BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
COAL COMBUSTION WASTE (CCW)	)	
SURFACE IMPOUNDMENTS AT	)	R14-10
POWER GENERATING FACILITIES:	)	(Rulemaking-Water)
PROPOSED NEW 35 ILL. ADM. CODE	)	
841	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed with the Illinois Pollution Control Board the Responses of the Illinois Attorney General's Office, a copy of which is hereby served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,
by LISA MADIGAN, Attorney
General of the State of Illinois

BY: _____

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CERTIFICATE OF SERVICE

I, JAMES GIGNAC, an attorney, do certify that I caused the RESPONSES OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE in this matter to be served upon the persons listed in the attached Service List by email for those who have consented to email service and by U.S. Mail for all others.

JAMES P. GIGNAC

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RESPONSES OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE

The Hearing Officer's order dated January 20, 2017, directed the Illinois Environmental Protection Agency ("IEPA" or "Illinois EPA") to respond to questions posed by the Board and "welcome[d] responses to any of the questions from any other participant." Pursuant to 35 Ill. Adm. Code § 102, and the Hearing Officer's order, the Illinois Attorney General's Office, on behalf of the People of the State of Illinois (the "People"), hereby submits its responses to certain of the Board's questions set forth in Attachment A to the order. Many of our responses here reiterate comments that we made to IEPA in a June 1, 2016, stakeholder letter, attached hereto for additional reference as Exhibit A.

> **Board Question 1:** On December 16, 2016, the President signed into law the Water Infrastructure Improvements for the Nation (WIIN) Act, Title II of which is designated as the Water and Waste Act of 2016. P.L. No. 1 14-322. Section 2301 specifically addresses USEPA approval of state programs for control of coal combustion residuals. *Id*. (amending Section 4005 of the Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6901 *et seq.*).
>
> Is IEPA aware whether USEPA intends to propose rules to implement review and approval of state CCR programs? If USEPA intends to propose such rules, is it appropriate for the Board to consider CCR rules pending final adoption of those rules? Has IEPA discussed with USEPA whether its amended proposal is approvable under the revised Section 4005(d)(l) of the SWDA? If so, please comment on the results of those discussions.
>
> Revised Section 4005(d)(6) of the SWDA considers coal combustion residuals units to be sanitary landfills under specified conditions. Please comment on IEPA's rationale for proposing permitting requirements under Part 309 rather than the solid waste disposal permit requirements under Part 807 or 813.

What does IEPA consider the potential advantages and potential disadvantages of creating a state permit program addressing coal combustion residual units?

How does this legislation and potential approval of an Illinois state program affect IEPA's view of the nature of the regulations appropriate for controlling coal combustion residuals?

People's Response:

We address here the following aspect of the Board's question: "proposing permitting requirements under Part 309 rather than the solid waste disposal permit requirements under Part 807 or 813."

While the Illinois EPA has proposed a permit program pursuant to the Part 309 Regulations under Subtitle C of the Board Regulations for Water Pollution, the current proposed regulations are found in Subtitle G of the Board's Regulations aptly titled: "Waste Disposal." "Disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking or placing of any waste . . . into or on any land or water . . . so that such waste . . . or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." 415 ILCS 5/3.185 (emphasis added). Depositing coal combustion waste into surface impoundments is "disposal." Moreover, the federal coal ash rules were promulgated under Subtitle D of the Resource Conservation and Recovery Act—not the Clean Water Act. Therefore, any new permitting process specific to the coal combustion waste surface impoundments should be permitted pursuant to Section 21 of the Act and Subtitle G of the Board's Waste Disposal Regulations, not the Part 309 Regulations.

With respect to the Board's question about creating a State permitting process, the People support the inclusion of the federal minimum criteria into the State program for regulating coal ash disposal. We also note that a permitting process creates more certainty and clarity for the regulators, regulated entities, and the public, and allows for public review and input. However,

the People also believe that permitting for coal ash surface impoundments and landfills has been required under the Act for decades. For example, the Board has found that on-site coal combustion waste disposal is not exempt from Section 21 of the Act and that a waste disposal permit was required. *People v. Commonwealth Edison Co*., PCB 75-368, Slip Op. (November 10, 1976) (Commonwealth Edison violated Section 21 of the Act by disposing of coal combustion waste without a permit).

The People have stated previously that the coal ash disposal units are required to have financial assurance. This requirement arises under Section 21.1 of the Act, 415 ILCS 5/21.1, and Section 807.601 of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 807.601. Similarly, the People also state that Part 807 of the Board's Waste Disposal Regulations provides that the facilities subject to these proposed rules already are required to have sought and obtained permits from the Illinois EPA. Section 807.201 of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 807.201, requires a Development Permit for the development of any new solid waste management site or modification of an existing site. Also, Section 807.202 of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 807.202, requires an Operating Permit for both New Solid Waste Management Sites and existing ones.

Accordingly, any permit process under this proposal should be consistent with the Board's existing Waste Disposal Regulations in Part 807 and should be used to clarify and update the waste disposal regulations specific to coal combustion waste disposal and the federal minimum criteria.

> **Board Question 2:** In its motion to amend its rulemaking proposal, IEPA identifies six Illinois facilities with surface impoundments that are exempt from USEPA rules: Vermilion; Meredosia; Crawford; Pearl; Venice; and Hutsonville. Mot. Amend at 5. IEPA proposes to exempt the last four of those six facilities from its amended rules. IEPA states that "[t]hese sites should be treated

> differently because they already have an Agency approved closure plan. *Id*. at 6; *see id*. at 5, n.1-4.
>
> Please clarify whether these six facilities are exempt from USEPA rules under 40 C.F.R. § 257.50(d) or (e).
>
> IEPA does not propose to exempt Vermilion or Meredosia from its amended rules. See Mot. at 5. Please explain why IEPA's amended proposal does not exempt these two facilities from the proposed rules. Please provide the status of any remedial action or closure activities at any impoundments at Vermilion and Meredosia.

People's Response:

Yes, the identified facilities are exempt from USEPA's coal ash regulations pursuant to 40 C.F.R. § 257.50(e) (exempting coal ash impoundments at electric utilities and independent power producers that ceased producing electricity prior to October 19, 2015).

Illinois has several inactive power plants with coal ash pits that have not undergone a closure process. As the Environmental Groups point out:

> Several Illinois power generating stations have closed in recent years, including Vermilion Generating Station (3 ash pits), Pearl Station (1 ash pit), Hutsonville (5 ash pits), Grand Tower Station (1 ash pit), Meredosia Station (4 ash pits), Venice (2 ash pits), and Crawford (1 ash pit). These facilities do not pose a lesser risk to contamination of Illinois waters. For example, Illinois EPA has issued violation notices to both Vermilion and Baldwin for groundwater contamination.

Environmental Groups' Status Report (March 4, 2015) at 9.

Illinois EPA correctly and appropriately recognizes that there is no reason to treat impoundments at inactive power plants different than impoundments at active plants. For its part, USEPA "agrees that inactive CCR surface impoundments that have not been properly closed warrant regulatory oversight." EPA-HQ-RCRA-2009-0640-12126 at 26 (USEPA Response to Comments, Volume 3). Impoundments at inactive power plants are potentially more concerning from a regulatory perspective because the sites are not generating revenue and could be de-prioritized by owners and operators as a legacy/liability site instead of an asset that

needs to be maintained. Moreover, USEPA "agrees that if CCR is left disposed in closed units that are unlined and uncapped, and therefore exposed to groundwater and infiltrating rain (surface water), that groundwater contamination can continue for many years." EPA-HQ-RCRA-2009-0640-12132 at 57 (Response to Comments, Volume 9).

For example, the Vermilion plant, which has been closed for several years, would not be required to comply with the federal minimum criteria even though it has ash ponds that continue to pose a threat to both the Middle Fork of the Vermillion River and groundwater at and around the site. *See, e.g.*, Public Comment No. 3939 (R14-10PC). However, as the People stated in response to the Board's first question above, Section 21 and 21.1 of the Act, 415 ILCS 5/21 and 21.1, and Part 807 of the Board's Waste Disposal Regulations, have required for decades that coal combustion waste disposal units: (1) obtain development permits, 35 Ill. Adm. Code 807.201; (2) obtain operating permits, 35 Ill. Adm. Code 807.202; and (3) provide financial assurance, 35 Ill. Adm. Code 807.601. Consequently, these proposed Part 841 Regulations should apply to both active and inactive sites.

In addition, while structural integrity is within the purview of the Illinois Department of Natural Resources ("IDNR") (*see* 17 Ill. Adm. Code Part 3702), any such failures at inactive plants could cause major environmental impacts. Significantly, USEPA states that inactive impoundments are "as susceptible to structural failure as units currently receiving CCR, given that they still contained CCR and maintained an ability to impound liquid (*i.e.*, the unit had not been breached)." *See* 80 Fed. Reg. at 21,313 (April 17, 2015). Moreover, IDNR maintains regulatory oversight of the impoundment/dam whether the plant is generating electricity or not. *See* 17 Ill. Adm. Code Part 3702.50 (providing requirements for approval of permits for removal of dams). Therefore, IEPA should maintain regulatory oversight of impoundments at inactive

plants, and the People support IEPA's proposal to include inactive power plant locations within the state regulatory proposal.

However, IEPA's amended proposal provides an exemption for any surface impoundment that is not subject to the federal rules and "that has commenced closure of the [coal ash] surface impoundment prior to" the effective date of the state regulations under IEPA approval. *See* Proposed Section 841.105(c). While IEPA states that it is "confident that all remedial action performed at these sites will be in accordance with state law and will meet or exceed the federal standards," IEPA Motion at 6, it appears that the proposed rule would not require this class of surface impoundments to meet the post-closure care requirements in Section 841.130(c)—and potentially the requirement to maintain financial assurance. The current affected sites include Crawford, Pearl, Venice, and Hutsonville. The People recommend that the Board delete the proposed exemption in Section 841.105(c).

> **Board Question 3:** Since IEPA filed its original rulemaking proposal, the electric generating industry and its facilities have undergone changes in ownership, ownership structure, and financial condition including bankruptcy. Several entities that own or control CCR units in Illinois have been subject to voluntary bankruptcy proceedings, including at least one current proceeding. Some entities that own or control CCR units have financial structures that appear to insulate parent corporate entities from financial responsibility in certain instances. Environmental Groups and the Office of the Attorney General have favored rules requiring financial assurance for CCR units, particularly as the CCR units may exist after the electric generating stations they serve cease operations.
>
> How does IEPA understand its ability to require entities that own or operate a CCR unit to meet financial obligations concerning the closure and post-closure care of CCR units?
>
> If the entity that owns or operates a CCR unit is unable to meet its financial obligations concerning closure **and** post-closure care of one or more CCR units, what steps can IEPA now take to require corporate parents to meet those financial obligations?

People's Response:

Illinois EPA witnesses and representatives have stated that the agency does not believe it has the authority to propose financial assurance requirements in this rulemaking but have not precisely articulated the basis for this position. Tr. 2/27/14 at 54-57. The People have stated that IEPA and the Board not only have the authority but State law already mandates financial assurance. *See, e.g.*, Post-Hearing Comments of the Illinois Attorney General's Office, R14-10 (Oct. 20, 2014) at 6-16. Enacting financial assurance requirements tailored specifically for coal ash sites (as opposed to the current requirements for all solid waste disposal, including of coal ash, found in 35 Ill. Adm. Code 807.601) and immediately working with subsidiaries and parent companies to meet the requirements are the steps that IEPA and the Board must take. The point of financial assurance is to guard against future scenarios of bankrupt, out-of-business, or "ring-fenced" corporate entities being unable, or claiming to be unable, to fulfill their closure and post-closure care obligations.

> **Board Question 4:** IEPA met with participants on May 3, 2016 and asked participants whether state rules should require financial assurance. IEPA received comments and made minor changes to its proposed rules but maintained its position that state rules should not require financial assurance. Please summarize participants' comments and positions on this issue and elaborate on IEPA's position that state rules should not require financial assurance.
>
> If state rules do not require financial assurance, do local governments such as counties, municipalities, and townships have the authority to impose such a requirement? If so, please elaborate on that authority.

People's Response:

As noted in the question above, the Office of the Attorney General has advocated for financial assurance requirements specific to coal ash disposal throughout this rulemaking proceeding. *See, e.g.*, Post-Hearing Comments of the Illinois Attorney General's Office, R14-10 (Oct. 20, 2014). We continued to do so in the stakeholder process. *See* Illinois Attorney General's Office Letter to IEPA, June 1, 2016 at 4-5 (attached as Exhibit A).

The People urge the Board to acknowledge existing authority under Sections 21 and 21.1 of the Act, 415 ILCS 5/21 and 21.1, as well as the Part 807 Waste Disposal Regulations, and require financial assurance specific to coal ash disposal. Thereafter, the Board should direct the agency and the parties to develop a proposal for inclusion in first notice rules consistent with existing law and current economic realities regarding the coal industry—*i.e.*, with no self-bonding allowed as part of any financial assurance regulations.

> **Board Question 5:** As IEPA knows, on December 19, 2014, USEPA finalized rules for disposal of CCR from electric utilities. The rules were published in the Federal Register (80 Fed. Reg. 21302-21501 (Apr. 17, 2015)) and became effective on October 19, 2015 (80 Fed Reg. 37988-89 (July 2, 2015)). While USEPA "strongly encourages the states to adopt at least the federal minimum criteria into their regulations" (80 Fed. Reg. 21302-21501 (Apr. 17, 2015)), IEPA recommends that the Board should not incorporate the federal rules into its proposed Part 841. IEPA Rpt. at 2, 7. What were the chief factors leading IEPA to this recommendation?

People's Response:

The People believe that the federal minimum criteria should be incorporated into the state regulations. As noted in the Board's question above, USEPA has strongly encouraged states to incorporate the minimum federal criteria into their regulations and has provided several reasons why states should do this. First, as stated in the regulatory preamble to the federal rules, the process of ensuring consistency with the minimum federal criteria also allows for consideration of "state regulations [that] are more stringent than or otherwise go beyond the federal minimum criteria." 80 Fed. Reg. 21,431 (April 17, 2015). Second, the process "can greatly assist the regulated community to understand the regulatory structure under which they will be [or are] operating." *Id*. Third, the process can "assist the general public in understanding the regulations and thereby their ability to monitor industry's compliance with the rule." *Id*.

For example, "to ensure there will be no reasonable probability of adverse effects on health or the environment from the disposal of [coal combustion residuals]," the federal minimum criteria imposes location restrictions on existing coal ash impoundments related to placement above the uppermost aquifer (no closer than 5 feet), in wetlands, and in unstable areas. 80 Fed. Reg. at 21,304; *see also* 40 CFR 257.60 through 257.64. Surface impoundments that "do not meet these restrictions can retrofit or make appropriate engineering demonstrations to meet this criteria." 80 Fed. Reg. at 21,304. The federal rule "requires owner or operators of existing CCR units that cannot make the required demonstrations to close, while owners or operators of new CCR units and all lateral expansions who fail to make the required demonstrations are prohibited from placing CCR in the CCR unit." *Id*. Compliance with these locational standards is critical, and they should be included in our state regulatory program as well.

In addition, although entities must currently comply with the federal minimum criteria regardless of whether they are incorporated into state regulations, enforcement can only be accomplished by USEPA under RCRA's prohibition on open dumping[1] or through a citizen suit filed in federal court. Incorporating the federal minimum criteria into our state regulations would allow the State of Illinois to utilize its full enforcement abilities versus having citizen suits as the only option under the federal rules. In addition, incorporation would allow for the State to obtain civil penalties for any violations, which would otherwise go to the federal government in any citizen suits for violations of RCRA. For these reasons, IEPA should include the federal minimum criteria in these regulations.

> **Board Question 6:** IEPA's motion to amend notes that USEPA has established self-implementing requirements "that owners or operators of regulated units can implement without any interaction with regulatory officials." 80 Fed. Reg. 21

[1] *See* 42 U.S.C. 6945(d)(4). The authority for USEPA to utilize Sections 3007 and 3008 of RCRA (42 U.S.C. 6927 and 6928) with respect to coal combustion residuals units was granted as part of the Water Infrastructure and Improvements for the Nation ("WIIN") Act of 2016.

330 (Apr. 17, 2015); *see* Mot. Amend at 4. Please clarify whether USEPA has authority or mechanisms with which to enforce its CCR rules.

People's Response:

As discussed above in response to Board Question 5, USEPA was recently granted the authority to use 42 U.S.C. §§ 6927 and 6928 with respect to the federal coal ash rules.

Board Question 7: In their response to IEPA's motion to amend, Environmental Groups state that IEPA's proposal does not include federal reporting requirements and suggest that incorporating those requirements into Board rules will strengthen their enforcement. Please explain why IEPA has not proposed reporting requirements in its amended proposal.

People's Response:

Under the federal rule, all coal ash unit owners must make all data and reports available on public websites. Incorporating the federal reporting requirements into our state rules will allow for state enforcement mechanisms to ensure the requirements are being followed. In addition, because the federal rules do not apply to power plants that ceased generating electricity by October 19, 2015, the Board should require in our state rules that sites at these inactive power plants post the same information. The Board should further direct IEPA to consider whether additional reporting and disclosure should be required on the websites pursuant to state rule. For example, maintaining groundwater monitoring data would provide the public with valuable information about the condition of groundwater and potentially drinking water at or near the sites.

Board Question 8: In their response to IEPA's motion to amend, Environmental Groups note that IEPA's July 2014 proposal required that corrective action plans include an alternative impact analysis. Groups' Resp. at 4. Proposed Section 841.125(d)(9) of IEPA's proposal requires that a groundwater management zone application contain a "[d]escription of selected remedy and why it was chosen" (emphasis added).

Does IEPA intend that describing the choice of a remedy encompasses assessing alternatives to the proposed remedy? If so, would IEPA consider amending its

proposed Section 841.125(d)(9) to include the elements of this assessment? If not, please explain why IEPA has not proposed to require this assessment in a groundwater management zone application.

People's Response:

The People support the inclusion of a requirement that an applicant for a groundwater monitoring zone include an assessment of alternatives to the proposed remedy. On July 17, 2014, IEPA submitted Prefiled Answers in which it proposed amendments to its initial rulemaking proposal. IEPA proposed, among other things, "requiring that the owner or operator conduct an alternative impact analysis, which includes assessment of alternatives to the proposed corrective action or [closure] plan." IEPA's Prefiled Answers, R14-10 (July 17, 2014), Attachment A, at 6-7. IEPA also proposed requiring that the owner or operator include in any proposed corrective action or closure plan an evaluation of 11 factors to assess "risk to human health and the environment." *Id*. at 7. IEPA's Motion to Amend provides no basis to discard the alternative impact analysis and evaluation of risk factors that IEPA earlier deemed essential to its rulemaking proposal. In any First Notice rule, the Board should include both the alternative impact analysis and evaluation of risk factors with respect to applications for groundwater management zones under Section 841.120.

Board Question 9: In their response to IEPA's motion to amend, Environmental Groups note that IEPA's July 2014 proposal at Section 841 .500(c)(3) includes 11 factors for reviewing plans for corrective action, closure, and post-closure care.

Does IEPA intend to consider these factors when reviewing proposed plans under the permit provisions at Part 309? If so, please identify the authority or authorities under which it can evaluate these factors. If not, please explain why IEPA has not proposed to require consideration of these factors in its review of these plans.

People's Response:

As discussed above in response to Board Question 8, IEPA in 2014 viewed it important to require that owners and operators submitting corrective action and closure plans include both

an alternative impact analysis and an evaluation of 11 specific human health and environmental risk factors. IEPA's Prefiled Answers, R14-10 (July 17, 2014), Attachment A, at 6-7. Further, IEPA proposed that it be required to consider those same 11 risk factors when reviewing a corrective action plan, closure plan, or post closure plan. *Id*. at 7-8. Again, IEPA has provided no basis in its Motion to Amend to discard these requirements.

With respect to IEPA's authority under Part 309, we note that the existing regulation on the content of applications for construction and operating permits under Part 309 Subpart B authorizes IEPA to "adopt procedures requiring such additional information as is necessary to determine whether the treatment works, pretreatment works, sewer or wastewater source will meet the requirements of the Act and this Chapter." 35 Ill. Adm. Code 309.221(b). Also, as mentioned above, the Board's more appropriate Part 807 Waste Disposal Regulations provide IEPA with similar authority. *See* 35 Ill. Adm. Code 807.205(b).[2] IEPA therefore could require that applications for construction and operating permits for coal ash impoundments include both an alternative impact analysis and an evaluation of the 11 earlier-identified risk factors.

As for IEPA's consideration of those submissions, the primary standard for issuance of a construction or operating permit under Part 309 Subpart B is that "[t]he Agency shall not grant any permit required by this Subpart B . . . unless the applicant submits adequate proof that the treatment works, pretreatment works, sewer, or wastewater source will be constructed, modified, or operated so as not to cause a violation of the Act or of this Subtitle . . . ." 35 Ill. Adm. Code 309.241. Similarly, IEPA cannot issue a permit under Section 807.207(a) of the Board's Waste Disposal Regulations, 35 Ill. Adm. Code 807.207(a), unless the applicant submits adequate proof that the solid waste management site "will be developed, modified, or operated so as not to cause

[2] Section 807.205(b) of the Board's Waste Disposal Regulations provides that "[t]he Agency may adopt procedures requiring such additional information as is reasonably necessary to determine whether the waste management site will meet the requirements of the Act and regulations."

a violation of the Act or the Rules." The 11 risk factors previously identified by IEPA are consistent with consideration of whether a proposed corrective action or closure plan, or more generally operation of an impoundment, will cause a violation of the Act. For example, if "CCW will remain in contact with the natural water table after closure," this could constitute at a minimum an ongoing cause or threat of water pollution in violation of Section 12(a) of the Act, 415 ILCS 5/12(a), and a water pollution hazard in violation of Section 12(d) of the Act, 415 ILCS 5/12(d). IEPA's Prefiled Answers, R14-10 (July 17, 2014), Attachment B at 47 (proposed Section 841.500(c)(3)(B)(ii)).

In any First Notice rule, the Board should include both the alternative impact analysis and evaluation of risk factors with respect to applications for construction and operating permits under Section 841.130.

> **Board Question 10:** In their response to IEPA's motion to amend, Environmental Groups note IEPA's statement that state operating permits will include the minimum USEPA requirements, but they assert that the rule does not include these requirements. IEPA's stated purpose in Section 841.100 is that "[c]onstruction permits, operating permits, and groundwater management zones issued pursuant to this Part must be at least as stringent as the federal requirements found in Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments,' 40 C.F.R. Part 257, Subpart D." Please indicate how IEPA's amended proposal incorporates minimum USEPA requirements into a state permit.

People's Response:

The People agree with the Environmental Groups that the amended proposal should provide additional clarity with respect to the proposed use of state operating permits. The minimum requirements should be set forth in the rules so that regulated entities and the public will know what to expect with regard to the basic content of these permits. Leaving open the issue of what specific requirements to include in individual permits, without any minimum

requirements in the regulations, could result in inconsistencies or adjustments from permit to permit that may result in unnecessary litigation or compliance disputes.

> **Board Question 11:** In their response to IEPA's motion to amend, Environmental Groups acknowledge that IEPA's amended proposal provides for public comment on an application for a groundwater management zone but state that "not every site will necessarily have a GMZ." Groups' Resp. at 8. IEPA anticipates that facilities will seek a groundwater management zone to obtain an alternative groundwater quality standard during corrective action and to avoid enforcement. Mot. Amend at 6-7, citing 35 Ill. Adm. Code 620.450.
>
> Please comment on any opportunities for public participation in the permitting process under IEPA's amended proposal for any facility that pursues corrective action without seeking a groundwater management zone.

People's Response:

As an initial matter, obtaining a groundwater management zone is not a defense to enforcement and the imposition of civil penalties. Rather, it may be a remedy for violations of groundwater standards, only if it is effective at addressing contamination in a manner that is protective of human health and the environment (*i.e.*, achieving compliance with Board Regulations and the Act).

If a construction-and-operating-permit framework is used in first notice rules, the Board should include notice and comment provisions in Section 841.130 of IEPA's amended proposal. The construction and operating permits should be posted and comments handled the same way as GMZs (groundwater management zones), *see* Section 841.125. These are important permits because of the potential longevity of the operating permit and the finality (*i.e.*, closure of the impoundment) involved with construction permits. Also, in response to the Board's question, requiring notice and comment for construction permits would provide for public participation in <u>all</u> corrective action, not just those involving a GMZ.

> **Board Question 17:** In the course of this proceeding, the Board has received detailed information on CCR facilities in Illinois, including Hearing Exhibit 14

admitted on February 27, 2014. Please provide a thorough and complete updated inventory of CCR facilities in Illinois: location including GPS and links to Google Earth; owner; entity responsible for site operation if different from owner; number of CCR surface impoundments at each facility; current and maximum volume of CCR in each CCR surface impoundment; and current status regarding corrective action or closure of each CCR surface impoundment.

People's Response:

The Board should also require IEPA to provide updates on groundwater monitoring data from coal ash facilities that the agency has received since last providing or describing this information in the docket. Illinois EPA should also provide an update on groundwater remediation activity occurring at Illinois coal ash sites, which the agency previously communicated through its ash impoundment strategy webpage (last updated October 2011). This information will assist the Board and the public in better understanding the environmental status of coal ash sites in Illinois and what requirements should be added to the federal minimum criteria to ensure that we "restore, protect, and enhance the groundwaters of the State, as a natural and public resource." 415 ILCS 55/2(b).

Dated: March 6, 2017

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
by LISA MADIGAN, Attorney
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Exhibit A

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

Lisa Madigan
ATTORNEY GENERAL

June 1, 2016

VIA ELECTRONIC MAIL

Joanne Olson
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Re: Comments on Draft Amended Proposal for Part 841, Coal Combustion Waste Surface Impoundments at Power Generating Facilities

Dear Ms. Olson:

On behalf of the Office of the Illinois Attorney General, we are writing to provide our comments on the Illinois Environmental Protection Agency's ("Illinois EPA") draft amended proposal for 35 Ill. Adm. Code Part 841, Coal Combustion Surface Impoundments at Power Generating Facilities. The Agency circulated the draft to stakeholders on May 3, 2016, and held a stakeholder meeting on May 9, 2016.

1. **Illinois EPA should incorporate the minimum federal criteria into these regulations.**

The United States Environmental Protection Agency ("USEPA") is strongly encouraging states to incorporate the minimum federal criteria into their regulations and has provided several reasons why states should do this.[1] First, as stated in the regulatory preamble, the process of ensuring consistency with the minimum federal criteria also allows for consideration of "state regulations [that] are more stringent than or otherwise go beyond the federal minimum criteria." 80 Fed. Reg. 21,431 (April 17, 2015). Second, the process "can greatly assist the regulated community to understand the regulatory

[1] *See, e.g.,* USEPA, *Frequent Questions About the Coal Ash Rule, No. 22*, available at http://www2.epa.gov/coalash/frequent-questions-about-coal-ash-disposal-rule#22 ("EPA is strongly encouraging States to adopt at least the federal minimum criteria into their regulations. EPA recognizes that some States have already adopted requirements that go beyond the minimum federal requirements. This rule will not affect these State requirements; moreover, the final rule does not preclude a State from adopting more stringent requirements where they deem that appropriate.").

structure under which they will be [or are] operating." *Id*. Third, the process can "assist the general public in understanding the regulations and thereby their ability to monitor industry's compliance with the rule." *Id*.

For example, "to ensure there will be no reasonable probability of adverse effects on health or the environment from the disposal of [coal combustion residuals]," the federal minimum criteria imposes location restrictions on existing coal ash impoundments related to placement above the uppermost aquifer (no closer than 5 feet), in wetlands, and in unstable areas. 80 Fed. Reg. at 21,304; *see also* 40 CFR 257.60 through 257.64. Surface impoundments that "do not meet these restrictions can retrofit or make appropriate engineering demonstrations to meet this criteria." 80 Fed. Reg. at 21,304. The federal rule "requires owner or operators of existing CCR units that cannot make the required demonstrations to close, while owners or operators of new CCR units and all lateral expansions who fail to make the required demonstrations are prohibited from placing CCR in the CCR unit." *Id*. Compliance with these locations standards is critical.

In addition, although entities must comply with the federal minimum criteria regardless of whether they are incorporated into state regulations, USEPA cannot enforce these regulations. Enforcement can only be accomplished through a citizen suit filed in federal court. Incorporating the federal minimum criteria into our state regulations would allow the State of Illinois to utilize its full enforcement abilities versus having citizen suits as the only option under the federal rules. In addition, incorporation would allow for the increased civil penalties provided for violations of RCRA. For these reasons, Illinois EPA should include the federal minimum criteria in these regulations.

However, in the event that Illinois EPA declines to include the federal minimum criteria in its proposal, it should provide its rationale to the Board in writing. *See* Order of the Board, R14-10 (March 17, 2016) at 4 (anticipating that parties will address USEPA's strong encouragement of states to do so); Reply Comments of the Illinois Attorney General's Office to the Environmental Groups' Motion to Reopen Rulemaking, R14-10 (Oct. 8, 2015).

2. Illinois EPA should provide updated information on groundwater monitoring and remediation activities at Illinois coal ash facilities.

In this rulemaking docket and in separate online efforts, Illinois EPA has provided helpful information about the location, activity, size, and compliance status of coal ash impoundments in Illinois.[2] As part of its submittal to the Board, Illinois EPA should consider providing updates on groundwater monitoring data from coal ash facilities that it has received since last providing or describing this information in the docket. Illinois EPA should also provide an update on groundwater remediation activity occurring at Illinois coal ash sites, which it previously communicated through its ash impoundment strategy webpage (last updated October 2011).

This information will assist the Board and the public in better understanding the environmental status of coal ash sites in Illinois and what requirements should be added to the federal minimum criteria to

[2] *See* Exhibit 14 (February 27, 2014 (spreadsheet including names of facilities, NPDES numbers, and number of ash ponds); Illinois EPA Ash Impoundment Strategy: http://www.epa.illinois.gov/topics/water-quality/watershed-management/ash-impoundment/index.

ensure that we "restore, protect, and enhance the groundwaters of the State, as a natural and public resource." 415 ILCS 55/2(b).

3. Illinois EPA's proposal to apply coal ash regulations to inactive or former power plant sites is critical.

Illinois EPA opened this proceeding in 2013 "to fill a regulatory gap in the Board's rules governing [coal combustion waste] surface impoundments," noting that the Board's regulations "do not provide a method for closure or corrective action at these facilities." Statement of Reasons at 8. Two and a half years later, a regulatory gap remains, as there are yet no federal standards applicable to coal ash impoundments at power plants that have ceased producing electricity. 80 Fed. Reg. 21,303 (April 17, 2015).

Illinois has several inactive power plants with coal ash pits that have not undergone a closure process. As the Environmental Groups point out:

> Several Illinois power generating stations have closed in recent years, including Vermilion Generating Station (3 ash pits), Pearl Station (1 ash pit), Hutsonville (5 ash pits), Grand Tower Station (1 ash pit), Meredosia Station (4 ash pits), Venice (2 ash pits), and Crawford (1 ash pit). These facilities do not pose a lesser risk to contamination of Illinois waters. For example, Illinois EPA has issued violation notices to both Vermilion and Baldwin for groundwater contamination.

Environmental Groups' Status Report (March 4, 2015) at 9.

Illinois EPA correctly and appropriately recognizes that there is no reason to treat impoundments at inactive power plants different than impoundments at active plants. For its part, USEPA "agrees that inactive CCR surface impoundments that have not been properly closed warrant regulatory oversight." EPA-HQ-RCRA-2009-0640-12126 at 26 (USEPA Response to Comments, Volume 3).[3] Impoundments at inactive power plants are potentially more concerning from a regulatory perspective because the sites are not generating revenue and could be de-prioritized by owners and operators as a legacy/liability site instead of an asset that needs to be maintained. Moreover, USEPA "agrees that if CCR is left disposed in closed units that are unlined and uncapped, and therefore exposed to groundwater and infiltrating rain (surface water), that groundwater contamination can continue for many years." EPA-HQ-RCRA-2009-0640-12132 at 57 (Response to Comments, Volume 9).[4]

For example, the Vermilion plant, which has been closed for several years, would not be required to comply with the federal minimum criteria even though it has ash ponds that continue to pose a threat to

[3] EPA-HQ-RCRA-2009-0640-12126 (USEPA Response to Comments, Volume 3) is available at: https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-RCRA-2009-0640-12126&disposition=attachment&contentType=pdf.

[4] EPA-HQ-RCRA-2009-0640-12132, Response to Comments, Volume 9, is available at: https://www.regulations.gov/contentStreamer?documentId=EPA-HQ-RCRA-2009-0640-12132&disposition=attachment&contentType=pdf

both the Middle Fork of the Vermillion River and groundwater at and around the site. *See, e.g.*, Public Comment No. 3939 (R14-10PC).[5]

In addition, while structural integrity is within the purview of the Illinois Department of Natural Resources ("IDNR") (*see* 17 Ill. Adm. Code Part 3702), any such failures at inactive plants could cause major environmental impacts. Significantly, USEPA states that inactive impoundments are "as susceptible to structural failure as units currently receiving CCR, given that they still contained CCR and maintained an ability to impound liquid (*i.e.*, the unit had not been breached)." *See* 80 Fed. Reg. at 21,313. Moreover, IDNR maintains regulatory oversight of the impoundment/dam whether the plant is generating electricity or not. *See* 17 Ill. Adm. Code Part 3702.50 (providing requirements for approval of permits for removal of dams). Therefore, the Illinois EPA should maintain regulatory oversight of impoundments at inactive plants.

Additional plants or units are likely to retire in the near future, including Wood River, Will County, Baldwin, and Newton. It is critical that Illinois have regulations in place that will apply to coal ash surface impoundments located at inactive power plants.

To provide additional clarity to the rules, Illinois EPA should consider an amendment to the applicability section to clarify that inactive power plant locations are included in the regulatory proposal as follows:

> "Except as specified in subsection (b) of this Section, this Part applies to all surface impoundments containing coal combustion waste at <u>active or inactive</u> electric utilities and independent power producers."

4. Illinois EPA should delete the exemption in Section 841.105(b)(4).

The proposed rules provide an exemption for any surface impoundment that "completed closure of the CCW surface impoundment as specified in a construction permit or groundwater management zone approved by the Agency or state construction permit issued by the Agency" prior to the effective date of the rules. It appears that the proposed rule would not require this class of surface impoundments to meet the post closure care requirements in Section 841.130(c)—and potentially the requirement to maintain financial assurance. This proposal does not appear to be an environmentally sound policy, and we recommend that the Illinois EPA delete this exemption.

5. Illinois EPA should request an order from the Board as to whether there is authority to require financial assurance.

The Board stated its anticipation that the parties would address "[w]hether state rules should require financial assurance." Order at 4. The topic of financial assurance has been discussed previously. *See, e.g.*, Post-Hearing Comments of the Illinois Attorney General's Office, R14-10 (Oct. 20, 2014) at 6-16.

To date, Illinois has not required financial assurance for coal ash impoundment-dumps in Illinois. In the related coal mining industry, companies have been allowed to "self-bond" their reclamation

[5] Public Comment No. 3939 in R14-10PC is available at: http://www.ipcb.state.il.us/documents/dsweb/Get/Document-92100.

obligations. Today, major coal mining companies are declaring bankruptcy and states are struggling to ensure there will be adequate resources for which to clean up and reclaim mining sites.[6] On the power plant side, Dynegy and NRG continue to announce plans to retire coal plants (Dynegy's Wood River and units at Baldwin and Newton; NRG's Will County 4).[7,8] On February 29, 2016, NRG posted a $6.4 billion loss for the fourth quarter of 2015, primarily from lowering the asset values of its coal plants.[9]

The Board and Illinois EPA must take steps to ensure that the companies who create coal ash disposal sites maintain the financial ability to properly close them, and to remediate any contamination they cause. *See* 415 ILCS 5/2(b) (emphasizing need to "assure that adverse effects upon the environment are fully considered and borne by those who cause them"). The need for independent financial assurance to ensure that there are sufficient resources available for the closure of Illinois' coal ash impoundments must be given close consideration by Illinois EPA and the Board.

Illinois EPA witnesses and representatives have stated that the agency does not believe it has the authority to propose financial assurance requirements in this rulemaking but have not precisely articulated the basis for this position. Tr. 2/27/14 at 54-57. This legal question is an impediment to a critical determination of how a financial assurance element could be structured and implemented in this context. Illinois EPA should request, or suggest, that the Board issue an interim order resolving this question of legal authority. If the Board agrees that financial assurance can be required here, then parties can and should immediately begin working on the substance of a regulatory proposal so that it could be included in a first notice.

6. The amended proposal should include groundwater monitoring provisions.

The proposed rules do not require any groundwater monitoring, and Illinois EPA should include this requirement in the rule. While many facilities may already have monitoring programs in place, the rules need to address new impoundments as well. The lack of groundwater monitoring requirements in the proposed amendments should be remedied with appropriate requirements applicable to all sites that should apply unless more specific and equivalent requirements are set forth in an operating permit issued by the agency.

7. There should be opportunity for public comment on the operating and construction permits.

Illinois EPA should reconsider its proposal not to allow for any notice and comment on construction and operating permits. *See* Section 841.130. These could be posted and handled just like GMZs (groundwater management zones) and are important because of the potential longevity of the operating permit and the finality (*i.e.*, closure of the impoundment) involved with construction permits.

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[6] *See, e.g.*, Wyoming, West Virginia, and Illinois; Alpha, Arch, and Peabody mining companies: http://www.insurancejournal.com/news/midwest/2016/02/16/398742.htm.

[7] *See* Dynegy press release dated May 3, 2016: http://www.businesswire.com/news/home/20160503007094/en/Dynegy-Shut-Multiple-Central-Southern-Illinois-Coal-Fueled

[8] *See* NRG statement of December 9, 2015 (NRG is the current owner of Midwest Generation): http://www.chicagobusiness.com/article/20151209/NEWS11/151209785/days-appear-numbered-for-last-remaining-coal-plant-in-romeoville

[9] http://fuelfix.com/blog/2016/02/29/nrg-energy-posts-6-billion-loss/

8. **The coal ash regulations should continue to apply to coal ash impoundments even if the coal ash has been removed.**

We are concerned that a facility could argue, under the current applicability language, that once coal ash has been removed from an impoundment, that impoundment is no longer subject to the coal ash regulations because it is no longer "containing" coal ash. Yet there could still be contaminants in the soil or groundwater from historic coal ash disposal that continue to cause or threaten groundwater contamination.

Therefore, we suggest a revision to the applicability language as follows:

> "Except as specified in subsection (b) of this Section, this Part applies to all surface impoundments containing or having contained coal combustion waste at electric utilities and independent power producers."

9. **The definition of facility should be revised to include any adjacent or proximate property under common control or ownership.**

Under the proposed definition of "facility," there is the potential that a coal ash surface impoundment could be located across a road from a power plant site and therefore arguably not "contiguous," not part of the "facility," and not included in the coal ash regulations. We suggest the following addition to the definition of "facility":

> "Facility" means all contiguous land, and any adjacent or proximate property under common control or ownership, and structures, other appurtenances, and improvements on the land, used for treating, storing, disposing or otherwise conducting solid waste management of CCW. A facility may consistent of several treatment, storage, or disposal units.

10. **The public review process for the GMZ should be adjusted.**

First, in the proposed rules, Illinois EPA commits to posting all applications to create new or modify existing groundwater management zones ("GMZs") on its website and accept comments for 30 days thereafter. Due to this narrow timeframe, Illinois EPA should provide a system that allows concerned citizens the opportunity to sign up for notice of any new postings via email.[10]

Second, the proposed rules do not require Illinois EPA to hold a public hearing or prepare a written response to comments it receives. However, Illinois EPA may hold a Part 164 hearing if warranted and at the discretion of the Illinois EPA. Therefore, we suggest the following amendment to Section 841.125(c):

[10] Illinois EPA maintains or has maintained a similar list for persons interested in notice of applications to construct air permitting sources.

> The Agency is not required to hold a public hearing pursuant to 35 Ill. Adm. Code 164 or prepare a written response to comments received. However, nothing shall preclude the Illinois EPA from holding a public hearing pursuant to 35 Ill. Adm. Code 164, when the Director of the Agency determines that a hearing is in the public interest.

Third, Illinois EPA has committed to posting its final decisions on GMZ applications on its website for at least 30 days. *See* Section 841.125(d). Illinois EPA should maintain access on its website to its final GMZ decision and the application documents while the GMZ is pending.

11. The Agency should provide the Board with an update on the litigation over the federal coal ash rule.

On April 18, USEPA filed an unopposed motion for voluntary remand of specific portions of the federal coal ash regulations. In its submittal to the Board, Illinois EPA should consider providing its views on the impact of the remand motion and its effect on Illinois EPA's proposal, assuming it is granted by the court. Parties could then comment to the Board if they have different views about this updated information on the federal litigation and its application to Illinois EPA's proposal.

12. Illinois EPA should alert the Board to the publicly available coal ash websites that are now being maintained by owners and operators and should require in these rules that sites at inactive power plants post the same information.

Under the federal rule, all coal ash unit owners must make all data and reports available on a public website. Illinois EPA should direct the Board's attention to the Illinois webpages that are now available for review.[11]

Illinois EPA should further consider whether additional reporting and disclosure should be required on the websites pursuant to state rule. For example, maintaining groundwater monitoring data would provide the public with valuable information about the condition of groundwater at the sites.

13. Illinois EPA should ensure that the Mahomet Aquifer is not impacted by coal combustion waste disposal.

As mentioned in Comment No. 1 above, the federal minimum criteria provide location restrictions concerning aquifers. On March 11, 2015, USEPA designated a portion of the Mahomet Aquifer system as a sole source aquifer.[12] USEPA reports that "[m]ore than half of the population in east-central Illinois relies on the Mahomet Aquifer system as a source of drinking water." A review of the map for the portions of the Mahomet Aquifer designated as a sole source indicates that there are some

[11] The websites available are:
http://www.nrg.com/legal/coal-combustion-residuals/
http://www.dynegy.com/contact/ccr-compliance-documents
http://ehs.cwlp.com/
http://www.sipower.org/p/dept_envfuels.php
[We were not able to locate the webpage for Prairie State Energy Campus]

[12] USEPA's Mahomet Aquifer Sole Source Designation Determination, available at:
https://www3.epa.gov/region5/water/gwdw/mahomet/.

coal ash impoundments located above this area.[13] While the federal rules only apply to upper aquifers, the Illinois EPA should include location restrictions that require owners and operators to demonstrate that there will be no adverse impacts to the Mahomet Aquifer and to take action if there are any such impacts.

Notably, Section 811.302(b) of the Board Waste Disposal Regulations (35 Ill. Adm. Code 811.302(b)) already has location restrictions for waste disposal units and sole source aquifers. The regulation prohibits a unit from being "located within the recharge zone or within 366 meters (1200 feet), vertically or horizontally," unless there is a stratum between the bottom of the waste disposal unit and the top of the aquifer that meets the following minimum requirements:

> 1) The stratum has a minimum thickness of 15.2 meters (50 feet);
> 2) The maximum hydraulic conductivity in both the horizontal and vertical directions is no greater than 1×10-7 centimeters per second, as determined by in situ borehole or equivalent tests;
> 3) There is no indication of continuous sand or silt seams, faults, fractures, or cracks within the stratum that may provide paths for migration; and
> 4) Age dating of extracted water samples from both the aquifer and the stratum indicates that the time of travel for water percolating downward through the relatively impermeable stratum is no faster than 15.2 meters (50 feet) in 100 years.

The Illinois EPA should modify its proposal to include protection of the portions of the Mahomet Aquifer that USEPA has deemed a sole source aquifer.

* * * *

Thank you for your consideration of these comments. We can be reached at the telephone numbers and email addresses listed below should you have any questions or wish to discuss our comments.

Sincerely,

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[13] Mahomet Aquifer Sole Source Map, available at: https://www3.epa.gov/region5/water/gwdw/mahomet/pdfs/mahomet-ssa-project-review-area-map-20150210.pdf.