwater monitoring wells.

Under the Agency's proposal, when a new groundwater sampling result is obtained for a given constituent from a groundwater monitoring well, it is compared against the statistical value established for that parameter for that well. This comparison determines whether there is a statistical exceedance for that particular sampling event. Both the nature and extent of the additional "statistical analysis" being proposed by the Environmental Groups is not only unclear, but it appears to be redundant of the statistical evaluation process proposed by the Agency.

Under the Agency's proposal, a statistically calculated background value, either from an interwell or intrawell analysis, depending on the site-specific conditions at a specific well for a specific parameter, is to be made per sampling event as well as annually. In addition, the calculated statistical background will need to be re-evaluated periodically based on new data being generated as part of the approved monitoring program. These evaluations are then directly compared to the applicable Part 620 groundwater standards. The Agency's proposal, without further modification as suggested by the Environmental Groups, is both consistent with generally accepted statistical evaluation procedures for groundwater monitoring well systems. The Agency's proposal also more clearly sets forth the required evaluation and reporting procedures to be applied in conducting the statistical evaluation.

In Section 841.235(c), the Environmental Groups further propose that the determination of whether a statistically significant increase has occurred shall be made by comparing the sampling data to any groundwater standard - - not just the Part 620 groundwater quality standard

that is applicable to groundwater in the vicinity of the CCW Unit(s). It is unclear what the Environmental Groups' proposed language is intended to accomplish. Further, the Environmental Groups' proposal also seems to conflict with the fundamental provisions of the Part 620 groundwater regulations. The Part 620 groundwater regulations establish various classifications of groundwater and the accompanying standards applicable to each such classification. An aquifer which satisfies the requirements for a Class 1 groundwater must comply with the Class 1 groundwater standards, a Class II groundwater must comply with the Class II groundwater standards, and so on through the four classes of groundwater standards established under the Part 620 regulations. However, under the Environmental Groups' proposal, the Part 620 groundwater classification distinctions are eliminated, making every Class I through Class IV groundwater standard applicable to a given groundwater. For example, where a particular aquifer qualifies as a Class IV groundwater under Part 620, the determination of whether a statistically significant increase has occurred would have to include a comparison to each and every groundwater standard for the monitored constituent in all four groundwater classifications set forth in Part 620, whether or not those standards actually apply to the aquifer in question. Such a requirement not only makes no sense, but is contrary to the express provisions of Part 620.

Compliance with groundwater standards, and any threat of an exceedance of a groundwater standard, is only properly determined by comparing monitoring results to the particular groundwater standard which is applicable to the groundwater being monitored. Therefore, the Board should decline to accept the Environmental Groups' proposed Section 841.235(c).

**M. Sections 841.300(b)(2) and 841.405: Environmental Groups' Proposal to Require Closure Upon Confirmed Detection of Groundwater Exceedance is Unreasonable and Unjustified.**

For Section 841.300(b)(2), as well as Section 841.305(c)(1), of the Proposed CCW Rules, the Environmental Groups propose that if confirmation sampling detects an exceedance of a Part 620 groundwater quality standard, the owner must close any CCW Unit pursuant to the time frames set forth in Section 841.405. Similarly, in Section 841.405, the Environmental Groups also propose to eliminate the language which conditions the requirement to close a CCW Unit

when a Part 620 groundwater quality standard exceedance is confirmed upon the owner's decision to close the unit. The Environmental Groups contend that their proposed revisions are necessary because timely closure must be required of unlined and inadequately lined impoundments that are causing groundwater contamination, regardless of whether the owner has made a decision to close the CCW Unit.<sup>18</sup> Moreover, where more than one CCW Unit is located in close proximity to the detected exceedance, under the Environmental Groups' proposal, it does not matter whether the identity of the particular CCW Unit causing the exceedance can be determined. All suspect CCW Units would have to be closed.<sup>19</sup>

The Environmental Groups' proposal unreasonably prohibits any consideration of site-specific factors relevant to a determination of appropriate corrective action measures in the event of an exceedance. In the case of Midwest Generation's active ash ponds, all have been relined with HDPE liners that represent "state of the art" liner technology. How can it be reasonable to trigger closure of these ash ponds when a reasonable inference is that any migration of CCW parameters would have occurred prior to the installation of the existing HDPE liners? Under the Environmental Groups' proposal, even a lone pH groundwater standard exceedance would trigger the early closure requirement. There is no additional environmental protection to be gained by forcing early closure of ash ponds whose current operation is not contributing to an exceedance. None of the Midwest Generation hydrogeological assessments have identified any risk of exposure to environmental or human health receptors. In such circumstances, allowing corrective action is a reasonable and technically defensible alternative to forcing early closure of the ash ponds.

The Environmental Groups simply have not provided any persuasive reasons to support the adoption of their draconian approach that forces early closure requirements for CCW Units. An owner or operator should be afforded the opportunity to pursue corrective action. No support for the Environmental Groups' position found in the proposed federal CCR Rule. As proposed, Section 257.98(c) of the federal CCR rules allows continued operation of a CCW impoundment even where the owner or operator determines that it cannot comply with corrective action requirements "with any currently available methods" by allowing the implementation of alternate

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<sup>18</sup> See, e.g., *Ex. 57 - 7/17/14 Env. Groups' Answers, Answers to Agency's Pre-filed Questions*, at Question 19.

<sup>19</sup> *Id.*, *Answers to Agency's Pre-Filed Questions* at Questions 25 & 25.1.

measures for the control of the sources of contamination. See 75 Fed. Reg. 35128, 35251 (June 21, 2010).

If the Environmental Groups' approach is adopted, it would open the "flood gates" to imposing similar closure requirements for any operating industrial facility or landfill which has detected an exceedance of groundwater standards, whether or not such an exceedance may be adequately addressed by appropriate corrective action, including institutional controls that prevent exposure to the impacted groundwater. There is no precedent under Illinois law for such a harsh burden to be imposed upon the regulated community. Because it is unreasonable to do so when corrective action is a reasonable and appropriate alternative to address a groundwater standard exceedance, the board should decline to accept the Environmental Groups' proposal.

**N. Section 841.310: Agency's Proposed Exclusion of TACO Approach to Corrective Action is Inconsistent with Illinois Law.**

The Agency's proposed Section 841.310 provides the general requirements for a Corrective Action Plan when an exceedance of a groundwater quality standard is confirmed. The Agency has opposed the application of the risk-based TACO standards based on its view that such an approach is not authorized by the IGPA. However, the Agency agrees that institutional controls (ICs) may be employed as part of acceptable correction action strategies. Midwest Generation submits that there is no legal prohibition under Illinois law that prevents the risk-based TACO standards from being applied to corrective actions associated with remediating impacts to groundwater associated with the operation of CCW Units. The TACO standards should be available for use in conjunction with the corrective action program requirements set forth in the Proposed CCW Rules.

The TACO regulations establish a uniform methodology for developing risk-based remediation objectives for the constituents of concern at a site which are intended to be used in remediation programs.<sup>20</sup> The use of risk based approaches and ICs as part of an overall corrective action strategy is a standard and accepted environmental practice under Illinois

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<sup>20</sup> "The TACO methodology codified at Part 742 is not independent. It must be used in conjunction with remediation programs..." *In the Matter of: Tiered Approach to Corrective Action Objectives (TACO): Amendments to 35 Ill. Adm. Code 742.105, 742.200, 742.505, 742.805, and 742.915*, PCB R97-12(B), (Dec. 4, 1997) at p. 2.

corrective action and remediation programs. Section 841.310 should be revised to allow the full use of TACO under Part 742, not just the use of certain institutional controls as contained in the Agency's proposal. The TACO regulations in conjunction with a regulatory remediation program are routinely used for the cleanup of impacted groundwater sites across the state. Many of these impacted sites involve remediating contaminants of much higher toxicity and cancer exposure risk than constituents commonly associated with CCW. Unless the TACO regulations are incorporated into the Proposed CCW Rules, the corrective action regulations for ash impoundments will be more restrictive and inflexible than those for equivalent or more severe groundwater issues under Illinois regulations. For this reason, Midwest Generation submits that the Agency's proposal creates equal protection concerns under applicable Illinois law.

The Agency's position that the TACO standards may not be applied to a program established pursuant to the authority of the Illinois Groundwater Protection Act (IGPA) is not correct. It is in direct conflict with Illinois legislative intent. Section 58 of Title XVII of the Act, the "Site Remediation Program," sets forth the legislative intent behind the use of the risk-based approach to site remediation described in Title XVII. It broadly states in Section 58(1) that: "It is the intent of this Title: (1) To establish a risk-based system of remediation based on protection of human health and the environment relative to present and future uses of the site." Similarly, Section 58.1 sets forth the broad scope of applicability the legislature intended for risk-based remedial objectives and the TACO standards adopted by the Board pursuant to its authority under Title XVII. Section 58.1(a)(1) provides:

Sec. 58.1. Applicability.

(a) (1) This Title establishes the procedures for the investigative and remedial activities at sites where there is a release, threatened release, or suspected release of hazardous substances, pesticides, or petroleum and for the review and approval of those activities.

The legislature intended that the TACO standards to apply to any "remedial activities" involving a release of a "hazardous substance."

Section 58.2 of the Act defines "remedial action" to mean "activities associated with compliance with the provisions of Sections 58.6 and 58.7 [of the Act]." The corrective action requirements of the Proposed CCW Rules, which require groundwater impacts to be remediated,

are “remedial activities” within the meaning of Section 58.1. Further, the intended meaning of “hazardous substances” as used in Section 58.1 of the Act is also very broad. It is not limited to “waste” but rather any “hazardous substance” whether or not it constitutes a “waste.” Although “hazardous substances” is not a defined term either in the definitions Section of Title XVII or the Act generally, the fact that it was intended to be interpreted broadly so as not to exclude chemicals released into groundwater from a CCW Unit is supported by the definition of “regulated substance” under Section 58.2 of the Act. Section 58.2 defines a “regulated substance” to include, in relevant part, “any hazardous substance as defined under Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (P.L. 96-510) [“CERCLA”].” Clearly, the types of constituents associated with CCW, such as for example, arsenic, constitute a “hazardous substance” within CERCLA’s broad definition of that term. Hence, Title XVII and the TACO standards promulgated thereunder are applicable to releases that require corrective action under the Proposed CCW Rules.

Nor are the proposed corrective action requirements for CCW Units excluded from Title XVII of the Act based on the exclusions set forth in Section 58.1(a)(2). Section 58.1(a)(2) excludes only:

- National Priorities List (NPL) sites (Appendix B of 40 CFR 300);
- a permitted treatment, storage or disposal (“TSD”) site under federal or state solid or hazardous waste laws;
- federal or state regulated underground storage tank sites; or
- remedial actions required by federal court or U.S. EPA administrative order.

None of these exclusions will typically apply to a CCW Unit. Further, if allowed under federal law and regulations, Section 58.1(a)(2) allows all of these excluded sites to utilize the risk-based remediation objectives under Section 58.5 of the Act [the section which authorized the Board to adopt the TACO standards], except TSD Sites.

In the adoption of the TACO standards, the Board specifically addressed the permissible scope of TACO’s applicability. The Board correctly interpreted the Illinois legislature’s intent

that the TACO standards have broad application “to all types of remediation programs,” stating as follows:

The proposed rules create a tiered approach to establishing corrective action, *i.e.* remediation objectives, based on risks to human health and the environment, allowing consideration of the proposed land use at a subject site. Although this approach is premised upon the statutory mandates in the Site Remediation Program legislation (P.A. 89-431, as amended by P.A. 89-443), it is intended to apply to all types of remediation programs under the Act, including not only the Site Remediation Program, but also the Underground Storage Tank and the Resource Conservation and Recovery Act programs.<sup>21</sup>

Further, the Illinois EPA is mistaken that the IGPA’s provisions regarding non-degradation prevent the application of TACO to corrective actions involving CCW Units. The Board previously addressed this issue, and rejected the Agency’s position, in the course of its adoption of the Part 742 TACO regulations:

The use of Part 742 is subject to the limitation that it cannot be used where there is an imminent and substantial endangerment to human health and the environment. Section 742.105 also makes clear that groundwater remediation objectives established pursuant to the TACO process can exceed the groundwater quality standards set forth at 35 Ill. Adm. Code Part 620. This exception is based upon a statutory provision; the record does not otherwise support such a rule. Section 58.5 of the [Illinois Environmental Protection] Act authorizes the use of groundwater remediation objectives for contaminants of concern that are greater than the groundwater quality standards established by the Board at 35 Ill. Adm. Code 620 pursuant to the Illinois Groundwater Protection Act. (415 ILCS 55/1 *et seq.*)<sup>22</sup>

Similarly, the Board previously found that there is no legislative prohibition against applying the risk-based criteria of the TACO regulations to the landfill regulations governing corrective actions should the Agency decide to seek such an amendment to those regulations.<sup>23</sup> When it adopted the Site Remediation Program (“SRP”) regulations, the Board found that while

<sup>21</sup> *In the Matter of: Tiered approach to Corrective Action Objectives (TACO): 35 Ill. Adm. Code Part 742, PCB R97-12(A)* (April 17, 1997) at p. 1.

<sup>22</sup> *Id.* at p. 8.

<sup>23</sup> Even though the Agency has not yet decided to amend the landfill regulations to apply the TACO regulations, the landfill regulations still allow for greater flexibility in determining the applicable remediation objectives than what the Agency is proposing here. Under the Part 811 landfill regulations, the owner or operator may seek adjusted groundwater quality standards (AGQSs) for its facility. When an AGQS is in place, it becomes the applicable standard. 35 Ill. Adm. Code § 811.320(d). No such site-specific groundwater standards process is proposed here.

the legislature did not intend the SRP to “supplant” the landfill regulations, “the SRP does not preclude the Agency from using risk-based criteria in any further amendments to the landfill rules.”<sup>24</sup>

Because the TACO regulations are applicable to RCRA, CERCLA and SRP programs, all of which are intended to address releases of contaminants to the environment, there is no logical reason why the TACO regulations should not apply to a release to groundwater from a CCW Unit. The record here is devoid of any evidence that would provide a rational basis for distinguishing between CCW Unit releases and all of the other types of releases to which the TACO regulations apply. Midwest Generation requests that the Board revise proposed Section 841.310 to authorize the application of the TACO regulations to corrective actions under the Proposed CCW Rules.

**O. Sections 841.135 and Section 841.440: Environmental Groups’ Proposal to Extend Post-Closure Period and Recordkeeping from 10 to 30 Yrs. is Unjustified and Unreasonably Burdensome.**

The Environmental Groups’ broad proposal to extend the post-closure care period in Section 841.440, along with the associated recordkeeping retention requirement in Section 841.135, from ten to thirty years has not been justified and imposes an unreasonable burden on owners and operators of CCW Units, particularly when applied to existing CCW Units like Midwest Generation’s which have been operating for decades. The Environmental Groups point to the proposed federal CCR Rule in support of their proposal. The proposed federal CCR Rule includes a 30-year post-closure care period only because the U.S. EPA “has no information to indicate that a different period would be appropriate for post-closure care.” 75 Fed. Reg. 35128, 35209 (June 21, 2010).”

The Environmental Groups’ proposal ignores the fact that groundwater monitoring systems already exist for CCW Units like those operated by Midwest Generation. This monitoring will continue not only through the remaining active life of these units, but also is proposed to continue through an additional ten years after their closure. If the migration of any

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<sup>24</sup> In the Matter of: Site Remediation Program and Groundwater Quality (35 Ill. Adm. Code 740 and 35 Ill. Adm. Code 620), PCB R97-11 (June 5, 1997) at p. 6.

constituents has not been detected by ten years after these units have been closed, it is unreasonable to assume that this status quo would change simply by the passage of more time. The Board is required to consider the economic reasonableness of the Proposed CCW Rules. Expanding the post-closure time period from ten to thirty years represents a significant increase in post-closure care costs. Without a reasonable scientific basis for this extension of the post-closure care period, the additional economic costs involved are not justifiable and hence, are unreasonable.

**P. Section 841.450: Environmental Groups Proposed Design Standards for New and Existing Impoundments should be deferred to a Separate Subdocket as the Agency Proposes.**

For the reasons set forth in the Illinois EPA's pending Motion to Sever, Midwest Generation requests that the Board grant the Agency's motion and include the design standards in a separate Subdocket to this rulemaking proceeding. Deferring the subject of design standards for new and existing impoundments also has the benefit of providing additional time to see if the final federal CCR Rule, currently anticipated to be issued in December 2014, contains design standards for new and existing CCW Units, and what those standards will be. (See proposed sections 257.70 through 257.72 of the federal CCR Rule at 75 Fed. Reg. 35128, 35243-45 (June 21, 2010)).

**Q. Section 841.500(f): Environmental Groups Proposed Addition to Plan Review, Approval and Modification is a Misleading Statement of Illinois Law.**

The Environmental Groups propose to add a new subparagraph (f) to Section 841.500 that provides: "The Agency's approval of a plan or modification submitted to it pursuant to this Part 841 shall not be a defense to violations of the Act or the Board's Regulations." This proposed statement should not be included in the CCW Rules enacted by the Board because it inaccurately implies that the Agency's actions in approving a plan or modification are not relevant to and should not be considered in the defense of an allegation that the plan or modification does not satisfy the requirements of the Part 841 CCW rules. If an owner or operator of a CCW Unit receives Agency approval of a plan or modification, that approval represents the Agency's conclusion that the plan or modification likely satisfies the requirements

of the CCW Rules. The Agency's approval is relevant and persuasive evidence that may be used as part of a defense both to liability and to any demand for the imposition of civil penalties.

The proposed Section 841.500(f) language is an unnecessary intrusion into evidentiary issues relating to the required burden of proof in defense of allegations regarding noncompliance with the Proposed CCW Rules, which are best left to the Illinois courts to decide. Further, the Environmental Groups' proposed language may lead to confusion as to whether a defendant may rely on the Agency's approval of plans or modifications in support of its defense to an allegation that such documents do not satisfy the requirements of the rules. The Board has rarely included such a provision in its rules. The Environmental Groups have cited no relevant precedent that such a provision is required or appropriate here. If the Environmental Groups's language is adopted, it will create a bad precedent that every time a regulation provides for Agency approval of a written submission, the rules must expressly state whether or not such an approval may be relied upon in defense of a claim of noncompliance. Midwest Generation requests that the Board decline to establish this unwise precedent.

**R. Section 841.600: Environmental Groups' Proposed Financial Assurance Requirements Exceeds Existing Legislative Authority.**

Midwest Generation has not opposed the Agency's Motion to Sever the Environmental Groups' proposed Section 841.600 containing financial assurance requirements for the closure and post-closure care of CCW Units. However, it believes there is a fundamental legal issue raised by the proposed financial assurance requirements which the Board should consider and address prior to proceeding further with these proposed requirements. The legal issue is whether the Illinois Environmental Protection Act or the Illinois Groundwater Protection Act, the only two sources of Illinois statutory authority for these proposed requirements, provide the necessary legal authority for adopting financial assurance requirements for CCW Units. Midwest Generation submits that they do not, particularly for CCW surface impoundments like those it operates where coal ash is routinely removed and used for beneficial purposes.

A review of the Illinois Groundwater Protection Act does not identify any provisions which authorize the requirement to provide financial assurance for a CCW surface impoundment.

Where the Illinois legislature deemed it appropriate to require financial assurance, it expressly set forth such a requirement in the provisions of the Illinois Environmental Protection Act. There are numerous provisions in the Act which address the need for financial assurance. These include the following:

- Section 21.a. and b.: MSWLF unit or other waste disposal operation on or after March 1, 1985, which requires a permit under subsection (d) of Section 21 of this Act;
- Section 22.19b.: Postclosure care requirements for certain sanitary landfills and waste disposal sites;
- Section 22.33(a): Landscape waste compost facilities;
- Section 22.34: Organic waste compost facilities;
- Section 22.35: Mixed municipal waste compost quality standards;
- Section 22.5: Clean Construction or Demolition Debris Fill Operations;
- Section 55(d)(6): Tire storage sites; and
- Sec. 55.2. (a) and (b): Storage, disposal, processing and transportation of used and waste tires

There is no financial assurance requirement set forth in the Act which provides the Board with the necessary legal authority to require financial assurance for the storage or disposal of “coal combustion wastes.” “Coal Combustion Waste” is a separately defined term under Section 3.140 of the Act.<sup>25</sup>

Even if it is argued that the disposal of “coal combustion wastes” may fall within the scope of the provisions of Sections 21(a) and (b) or Section 22.19(b) of the Act, because of the

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<sup>25</sup> Section 3.140 of the Act defines “Coal combustion waste” to mean: any fly ash, bottom ash, slag, or flue gas or fluid bed boiler desulfurization by-products generated as a result of the combustion of:

- (1) coal, or
- (2) coal in combination with: (i) fuel grade petroleum coke, (ii) other fossil fuel, or (iii) both fuel grade petroleum coke and other fossil fuel, or
- (3) coal (with or without: (i) fuel grade petroleum coke, (ii) other fossil fuel, or (iii) both fuel grade petroleum coke and other fossil fuel) in combination with no more than 20% of tire derived fuel or wood or other materials by weight of the materials combusted; provided that the coal is burned with other materials, the Agency has made a written determination that the storage or disposal of the resultant wastes in accordance with the provisions of item (r) of Section 21 would result in no environmental impact greater than that of wastes generated as a result of the combustion of coal alone, and the storage disposal of the resultant wastes would not violate applicable federal law.

general references in those sections to “waste disposal sites,” the ash stored in the surface impoundments operated by Midwest Generation has not been “disposed.” Under Section 3.540 of the Act, a “Waste disposal site’ is a site on which solid waste is disposed.” Hence, these surface impoundments do not constitute waste disposal sites for which financial assurance requirements are authorized by the Act.

This is particularly true in the case of the Midwest Generation ash impoundments. As described in Section II above, Midwest Generation has an established practice of periodically removing ash from its impoundments under contracts with third parties for the beneficial use of the ash. In such circumstances, the ash does not constitute a “coal combustion waste” under the Act, but instead is classified as a “coal combustion by-product” under Section 3.135 of the Act. The definition of “waste” in Section 3.135 of the Act expressly excludes “coal combustion by-product” from the definition of “waste.”

Accordingly, Midwest Generation submits that there is no legal authority under the Illinois Environmental Protection Act or the Groundwater Protection Act for imposing financial assurance requirements on ash impoundments such as those operated by Midwest Generation. As such, it would be a more efficient use of the Board’s and interested parties’ resources to review and to decide this fundamental legal issue before determining whether to proceed with any rulemaking process regarding the adoption of financial assurance requirements for CCW Units.

#### **IV. CONCLUSION**

The Agency is to be commended for having conducted an inclusive stakeholder review and comment process prior to filing its Proposed CCW Rules and for its willingness to consider additional information presented during the course of this rulemaking and to further modify the Proposed CCW Rules in response. Midwest Generation also appreciates the time and effort devoted by the Board in the extensive hearing process it conducted which allowed for extensive examination of the issues raised by participants. Because of the regulatory rulemaking process followed here, Midwest Generation has limited concerns and requests for further modifications to the Agency’s Proposed CCW Rules. These concerns primarily are addressed to the proposed inclusion in these rules of inactive CCW Units and stormwater collection areas at coal-fired

generating stations that are more properly excluded from their scope, and to the exclusion of the TACO standards under Part 742 of the Illinois environmental regulations. For inactive CCW Units, Midwest Generation submits that the proposed inclusion of all CCW Units that are alleged to be causing groundwater exceedances is contrary to Illinois law on the permissible scope of retroactive regulations. For stormwater collection areas, the proposed exclusion of only those stormwater collection areas that contain less than 1 cu. yd. of CCW is both overly restrictive and runs afoul of the right to equal protection under Illinois law. There is simply no rational basis for singling out stormwater collection areas at facilities generating CCW for the type of extensive and burdensome regulation included in the Proposed CCW Rules when no other regulated industrial activity stormwater collection areas are subject to the same or substantially equivalent requirements. Finally, the TACO regulations should be incorporated into the CCW rules adopted by the Board because this approach is consistent with both Illinois legislative intent and the Board's prior precedent for addressing impacts to the environment from industrial operations. Allowing the TACO risk-based standards to be used as the basis for pursuing appropriate corrective action in the event of a release from a CCW Unit is the appropriate and reasonable course of action for the Board to follow.

With regard to the Environmental Groups' proposals to modify the Agency's Proposed CCW Rules, Midwest Generation requests that the Board decline to adopt those elements of their proposal for the reasons stated in these comments. The Environmental Groups' proposals would impose unreasonable, unnecessary and unduly burdensome requirements upon owners and operators of CCW Units without sound technical, scientific or logical justification and without affording any real benefit to the environment or the public welfare. The Proposed CCW Rules already establish a robust and extensive regulatory program that is more than adequate to address the potential risks from the operation of coal ash surface impoundments in Illinois. The Environmental Groups' proposals addressed herein seem to serve only the purpose of advancing their stated goal of eliminating coal-fired generating stations in Illinois. While that may be their goal, it is not a goal that the Illinois legislature has incorporated into existing Illinois law. Accordingly, the Board should decline to adopt these proposals.

Respectfully submitted,

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