BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	R 2020-019
STANDARDS FOR THE DISPOSAL	)	
OF COAL COMBUSTION RESIDUALS	)	(Rulemaking – Water)
IN SURFACE IMPOUNDMENTS:	)	
PROPOSED NEW 35 ILL. ADM.	)	
CODE 845	)	

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **INITIAL PUBLIC COMMENTS OF ENVIRONMENTAL LAW & POLICY CENTER, PRAIRIE RIVERS NETWORK, AND SIERRA CLUB**, copies of which are attached hereto and herewith served upon you.

Dated: June 15, 2020

Respectfully submitted,

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INITIAL PUBLIC COMMENTS OF ENVIRONMENTAL LAW & POLICY CENTER, PRAIRIE RIVERS NETWORK, AND SIERRA CLUB

The Environmental Law & Policy Center ("ELPC"), Prairie Rivers Network ("PRN"), and the Sierra Club (collectively, "Commenters"), hereby submit these initial public comments on the draft rules proposed by the Illinois Environmental Protection Agency ("the Agency") in the above-referenced docket. Coal combustions residuals ("CCR" or "coal ash"), which contain a dangerous brew of metals such as arsenic, chromium, cadmium, lead, mercury, and selenium, have been dumped in water-filled pits, or "impoundments," throughout our state. Most of those pits are unlined, and ongoing testing makes clear that many are leaking: samples reveal unsafe levels of coal ash constituents in groundwater underlying CCR impoundments statewide.

Alarmed by this pollution and the imminent closure of many CCR impoundments due to federal requirements, residents from throughout Illinois came together last year to successfully persuade lawmakers to enact Public Act 101-171 ("the Coal Ash Pollution Prevention Act") to put in place protective standards for those impoundments. The rules proposed here derive from that mandate. Unfortunately, while they contain some strong provisions, the proposed rules fall far short of providing the long- and short-term environmental protection and oversight that the Coal Ash Pollution Prevention Act demands.

In these comments, we provide an overview of our concerns with the proposed rules. Those include: the rules' failure to ensure long-term protection of Illinois' waters and environment; the rules' failure to protect communities near, and workers at, coal ash impoundments; the rules' failure to provide essential Agency oversight over owners/operators of coal ash impoundments; the rules' failure to provide comprehensive, meaningful public participation opportunities; the rules' numerous vague and inconsistent provisions that create uncertainty and threaten to undercut the protections demanded by the Act; and the rules' incorporation of various federal proposals that have not been finalized and would weaken protections for Illinois communities. Commenters intend to supplement this initial overview with more detailed comments later in this proceeding. We appreciate the Board's attention to these important concerns.

I. LEGAL FRAMEWORK

A. The Federal Coal Ash Rule

After decades of inaction on coal ash, and prompted by the catastrophic collapse of coal ash impoundments in Tennessee in December 2008,[1] the United States Environmental Protection Agency ("US EPA") issued the first ever national regulations for coal ash impoundments and landfills in 2015.[2] The 2015 Federal Coal Ash Rule, issued pursuant to Subtitle D of the Resource Conservation and Recovery Act ("RCRA"), established national minimum criteria for existing and new landfills and surface impoundments, including location restrictions, design requirements, operating requirements, closure and post-closure requirements. Some of its key protections include minimum structural stability criteria for impoundments; groundwater monitoring requirements which trigger corrective action obligations at coal ash impoundments and landfills; location restrictions to keep coal ash units out of groundwater, unstable areas, wetlands, fault areas, and seismic zones; and broad closure and post-closure requirements.

Because at the time RCRA Subtitle D neither authorized EPA to directly implement minimum national criteria for solid waste disposal facilities or to enforce such criteria, nor required states to adopt or implement EPA's minimum criteria, EPA established the 2015 Federal Coal Ash Rule as a "self-implementing rule" enforced solely via citizen suits.[3] The Rule included no permitting provisions, as it was not set up as a permitting program, and, accordingly, lacks the public notice, review and comment provisions common to federal environmental permitting programs. Moreover, neither the Rule nor other RCRA provisions established "financial assurance" requirements for the cleanup or closure of coal ash disposal units, leaving communities to shoulder the cost if owners or operators failed to perform, or inadequately performed, their cleanup or closure obligations.

B. The WIIN Act

In December 2016, Congress adopted the Water Infrastructure Improvements for the Nation Act ("WIIN Act").[4] The WIIN Act amended RCRA by, among other things, directing EPA to approve state coal ash permitting programs that "require[] each coal combustion residuals unit located in the State to achieve compliance with . . . criteria that [are] at least as protective as" the federal criteria for CCR units under 40 C.F.R. Part 257.[5] The WIIN Act calls for important increases in oversight and enforcement at coal ash disposal sites by authorizing States to replace the self-implementing Federal Coal Ash Rule with a permitting scheme similar

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[1] *See* Comments of Earthjustice *et al*. on "Part A" proposed rule, Jan. 31, 2020, Dkt. No. EPA-HQ-OLEM-2019-0172-0165, available at https://www.regulations.gov/document?D=EPA-HQ-OLEM-2019-0172-0165.
[2] US EPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (hereafter "Federal Coal Ash Rule").
[3] 80 Fed. Reg. at 21,310-11; *see also* 42 U.S.C. § 6972.
[4] Pub. L. No. 114-322, 130 Stat. 1628 (2016) (codified at 42 U.S.C. § 6945(d)).
[5] 42 U.S.C. § 6945(d)(1)(B) (emphasis added); *see also Util. Solid Waste Activities Grp v. EPA*, 901 F.3d 414, 437 (D.C. Cir. 2018) ("the WIIN Act does not affect the validity of the Rule itself . . . ").

to other environmental programs where regulatory requirements are administered and enforced through permits.[6]

C. The USWAG Decision

Soon after publication of the 2015 Federal Coal Ash Rule, both environmental organizations and industry brought legal challenges to the rule in the U.S. Court of Appeals for the D.C. Circuit.[7] In August 2018, the D.C. Circuit held that the initial Federal Coal Ash Rule must be strengthened. The D.C. Circuit held, among other things, that: (1) US EPA violated RCRA and acted arbitrarily and capriciously in failing to require the closure of unlined surface impoundments, without regard to whether they were already leaking; (2) US EPA violated RCRA and acted arbitrarily and capriciously in exempting inactive surface impoundments at inactive power plants – which include the ash ponds at the Vermilion power station, among others – from regulation; and (c) US EPA did not act arbitrarily in excluding considerations of cost and inconvenience from closure deadline extensions.[8]

In short, the Court held that the 2015 Federal Coal Ash Rule was not protective enough; it must be broader in terms of which coal ash impoundments it covers and more stringent in the provisions for impoundments it does cover, without regard to cost.

D. The Coal Ash Pollution Prevention Act

Recognizing that most of the numerous leaking coal ash ponds in Illinois face imminent closure and/or cleanup under the federal Rule,[9] our state's legislature decided not to leave the fate of those impoundments in the wavering hands of the federal government. Rather, in the Coal Ash Pollution Prevention Act (Public Act 101-171), signed by Gov. Pritzker in July 2019, Illinois lawmakers directed the Illinois Environmental Protection Agency ("the Agency") and the Illinois Pollution Control Board ("the Board") to, among other things, do the following:

- Adopt rules for CCR surface impoundments that:
  - are "at least as protective and comprehensive as" the 2015 Federal CCR Rule or amendments thereto "promulgated" by US EPA;[10]
  - require owners or operators to provide an analysis of different methods of closure for CCR surface impoundment, including removal of coal ash;[11]
  - prioritize the closure of high-risk impoundments as well as impoundments in areas of environmental justice concern;[12]
- Establish a transparent permitting program for coal ash impoundment, operation, cleanup, and closure that includes all requirements applicable to such impoundments in

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[6] 42 U.S.C. 6945(d)(1)(B).
[7] *Util. Solid Waste Activities Grp v. EPA*, 901 F.3d 414 (D.C. Cir. 2018) ("*USWAG*").
[8] *See id*. at 449-50.
[9] *See* Earthjustice, Environmental Integrity Project, Prairie Rivers Network and Sierra Club, Cap and Run: Toxic Coal Ash Left Behind by Big Polluters Threatens Illinois Water (Nov. 2018), *available at* https://illinoiscoalash.files.wordpress.com/2018/11/capandrun-ilcoalash web.pdf (hereafter "Cap and Run").
[10] 415 ILCS 5/22.59(g)(1).
[11] *Id*. at (d), (g)(2).
[12] *Id*. at (g)(9).

permits[13] and offers "meaningful" public participation, "including, but not limited to, public notice of the submission of permit applications, an opportunity for the submission of public comments, an opportunity for public hearing prior to permit issuance, and a summary and response of the comments prepared by [Illinois EPA];"[14] and

- Require owners and operators to set aside funds to cover cleanup and closure of coal ash impoundments so that Illinois communities are not left footing the bill for abandoned dumps that continue to foul our waters, air and land.

The legislature prefaced these requirements with findings that coal ash has already polluted our State's environment,[15] and made clear that the legislation should be liberally construed to carry out its purpose of "promot[ing] a healthful environment, including clean water, air, and land, meaningful public involvement, and the responsible disposal and storage of coal [ash], so as to protect public health and to prevent pollution of the environment of this State."[16]

II. THE PROPOSED RULES DO NOT ENSURE LONG-TERM PROTECTION OF ILLINOIS' WATERS AND ENVIRONMENT.

Long-term protection of Illinois' waters and communities requires that coal ash not be left in contact with water or in circumstances that will likely allow future contact of ash and water. The proposed rules fail to assure such long-term protection. First, the rules must be clearer that coal ash impoundments may not be closed in place, nor "corrective action" completed, if coal ash remains in contact with water. Second, the rules must not allow closure in place of coal ash impoundments sited in locations that jeopardize their stability, including floodplains, wetlands, and seismically active areas. Finally, the rules should address a major source of coal ash pollution: historic landfills and unconsolidated coal ash fill. The Board should ensure that cleanup is not evaded when historic ash landfills and unconsolidated coal ash fills are the source of groundwater contamination, and should independently regulate those sources in addition to CCR surface impoundments.

A. Coal Ash Must Not be in Contact with Water.

As the Board and Agency are well-aware, coal ash contact with water allows for leaching of contaminants. The harmful constituents in CCR do not degrade and can leach out of coal ash for centuries. Illinois has a clear example of such contamination continuing: the Pollution Control Board found that the Former Slag and Fly Ash Storage area at the Waukegan coal plant continues to cause groundwater pollution and leach out CCR contamination in concentrations above Illinois groundwater standards. *See Sierra Club v. Midwest Generation, LLC*, PCB 2013-15, Interim Order at 74-76, 87-91 (June 20, 2019) (discussions about Former Slag and Fly Ash Storage area). This in turn poses a threat of contamination to groundwater and surface water. One of the highest priorities for the coal ash rule is that ash is not allowed to be in contact with groundwater at all, and, where ash is already leaking contaminants to groundwater, those coal ash storage/disposal units are addressed in a manner that brings an end to that contamination.

[13] *See id*. at (g)(3).
[14] *Id*. at (g)(6).
[15] *See id*. at (a)(3).
[16] *Id*. at (a).

Commenters recommend making several additions to the proposed rule to address coal ash in contact with water.

First, as to the Location Restrictions, we recommend adding a provision that requires the base of the surface impoundment to be no less than five feet (1.52 meters) above the highest groundwater elevation—which should be interpreted as the uppermost zone of saturation—measured within or adjacent to the impoundment. There is variability to the upper limit of the uppermost aquifer depending on season and precipitation; as a result, this language provides the specificity to assure that ash is not in contact with groundwater even during the periods when groundwater reaches its highest elevations.

Second, we recommend adding a new section that restricts both new and existing surface impoundments from being located in floodplains. Locating impoundments in floodplains should be restricted because of the risk of CCR coming in contact with floodwaters. Floods do not need to overtop the berm of an impoundment to saturate the coal ash in the impoundment, and a cap does nothing to stop rising groundwater below the coal ash. This restriction is particularly important given the many coal ash impoundments in Illinois located immediately adjacent to flood-prone rivers and lakes and the increasing flooding and record water levels the state is experiencing.[17]

Third, just as with the location standards, any selected remedy in the Corrective Action Plan must also ensure that there is no intermittent, recurring, or sustained hydraulic connection between coal ash and groundwater or surface water. The Corrective Action standards must not be vague about allowing coal ash to remain in water. Rather than using the terminology "reduce or eliminate, to the maximum extent feasible," the source of releases, the rules should be explicit that allowing ash to remain in water or allowing ash to be exposed to groundwater or surface water is impermissible. The only way to truly "control the source of releases" and thereby prevent further contamination is to move the CCR to a place where it is not exposed to water.

Where surface impoundments do not meet the additional location restrictions that we recommend adding, the impoundment must be required to close. A provision should be added to the section of the rules addressing closure and retrofit that would require closure of CCR surface impoundments located within five feet of the uppermost zone of saturation and those located in floodplains.

Finally, commenters urge the Board to add the location restrictions as prerequisites that explicitly must be met in order for the Agency to approve closure in place. Just as CCR in active

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[17] *See*, *e.g.*, Patrick M. O'Connell and William Lee, More rain, more floods, more often. Why wet basements and swollen rivers are becoming the new spring reality for Illinois, Chicago Tribune, May 22, 2020, *available at* https://www.chicagotribune.com/news/breaking/ct-illinois-floodplains-extreme-weather-20200522-wlnu3qpasrhi7g32no5w3xuhge-story.html; Patrick M. O'Connell, Lake Michigan water levels break monthly record high for the first time in more than 30 years; Illinois to review shoreline damage, Chicago Tribune, Feb. 6, 2020, *available at* https://www.chicagotribune.com/news/environment/ct-lake-michigan-water-levels-january-record-20200205-t24afriu5fbltdg4mrbs5v4tvm-story.html; Tony Briscoe, Homeowners near the Great Lakes face a 'very scary' challenge: How do you handle a generation's worth of water level changes in just a few years?, Chicago Tribute, Jan. 9. 2020, *available at* https://www.chicagotribune.com/news/environment/great-lakes/ct-lake-huron-climate-change-water-levels-20200109-oiw7nunhonh3hm2vg5lrfiimou-story.html.

impoundments should not remain in or exposed to water, the same is true following closure because, even with a cap, CCR exposed to water will leach. While the federal performance standard does not allow CCR to remain exposed to water, it does so in a long and complicated manner. Illinois should make it crystal clear that closure in place may only be permitted if there will be *no intermittent, recurring, or sustained hydrologic connection between any portion of the CCR impoundment and any groundwater following closure.*

C. The Alternate Source Demonstration Should Not Allow Surface Impoundments to Evade Corrective Action.

Because the Alternate Source Demonstration concept allows a CCR surface impoundment owner to avoid cleanup of contamination, leaving Illinois communities with the burden of unsafe water, it must be very narrow, if allowed at all. The Agency's proposal appears to allow owner/operators to evade cleanup with a demonstration that is not allowed by the federal CCR rule. Specifically, Agency's proposed rule allows owners of CCR surface impoundments to submit a demonstration that a statistically-significant increase resulted from "a change in the potentiometric surface and groundwater flow direction." *Compare* proposed Section 845.650(d)(4) *and* 40 C.F.R. § 257.94(e)(ii) (allowing an owner of a CCR surface impoundment to "[d]emonstrate that . . . the statistically significant increase resulted from error in sampling, analysis, statistical evaluation, or natural variation in groundwater quality."); *id*. § 257.95(g)(3)(ii) (same). Any provision that is less protective than the federal rules is not allowed in Illinois rules and must be removed. *See* 415 ILCS 5/22.59(g)(1) (requiring rules "at least as protective and comprehensive as" the federal CCR rule).

The Alternate Source Demonstration likewise must not allow owners or operators of CCR surface impoundments to evade cleanup by asserting that other CCR sources at the facility (landfills, fill, etc.,) are the sources of the pollution. Illinois law provides that owners and operators are liable for groundwater pollution stemming from coal ash stored or disposed of on land they control when they fail to take adequate precautions to prevent that pollution even if the ash was stored or disposed of by a previous owner. *See, e.g., Sierra Club v. Midwest Generation LLC*, PCB 2013-015 (June 20, 2019). Similarly, owners and operators are liable for groundwater pollution from coal ash on land they control even if it is not possible to identify which of multiple coal ash sources on that land is the specific source of the contamination. *Id*. If another CCR source at the facility is causing the pollution, the owner or operator is liable for it and must, accordingly, halt the pollution and restore Illinois groundwater to safe conditions. Alternate Source Demonstrations, accordingly, must be approved only if the owner or operator demonstrates that the source of contamination is something other than another CCR source at the facility. The rules should be modified accordingly.

D. The Rules Should Not Allow Closure in Place when Coal Ash Would Pose a Risk in its Current Location.

In addition to prohibiting closure in place where ash is in contact with water, Illinois also should not accept closure in place where impoundments pose other significant risks. If an impoundment violates location restrictions for unstable areas, seismic areas, wetlands, or Commenters' proposed location restriction for floodplains, there is a significant risk that releases

from the impoundment will continue to put Illinois communities and waters at risk. Unstable areas can sink or collapse, removing any stability from a capped impoundment. Seismic and fault areas pose similar risks. And floodwaters inundate floodplains and erode riverbanks, increase groundwater levels, degrade caps, and increase the threat of collapse. As such, the rules should bar closure in place when an impoundment violates a location restriction. Likewise, the rules should bar closure in place for structurally unsound impoundments that fail to meet the required safety factors.

The rules should also prohibit closure in place if capping an impoundment will be insufficient to achieve the groundwater protection standards. The selected remedy must attain the groundwater protection standards as quickly as feasible. The remedial alternatives must be weighed against each other according to how well and how quickly they achieve the groundwater protection standards. If there are options, such as capping the impoundment, that do not achieve the standards within a reasonable timeframe, those options must be rejected. Further, the owner/operator of an impoundment must demonstrate that if any groundwater pumping is proposed during the closure and post-closure periods, that pumping can be halted without a risk that CCR constituents will then increase above groundwater protection standards or Illinois' water quality standards. The specific circumstances of each CCR surface impoundment must be considered as part of this analysis.

E. The Rules Fail to Address the Contamination from Unconsolidated Coal Ash Fill and Coal Ash Piles

Distinct from coal ash impoundments, coal ash landfills and CCR fill are contaminating Illinois' air and water. Groundwater monitoring at CCR landfills in Illinois regulated by the federal CCR rule has revealed unsafe levels of antimony, arsenic, cobalt, lead, lithium, beryllium, cadmium, chromium, and thallium, as well as elevated levels of CCR indicator boron and CCR constituents calcium, chloride, fluoride, and total dissolved solids ("TDS").[18] Just this past June, the Board found that a combination of CCR fill and historic coal ash disposal areas at Midwest Generation's Waukegan, Will County, Joliet 29, and Powerton coal plants are causing or contributing to water pollution and/or violations of Illinois groundwater standards at those sites. *See Sierra Club v. Midwest Generation*, PCB 13-15, Interim Order at 92–93 (June 20, 2019).

The levels and breadth of pollution seen from old CCR landfills and fill in Illinois are consistent with national trends. Recent groundwater monitoring data confirms that CCR landfills are a major source of dangerous groundwater contamination. In a review of the first national groundwater sampling results from coal ash landfills and impoundments that CCR unit owners/operators published in March 2018, Environmental Integrity Project and Earthjustice found that 76 percent of the 196 regulated landfills are leaching dangerous pollutants into

[18] *See* Cap and Run at 13-16, 20, 25-26, 37, 39-40, *available at* https://illinoiscoalash.files.wordpress.com/2018/12/ilcoalashreport_capandrun.pdf (discussing unsafe and elevated concentrations of CCR constituents found in groundwater adjacent to CCR landfills at the Waukegan, Will County, Duck Creek, Powerton, Joppa, and Prairie State coal plants).

groundwater at unsafe concentrations.[19] Among those landfills, nearly a third are contaminating groundwater with unsafe levels of arsenic, approximately one-third are contaminating groundwater with unsafe levels of cobalt and sulfate, and 43 percent are contaminating groundwater with unsafe concentrations of the neurotoxin lithium.[20] This contamination is widespread, with CCR landfills in 28 states and one federal territory leaching CCR constituents into groundwater at levels exceeding federal health standards.[21]

In short, CCR landfills and fill in Illinois are leaching pollutants into our waters and can be expected to continue to do so. CCR landfills and fill pose a confirmed threat to groundwater, surface waters, and air. Illinois should adopt safeguards to minimize the contamination from CCR landfills, in addition to that from CCR impoundments.

Coal ash piles likewise pose a serious threat to Illinois' air and water. In its June 20, 2019 decision in *Sierra Club v. Midwest Generation*, PCB 13-15, Interim Order at 42, 48–51, 86, the Board found that a temporary CCR pile contributed to exceedances of state groundwater standards for arsenic, boron, sulfate, and total dissolved solids, as well as boron and sulfate pollution in excess of state background levels, at the Powerton plant. The U.S. Minerals site, just south of the Coffeen power plant, is listed in US EPA's compendium of fugitive dust damage cases due to dust contamination from CCR piles that, when the damage case was finalized, lacked covers or windbreaks.[22] Finally, Illinois EPA has received repeated complaints of coal ash dust pollution from uncovered stockpiles of CCR at mines where coal ash has been used for "reclamation."[23]

The air and water pollution stemming from coal ash piles in Illinois is, as with landfills, neither unique nor unexpected. There is relatively little information available about coal ash piles because, under the Federal Coal Ash Rule, they have been regulated as landfills rather than identified separately as piles. But the coal ash piles that have been identified are environmental hazards. Coal ash piles in Texas, Iowa, Montana, Alaska, and Puerto Rico have caused significant pollution, either of water, air, or both.[24] In Puerto Rico, for example, health harms have been documented in the area near the coal ash piles.[25] CCR piles have significantly greater exposed surface area than do CCR landfills, and as a result are more vulnerable to wind, rain, and other elements. Consequently, they are at greater risk of wind erosion—wind blowing the small, light CCR particles, particularly fly ash particles, off the piles and into surrounding

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[19] Environmental Integrity Project & Earthjustice, Coal's Poisonous Legacy: Groundwater Contaminated by Coal Ash Across the U.S. ((Mar. 2, 2019, rev. July 11, 2019) ("Coal's Poisonous Legacy") at 11, 16, *available at* https://www.environmentalintegrity.org/reports/coals-poisonous-legacy.
[20] *Id.*
[21] *Id.*
[22] *See* US EPA, Damage Cases: Fugitive Dust Impact (Dec. 18, 2014) at 39, *available at* https://www.regulations.gov/searchResults?rpp=25&po=0&s=EPA-HQ-RCRA-2009-0640-11992&fp=true&ns=true.
[23] *See* http://www.epa.state.il.us/water/ash-impoundment/documents/other-coal-ash-sites.pdf.
[24] *See* attachment 3 to Earthjustice comments on Phase II proposal, Hutson Expert Report (Oct. 14, 2019), Docket ID No. EPA-HQ-OLEM-2018-0524-0326, *available at* https://www.regulations.gov/document?D=EPA-HQ-OLEM-2018-0524-0326.
[25] *Id.*

waterways and neighborhoods. Notwithstanding the powerful evidence of contamination from CCR piles, U.S. EPA is proposing to essentially deregulate those piles.[26] Illinois must do better.

First, as discussed in detail in Section VII of these comments, the Board should revise the provisions in the Agency's proposal that allow the use of coal ash piles of unlimited size for an indefinite time.

Second the Board should address the gap in the rules left by the failure to include coal ash landfills. The Board should include in this rulemaking regulations that address historic CCR landfills in order to ensure that those CCR dumps do not continue contaminating Illinois' environment. Specifically, the Board should include in the rulemaking a prohibition on using unlined areas for the temporary or permanent storage or disposal of CCR and requirements for CCR landfills similar to those for CCR impoundments, including but not limited to requirements on groundwater monitoring, corrective action, closure, fees, and financial assurances.

Lined CCR landfills—and, when done properly, enclosures—are the best options for storage of CCR. "Lined" should be defined as the type of liner required by the federal CCR rule for CCR landfills, *see* 40 CFR § 257.70, or, at a minimum, as the type of liner required for Municipal Solid Waste Landfills ("MSWLFs") under 35 Il. Adm. Code Part 811. Moreover, all other protections at MSWLFs—including leachate collection, groundwater monitoring, daily cover, etc.—under 35 Il. Adm. Code Part 811 should also be required for landfills in which CCR will be stored or disposed.

III. THE PROPOSED RULES DO NOT PROTECT COMMUNITIES NEAR, AND WORKERS AT, COAL ASH IMPOUNDMENTS.

The proposed rules fall short on protecting communities adjacent to coal ash ponds and the workers who handle the ash. In particular, the proposed rules fail to satisfy the Coal Ash Pollution Prevention Act's directive to set "standards for responsible removal of CCR from CCR surface impoundments." 415 ILCS 5/22.59(g)(10). Three key shortcomings of the proposed rules illustrate their failure to require responsible removal as directed by the legislature: the rules lack specific control and monitoring provisions for facility fugitive dust plans; they would allow for seriously deficient Safety and Health Plans; and they neither require consideration of alternatives to trucking for transportation of excavated ash, nor limit the trucks that may be used for CCR transport to low- or zero-pollution trucks.

A. The Fugitive Dust Control Plans in the Proposed Rules Lack the Monitoring Oversight Necessary to Ensure that Workers and Communities are Protected.

Coal ash dust is severely harmful, and inhalation of CCR poses grave hazards to human health, especially during removal. Coal ash is emitted to the air during removal by loading and unloading, transport, and wind. Once in the air, fugitive dust can impact workers on-site and

[26] *See* US EPA, "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles," 84 Fed. Reg. 40,353 (Aug. 14, 2019).

migrate off-site. As a result, workers and nearby residents can be exposed to significant amounts of CCR dust. Breathing in that dust puts people at risk in numerous ways:

- Exposure to course particulate matter (PM 10) and respiration of small particulates (PM 2.5) that lodge in the lung;[27]
- Inhalation of radioactive particles;[28]
- Uptake of heavy metals, including mercury;[29]
- Inhalation of silica; and
- Exposure to hydrogen sulfide.[30]

Both coarse and small particulates have been linked to heart disease, cancer, respiratory diseases, and stroke.[31] Of recent and immediate concern, long-term exposure to small particulates has recently been linked to increased risk of death from COVID-19.[32] Coal ash contains significant amounts of silica, which can lodge in the lungs and cause lung cancer[33] or silicosis (scarring of the lung tissue), which can result in a disabling and sometimes fatal lung disease.[34] Inhalation of coal ash also poses significant health threats because of the metals present in the ash – including but not limited to arsenic, hexavalent chromium, lead, manganese, mercury, and radium – which, when inhaled, can cause a wide array of serious health impacts, ranging from cancer to neurological damage.

In light of these grave risks to human health from exposure to coal ash dust, strict control of fugitive CCR dust is critical. Yet the fugitive dust control requirements in the proposed rules leave far too much up to coal ash pond owners' and operators' discretion. *See, e.g.* Sections

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[27] Alan H. Lockwood & Lisa Evans, Ash in Lungs: How Breathing Coal Ash Is Hazardous to Your Health, 13–15 (2014), *available at* https://earthjustice.org/blog/2014-july/ash-in-lungs-how-breathing-coal-ash-is-hazardous-to-your-health.

[28] *Id.* at 5. Burning coal concentrates the radionuclides approximately three to ten times the levels found in the initial coal seams. The radioactive metals stay with the coal ash when the carbon is burned off. *See Figure 1* (Graph from Radioactive Elements in Coal and Fly Ash: Abundance, Forms, and Environmental Significance. U.S. Geological Survey Fact Sheet FS-163-97. October 1997).

[29] *Id.* at 6. Implementation of the federal Clean Air Mercury Rule significantly increases the mercury content in fly ash because the mercury capture required by the rule will result in more mercury ending up in the solid waste created by coal burning. According to EPA testing of fly ash at plants that had mercury controls, the mercury in ash increased by a median factor of 8.5, and in one case, by a factor of 70. *See also*, U.S. EPA, National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry, Federal Register Vol 71, No. 244, December 20, 2006.

[30] *Id.*

[31] *See* Air particulate matter and cardiovascular disease: the epidemiological, biomedical and clinical evidence, J Thorac Dis. 2016 Jan; 8(1): E8–E19, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4740122/. *See also*, US EPA, Linking Air Pollution and Heart Disease, *available at* https://www.epa.gov/sciencematters/linking-air-pollution-and-heart-disease.

[32] Xiao Wu, *et al.*, Exposure to Air Pollution and COVID-19 Mortality in the United States: A Nationwide Cross-Sectional Study, updated Apr. 24, 2020 (pre-publication), *available at* https://www.medrxiv.org/content/10.1101/2020.04.05.20054502v2.

[33] *See* National Institute of Health, National Cancer Institute, "Crystalline Silica," available at https://www.cancer.gov/about-cancer/causes-prevention/risk/substances/crystalline-silica. .

[34] *See* Earthjustice and Physicians for Social Responsibility, Ash in Lungs: How Breathing Coal Ash is Hazardous to Your Health, *available at* https://earthjustice.org/blog/2014-july/ash-in-lungs-how-breathing-coal-ash-is-hazardous-to-your-health.

845.500(b) (leaving owners and operators to choose the measures they plan to use to control dust); Section 845.740(c)(2) (requiring that "CCR must be handled to minimize airborne particulates and offsite particulate movement" but only "during any weather event or condition.)" Moreover, neither section requires monitoring of fugitive dust. *See id*.

The proposed requirements are simply not adequate to ensure that robust dust controls are in place. The rules should require certain minimum dust control measures—measures which we will detail in later comments and testimony—at all sites, together with a robust monitoring program to ensure that fugitive dust controls are in fact minimizing CCR dust pollution. Communities near coal ash dump sites in northwest Indiana are acting to demand more monitoring oversight of fugitive dust controls,[35] and Illinois should do no less to ensure full protection for communities hosting coal ash dumps in our state, which are all too often overburdened with air and water pollution and disparate health impacts.[36]

The deficiencies in the fugitive dust controls included in the proposed rules are compounded by the fact that they are, all too often under the proposal, excluded from Agency review and approval and shielded from public review and comment. As detailed below, the rules do not require CCR permit applicants for existing CCR surface impoundments to include a proposed fugitive dust plan in *any* permit applications,[37] meaning that the plans lack essential oversight and input to shape, and strengthen, dust controls. The failure of the rule to mandate that applicants submit essential plans and other information, including and beyond fugitive dust plans, with their applications is one of the most serious problems with the proposed rule, as discussed *infra* Sections IV and V.

In sum, the fugitive dust mandates of the proposed rules must be strengthened by including specific minimum control measures, dust pollution monitoring requirements, and Agency and public review and oversight. The Coal Ash Pollution Prevention Act demands protective requirements including responsible removal, *see* 415 ILCS 5/22.59(g)(10), and given the risks from inhaling dust, Illinois workers and communities deserve no less.

B. The Safety and Health Plans Required by the Proposed Rules do not Adequately Protect Workers Who Will Be Exposed to the Coal Ash.

Coal ash workers often bear the brunt of coal ash injuries. Injuries to workers cleaning up the Kingston TVA Fossil Plant spill in Harriman, Tennessee provide a devastating example of

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[35] The Michigan City, Indiana Common Council, for example, recently passed a resolution requiring independent monitoring and robust safety measures for the closure of ash ponds owned by Northern Indiana Public Service Company (NIPSCO) in Michigan City and removal of ash to a landfill at NIPSCO's Schafer Plant. *See* Kelley Smith, Council wants NIPSCO to assure safety and transparency during coal ash removal, *News Dispatch*, June 11, 2020, *available at* https://www.thenewsdispatch.com/news/local/article_78f4478d-1cba-5f3e-b250-df49b492898a.html.

[36] *See*, *e.g*., Cap and Run at 42–43, *available at* https://illinoiscoalash.files.wordpress.com/2018/12/ilcoalashreport_capandrun.pdf; Emily K. Coleman & James T. Norman, Lake County Health Department watching growing number of coronavirus cases among Hispanic, black residents, *Lake County News-Sun*, May 10, 2020, *available at* https://www.chicagotribune.com/suburbs/lake-county-news-sun/ct-lns-lake-county-essential-workers-st-0509-20200509-ttnbev62ebgwjj4u4bfkbg4f5u-story.html.

[37] *See* proposed Sections 845.220(a), (d); 845.230(a)(10); 845.500(b)(7).

risks to workers from coal ash dust. In the decade following the multi-year cleanup of the 5.4 million-ton coal ash spill, at least 40 cleanup workers died and over 400 have reported being sickened with skin rashes, lung disease, and cancer from the inhalation of coal ash, all of which are ailments known to be caused by long-term exposure to arsenic, radium, metals, and other toxins found in coal ash, according to a lawsuit filed after the spill.[38] Workers at the Arrowhead Landfill in Uniontown, Alabama, which received more than 4 million tons of coal ash from the TVA spill, also reported significant injuries to health.[39] In short, the workers who clean up coal ash are subject to increased risk of harm and accordingly must be assured extensive protections to protect their health and that of their families.

Yet the Safety and Health plans required by the rule do not provide the necessary protections.[40] To adequately protect workers, the Safety and Health plans must both prescribe safety and health measures sufficient to prevent workers' exposure to ash and inadvertent transport of ash to their homes and also state the requirements for those measures clearly enough that both workers and employers understand the protections due. The proposed rules fail to do either.

First, the provisions regarding incorporation of Occupational Safety and Health Administration (OSHA) standards into the plan are both confusing and insufficient. *See*, *e.g.*, proposed Section 845.530(b) (referring to "hazards not otherwise classified as defined in 29 CFR 1910.1200(c)"). That reference makes little sense here because 29 CFR 1910.1200(c) defines "hazards not otherwise classified" as meaning certain limited health *effects*, rather than referring to particular coal ash constituents. The proposed rules are also confusing because they include various cross references to OSHA standards. Rather than cross-reference those lengthy, complex standards, the rules should explicitly incorporate the most relevant sections of OSHA standards. Employers and workers alike should not have to be OSHA experts to determine what safety measures are required for handling coal ash. The rules can and should make this easier for employers and for workers trying to determine what protections are due. While the applicable OSHA standards will apply no matter what the state's regulations say, the regulation should at

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[38] *See* Jamie Satterfield, Judge rejects TVA contractor's ask for a new trial over coal ash contamination lawsuit, *Knox News*, March 1, 2019 *available at* https://www.knoxnews.com/story/news/crime/2019/03/01/judge-says-evidence-backs-jury-verdict-kingston-coal-ash-contamination/3017696002/; Jamie Satterfield, Sickened Kingston coal ash workers left with faulty, manipulated test results, *Knox News*, Sept. 2, 2018, *available at* https://www.knoxnews.com/story/news/crime/2018/09/02/kingston-coal-ash-spill-faulty-manipulated-testing/1126963002/; J.R. Sullivan, A Lawyer, 40 Dead Americans, and a Billion Gallons of Coal Sludge, *Mens Journal*, Aug. 26, 2019, *available at* https://www.mensjournal.com/features/coal-disaster-killing-scores-rural-americans. Seventy-three plaintiffs, comprising sick workers and families of deceased workers, won a jury verdict in November 2018 that found that exposure to toxic heavy metals and radiation in coal ash could be responsible for the workers' illnesses, including skin rashes, lung disease and cancer. *Id*.

[39] Holly Haworth, *Oxford American*, Something Inside of Us, Issue 82, Nov. 11, 2013, available at https://www.oxfordamerican.org/magazine/item/136-something-inside-of-us.

[40] In addition to the problems noted here, proposed Sections 745.530(c)(1) and (c)(2) create ambiguity through drafting errors, an issue that plagues the proposal as a whole, *see* SectionVII. Proposed Section 845.530(c)(1) should be changed back to require employers to provide "a description of how the training program is designed to meet actual tasks," as it said in the stakeholder draft, rather than a description of how the "training program updates," which is considerably more vague. Drafting errors in proposed Section 845.530(c)(2) need to be fixed to make sure that the list of training contents has parallel structure, i.e. so that the training program *includes* the items in (E) through (G), rather than making sure that employees can "respond effectively to" them.

least explicitly incorporate the OSHA regulations for the chemicals found in coal ash, and at the very least should not confuse or mislead employers and workers attempting to comply with them by being less than comprehensive.

Moreover, incorporation of OSHA measures into Safety and Health Plans is necessary but not sufficient. Even OSHA acknowledges that its safety requirements and action levels are out-of-date and not sufficiently protective.[41] The proposed rules refer to the more protective National Institute for Occupational Safety and Health Pocket Guide, but only require that employers "consider" the protections in the guide. Proposed Section 745.530(b)(1). The Pocket Guide is an important resource because it is written to be fairly accessible to both worker and employer audiences, and is more protective than the outdated OSHA standards. To avoid any ambiguity, the proposed rules should specify the personal protection, exposure limits, and first aid measures needed to afford Illinois workers adequate protections and make those specifications required components of the Safety and Health Plan.

Finally, the Safety and Health plan requirements continue to lack important safeguards against harms to CCR workers and their families. Clothing contaminated with CCR should not be brought home, where family members will be exposed to the CCR but will not have the benefit of training on the harms of CCR nor the protective gear needed to limit those harms. Rather, on-site lockers should be provided to workers engaged in the handling, movement, cleanup or excavation of CCR to store protective gear and work clothes while not working. Shower areas should likewise be provided for the same reasons. Likewise, no CCR-contaminated equipment should be brought home; rather, storage areas should be provided for any equipment or instruments used in handling CCR. Moreover, separate spaces—either enclosed buildings or protected areas—should be offered for workers on their breaks so that workers are not eating or resting in areas where CCR dust may blow on them.

C. The Closure Alternatives Analysis in Proposed Section 845.710 Should Require Consideration of Transportation Alternatives and Limit Transport by Truck to Low- or Zero-Emission Trucks.

For ash ponds that are closing, the closure alternatives analysis required by Section 845.710 has a huge gap: it does not require any analysis of transportation alternatives. By not requiring consideration of multiple modes of transporting ash during cleanup, the proposed rules fail to protect communities near ash sites and along transportation routes. The alternatives analysis should be required to consider, at a minimum, transport of removed ash by rail, barge, and electric truck. Transport by train or barge could have very different air pollution impacts—considering CCR fugitive dust, exhaust, and impacts on traffic patterns for non-CCR related traffic—than transport by truck, and neither the Agency nor the public can meaningfully evaluate the closure-by-removal option without understanding the potential impacts of its transportation

[41] U.S. Dep't of Labor, Occupational Safety and Health Admin., Permissible Exposure Limits, https://www.osha.gov/dsg/annotated-pels/index.html (last accessed June 10, 2020) ("OSHA recognizes that many of its permissible exposure limits (PELs) are outdated and inadequate for ensuring protection of worker health. . . . OSHA recommends that employers consider using the alternative occupational exposure limits because the Agency believes that exposures above some of these alternative occupational exposure limits may be hazardous to workers, even when the exposure levels are in compliance with the relevant PELs.").

plans. Transport of removed ash by rail and barge is likely to be an option for many CCR impoundments, given historic use of those transportation networks for delivery of coal to the power plants that generated the ash.

The proposed rules should also mitigate potential harms from use of diesel trucks where rail and barge are not feasible. To minimize exhaust pollution from trucks, the transportation alternatives analysis should also require operators to analyze whether electric trucks can haul some or all of the excavated ash, and, where not feasible, utilize low-emission trucks to do the hauling.

IV. THE PROPOSED RULES FAIL TO PROVIDE ESSENTIAL PERMITTING AUTHORITY OVERSIGHT.

The proposed rules provide neither essential permitting authority oversight nor a permitting scheme that meets statutory requirements. The proposed rules fail to make fully clear that all requirements applicable to coal ash surface impoundments shall be treated as enforceable conditions of permits. Critical plans, as well as documents underlying other important assessments and plans, are not required by the proposed rules to be submitted in permit applications. Without such requirements, the proposed rules fail to ensure necessary Agency oversight and full public participation, as required by applicable federal and state regulations. Certification by a third party is not sufficient to meet the statutory requirements. All plans, proposals, and assessments, as well as supporting documentation, for all coal ash surface impoundments, must be submitted and reviewed by the Agency.

US EPA has explained that the 2015 Federal Coal Ash Rule was promulgated to be self-implementing with the understanding that there would be no permitting oversight allowing for essential site-specific analysis.[42] As mentioned above, the WIIN Act calls for important increases in oversight and enforcement, authorizing Illinois to replace the self-implementing 2015 Federal Coal Ash Rule with a permitting scheme where regulatory requirements are administered and enforced through permits. The WIIN Act also requires state permit programs to ensure that all CCR units to achieve compliance with criteria at least as protective as the 2015 Federal Coal Ash Rule.

To address the hole in regulatory oversight left by the 2015 Federal Coal Ash Rule, the Coal Ash Pollution Prevention Act aimed to establish a comprehensive permitting program – mandating that all requirements applicable to CCR impoundments be included in permits;[43] that the Agency receive significant funding to implement the permitting program;[44] and that the program include robust, meaningful opportunities for public participation.[45] Because the "requirements applicable to CCR surface impoundments" include completion and/or compliance

[42] 80 Fed. Reg. 21,302, 21,311 (April 17, 2015); *USWAG*, 901 F.3d at 437 (citing counsel for EPA's oral argument explanation that certain provisions of the 2015 Federal Coal Ash Rule "cry out for site specific enforcement").
[43] 415 ILCS 5/22.59(g)(3) requires that the rules "specify which types of permits include requirements for closure, post-closure, remediation and all other requirements applicable to CCR surface impoundments
[44] 415 ILCS 5/22.59(j) specifies fees to be paid by owners and operators of CCR surface impoundments, while 415 ILCS 5/22.59(k) specifies that those fees are to be deposited into the "Environmental Protection Permit and Inspection Fund."
[45] *See* 415 ILCS 5/22.59(a), (a)(5), and (g)(6).

with specific assessments, plans, and demonstrations, the Coal Ash Pollution Prevention Act and the Environmental Protection Act require that completion of those plans and assessments and compliance with the plans, once approved by the Agency, be enforceable conditions of permits. Similarly, in order to ensure Agency oversight, transparency, and meaningful public participation and not hinder enforcement, the documents essential for determining compliance with the requirements for CCR surface impoundments—including all plans and demonstrations mentioned above, together with other assessments and financial assurance documents required by the Federal Coal Ash Rule, the Coal Ash Pollution Prevention Act, and these rules—must be required to be submitted in permit applications.

The proposed rules do not satisfy the Coal Ash Pollution Prevention Act's permitting requirements. They do not explicitly require a CCR permit applicant to submit, as part of its permit application or otherwise for Agency review and approval, any of the following essential information:

- Composite liners
    - For existing CCR impoundments, any documentation supporting either a certification that a composite liner meets the design criteria requirements or a statement that that the CCR surface impoundment does not have a liner that meets the requirements.
    - For new or expanded CCR impoundments, plans and demonstrations that the liner meets design criteria requirements. Only a certification from an engineer that the liner meets requirements is required to be submitted.
- Initial hazard potential classification assessment
    - For existing CCR surface impoundments, the initial hazard potential classification assessment or the certification of the initial hazard potential assessment.
    - For new or expanded CCR impoundments, any documentation supporting the certification that the initial hazard potential assessment was completed according to the requirements.
- Initial Emergency Action Plan
    - For both existing and new or expanded CCR impoundments, the Emergency Action Plan. Only the initial emergency action plan certification is required to be submitted in the initial and operating permit renewal applications.
- Initial structural stability assessment
    - For existing CCR surface impoundments, the initial structural stability assessment or the certification of the initial structural stability assessment.
    - For new or expanded CCR impoundments, only the certification must be submitted in operating permit applications.
- Initial safety factor assessment
    - For existing CCR surface impoundments, the initial safety factor assessment or the certification of the initial safety factor assessment.
    - For new or expanded CCR impoundments, any documentation supporting the initial safety factor assessment. Only the initial safety factor assessment certification is required to be submitted in operating permit applications.
- Fugitive dust control plan

    - For existing impoundments, the Fugitive Dust Control Plan. Only the initial fugitive dust control plan certification is required to be submitted in the initial and operating permit renewal applications.
- Initial inflow design flood control system plan
    - For existing CCR surface impoundments, the initial inflow design flood control system plan or the certification of the initial inflow design flood control system plan.
    - For new or expanded impoundments, any documentation supporting the initial inflow design flood control system plan. Only the initial inflow design flood control system plan certification is required to be submitted in operating permit applications.
- Safety and Health Plan
    - For any permit application, the safety and health plan.

These essential plans, proposals, and assessments, as well as supporting documentation, include fundamental protections that must not be excluded from the permitting process. Fugitive Dust Control Plans are a good example. As discussed above, fugitive CCR dust poses a grave threat to workers, passersby, and affected communities if not properly controlled, and many instances of harm from CCR dust have been documented, including here in Illinois.[46] Requiring submission of the Fugitive Dust Control Plan in permit applications for existing CCR impoundments, and incorporating the approved plan as an enforceable part of the permit, is essential to provide the oversight necessary to ensure that the Fugitive Dust Control Plan is adequately protective.

Requiring submission of the Inflow Design Flood Control Plan, as well as incorporating the approved plan into a permit, is also necessary because flood control is critical at CCR surface impoundments. Floods can lead, and have led, to devastating outcomes at CCR impoundments and landfills in the US.[47] With many of Illinois' CCR surface impoundments sitting adjacent to flood-prone rivers and lakes, Agency review and approval of these plans is critical.

It is likewise essential that the Agency review and approve updated hazard potential classification assessments, structural stability assessments, and safety factor assessments for CCR surface impoundments. The Agency must have an up-to-date understanding of the stability of these sites in order to, among other things, assign them a proper closure priority classification

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[46] In developing the federal CCR Rule, US EPA completed a damage case report specific to fugitive CCR dust impacts, listing 27 sites, including 3 in Illinois. *See* US EPA, Damage Cases: Fugitive Dust Impact, Technical Support Document, Docket EPA-HQ-RCRA-2009-0640 (Dec. 18, 2014), *available at* https://www.regulations.gov/document?D=EPA-HQ-RCRA-2009-0640-11992. One Illinois case, involving piles of coal ash at U.S. Minerals near the Coffeen plant, resulted in "OSHA fin[ing] U.S. Minerals nearly $400,000. . . for more than two dozen safety violations endangering workers with dangerously high levels of hazardous ash dust without proper breathing equipment and training." *Id*. at 40.

[47] In the wake of 2018's Hurricane Florence in North Carolina, a berm at Duke Energy's Sutton coal plant failed, sending CCR and CCR-polluted water from the CCR basin into the Cape Fear River and Sutton Lake. *See* Brady Dennis, Juliet Eilperin, and Steven Mufson, "Dam breach sends toxic coal ash flowing into a major North Carolina River," *Wash. Post* (Sept. 22, 2018), *available at* https://www.washingtonpost.com/energyenvironment/2018/09/21/dam-breach-reported-former-nc-coal-plant-raising-fears-that-toxic-coal-ash-may-pollutecape-fear-river/.

or order immediate action to prevent collapse. Conditions can and do change quickly as evidenced by the Vermilion plant, where the erosion of the riverbank has progressed significantly in recent years. Review and approval of Emergency Action Plans, which set out where ash-saturated water would break through berms in the potentially catastrophic event of a spill[48] and contain important safety information for the public, are also essential for similar reasons.

The Agency's failure to require that all requirements applicable to CCR surface impoundments be included in a permit, and that all documents pertaining to compliance with those requirements are submitted in permit applications and subject to Agency review and approval, is both a violation of public participation mandates as well as a total abdication of the Agency's duty to ensure compliance with applicable statutory requirements.[49] Without agency review and, if appropriate, approval of site-specific proposals for compliance with applicable law, the "self-implementing" approach of the federal CCR rule—the approach that both the WIIN Act and the Coal Ash Pollution Prevention Act were enacted to avoid—continues. Relying on third-party certifications cannot satisfy the Agency's duty and will likely result in numerous deficiencies as well as significant variations in quality of information provided, amongst other likely issues. The rules must ensure that the Agency, or another agency with appropriate expertise, reviews and approves all required plans, proposals, and assessments, as well as supporting documentation, for all CCR surface impoundments, and that all requirements applicable to those impoundments are included in permits.

V. THE PROPOSED RULES DO NOT ENSURE MEANINGFUL PUBLIC PARTICIPATION, AS REQUIRED BY THE COAL ASH POLLUTION PREVENTION ACT.

Meaningful public participation is a necessary requirement of the permitting process. Public participation is a key safety valve that helps to ensure compliance and minimizes risk to the environment. When agencies lack resources to ensure that industry meets all permit requirements, the public can step in to protect the environment and communities. Moreover, community members often have local knowledge that can help regulators make better-informed decisions about a site. Public participation in permitting serves the same goals as public

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[48] Catastrophic failures at CCR surface impoundments are, unfortunately, events that have happened multiple times in the last few decades. Such failures have occurred at sites including but not limited to the Kingston spill in Tennessee in 2008, the Dan River failure in North Carolina in 2014, and failure of a berm at Vistra's Baldwin coal plant here in Illinois in 1995. *See, e.g.*, John Seymour et al., "Conditions of coal ash embankments" at pdf pp. 14–15, May 2015, *available at* http://www.flyash.info/2015/028-seymour-2015.pdf.

[49] *See, e.g., Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 498-502 (2d Cir 2005) (EPA's Concentrated Animal Feeding Operation ("CAFO") rule violated the Clean Water Act's mandate to ensure compliance with applicable requirements when it failed to require permitting authorities to review CAFOs' nutrient management plans); *Envtl. Def. Center, Inc. v. U.S. E.P.A.*, 344 F.3d 832, 855-56 (9th Cir. 2003) (holding that EPA's rule for storm water management violated the Clean Water Act when it failed to require permitting authorities to review operators' site-specific "minimum measures" to reduce storm water discharges, and concluding that "programs that are designed by regulated parties must, in every instance, be subject to meaningful review by an appropriate regulating entity to ensure that each such program reduces the discharge of pollutants to the maximum extent practicable").

participation in rulemaking; in both contexts, the public can voice their concerns and provide new information to the government body making a determination.[50]

The Coal Ash Pollution Prevent Act is clear: the Board must adopt regulations governing coal ash surface impoundments that provide "meaningful" public participation in the permitting process.[51] Meaningful public participation requires that all documents underlying permitting applications and decisions be available for the public to review and comment.[52] This is so because, without an opportunity to review and comment on the *full* permit application, residents cannot adequately scrutinize whether the activities happening in their communities put them, or their environment, at risk, nor can they offer input that may help minimize any such risk.

We have many concerns about the lack of robust public participation opportunities in the proposed rules, which fail to fulfill the Act's mandate. Three key weaknesses of the proposed rules that hinder meaningful participation include: (1) the proposed rules' failure to make numerous key documents available for public review and comment, (2) the proposed rules' inadequate notice requirements and inadequate opportunity for review of permitting documents, and (3) the proposed rules' failure to ensure opportunities for public hearing and to provide for responses to comment for all permits. The final rules must remedy these deficiencies.

A. The Proposed Rules Fail to Make Key Documents Available for Public Review and Comment By Not Making Them Required as Part of Permit Applications.

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[50] *See Conn. Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making"); *see also Senn Park Nursing Ctr. v. Miller*, 455 N.E.2d 153, 158 (Ill. Appt. Ct. 1st Dist. Sept. 28, 1983) ("We note first that public participation 'in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests.'") (internal citations omitted).

[51] *See, e.g.*, 415 ILCS § 5/22.59(a)(5) ("The General Assembly finds that: . . . (5) meaningful participation of State residents, especially vulnerable populations who may be affected by regulatory actions, is critical to ensure that environmental justice considerations are incorporated in the development of, decision-making related to, and implementation of environmental laws and rulemaking that protects. . . ."); § 5/22.59(a) ("[T]he purpose of this Section is to promote a healthful environment, including clean water, air, and land, meaningful public involvement. . . ."); § 5/22.59(g)(6) (Board shall adopt rules that "must, at a minimum: . . . specify meaningful public participation procedures for the issuance of CCR surface impoundment construction and operating permits. . . .").

[52] *See, e.g., Waterkeeper All., Inc. v. U.S. E.P.A.*, 399 F.3d 486, 503 (2d Cir. 2005) (EPA's CAFO Rule's permitting scheme deemed illegal because it conflicted with the Clean Water Act's public participation mandate by not explicitly providing the public the ability to review and comment on nutrient management plans); *Nat'l Wildlife Fed'n v. Marsh*, 568 F. Supp. 985, 993-994 (D.D.C. 1983) (holding that the Army Corps of Engineers violated public participation requirements in issuing a Clean Water Act permit with a permitting process that denied public access to certain documents underlying permitting decision, and noting, "[o]nly when the public is adequately informed can there be any exchange of views and any real dialogue as to the final decision. And without such dialogue any notion of real public participation is necessarily an illusion. . . .") (internal citations omitted); *Gerber v. Norton*, 294 F.3d 173, 177 (D.C. Cir. 2002) (holding that the Fish and Wildlife Service violated public participation requirements under the Endangered Species Act when it failed to provide the public a site map of proposed conservation area during a permit's public comment period).

First, as detailed throughout these comments, the proposed rules fail to require that numerous key documents—all of which are, or contain, requirements applicable to CCR surface impoundments—be included as part of permit applications and thus be subject to public review and comment. Those documents include, but are not limited to, the assessments and plans detailed in Section IV *supra*; Alternate Source Demonstrations; and documents supporting those plans, assessments, and other components that are required to be submitted in permit applications, such as a closure alternatives analysis. *See, e.g.*, Proposed Sections 845.220, 845.230(a); 845.710(b). The rules must be modified to ensure all documents that contain or represent requirements applicable to CCR surface impoundments, as well as supporting documentation, be included in permit applications to ensure the meaningful public participation that the Coal Ash Pollution Prevention Act requires.

B. The Proposed Rules Do Not Provide Adequate Notice or Opportunity to Review Key Permitting Documents.

Second, the proposed rules provide inadequate opportunity for review of the documents in permit applications. The proposal would provide only 14 days for the public to review extensive application materials for construction permit applications prior to the pre-application public meeting. *See* Proposed Section 845.240(e). Given the likely length and complexity of those materials, at least 30 days is necessary in order for public participation in that public meeting to be meaningful.

In addition, the proposed rules fail to ensure adequate notice and opportunity for review of permitting documents by non-English speaking community members. Owners or operators of CCR surface impoundments are required to provide notice of a public meeting on an application for a construction permit, which must be circulated or broadcast in a non-English language if the community includes a significant proportion of non-English speaking residents. *See* Proposed Section 845.240(c). The proposed rules, however, include no requirement that the Agency publish non-English notices of draft permits. *See* Proposed Section 845.260(b). While people who do not speak English can make a request for translation services, non-English speakers may not even know to make that request if the notice is not in a language that they speak. To ensure the diverse communities surrounding many CCR surface impoundments can meaningfully participate in the permitting process, the Agency should be held to at least the same standard of public outreach as the owner/operators of CCR impoundments.

The Proposed Rules also fail to provide sufficiently robust notice requirements to ensure that community members know how to participate meaningfully in the permitting process. For example, the Agency's notice of the draft permit would not: (1) explain how to request a public hearing, (2) explain how to be added to the Agency's listserv, so the public can stay informed about the permit, or (3) how to access technical assistance funding from US EPA, so the community can afford experts to help them better understand the documents. *See* Proposed Section 845.260(b). The rules should be modified to require notices to provide that essential information.

C. The Proposed Rules Unlawfully Fail to Require a Public Hearing on Permits or Require Agency Response to Comments.

Finally, the Proposed Rules do not ensure the opportunity for public hearing on permits or for a response to comments, as the Coal Ash Pollution Prevention Act requires. *See* 415 ILCS 5.22/59(g)(6). Rather than provide that the Agency "must" or "shall" hold a public hearing where there is a significant degree of public interest in the proposed permit, the proposal states that the Agency "may" hold such a hearing. *See* Proposed Section 845.260(d). The opportunity for a public hearing is a directive of the Act and thus may not be left to Agency discretion, particularly where there is significant interest in the permit.

Similarly, preparation of a response to comments is not discretionary. The Act provides that the rules "must . . . specify meaningful public participation procedures for the issuance of [CCR] permits, including but not limited to . . . a summary and response of the comments prepared by the Agency." 415 ILCS 5.22/59(g)(6). The proposal that a response to comments need only be prepared when a public hearing is held, see Proposed Section 845.260(f), is inconsistent with that mandate.

The above examples represent only a limited selection of our concerns with the public participation opportunities in the Proposed Rules. We shall detail those concerns at greater length in later submissions.

VI. THE PROPOSED RULES INCLUDE INCONSISTENT AND VAGUE PROVISIONS THAT LEAVE REQUIREMENTS UNCLEAR AND COMPLIANCE CHALLENGING TO DETERMINE.

Vague terms and inconsistences plague the proposed rules, leaving operators without regulatory clarity and the public with questions about whether required protections are being met. These problems include, for example, provisions that could allow companies to improperly evade cleaning up pollution from their coal ash impoundments, provisions that create ambiguity about what must be done to complete closure, and provisions that leave unclear which requirements will be incorporated into permits.

Provisions addressing groundwater monitoring and corrective action offer stark examples of the type of vague and inconsistent language that threatens to undermine the rule's protections. Context is necessary to understand how those provisions undermine groundwater monitoring and cleanup requirements. The groundwater monitoring system is designed so that the public, the Agency, and operators gain an understanding of how much pollution is in groundwater that has *not* been contaminated by coal ash – that is, provides that "background" levels of contamination.[53] If those background concentrations are higher than the numeric groundwater protection standards the Agency has set, the background levels become the groundwater

[53] *See, e.g.*, 2015 Federal CCR Rule, 80 Fed. Reg. at 21,397 ("[T]he design of an appropriate groundwater monitoring system is . . . dependent on site conditions . . . [to] represent the quality of background groundwater that has not been affected by contaminants from a CCR unit.").

protection standards applicable at the site[54] and cleanup requirements are triggered only if concentrations of pollutants in downgradient groundwater (groundwater that has passed through or beneath impoundments) are higher than background levels.[55] In short, background levels strongly influence when clean-up is required and how thoroughly groundwater must be remediated.[56] Thus, if background is improperly determined—for example, if "background" actually reflects coal ash contamination in groundwater—then cleanup requirements may never be triggered or, even if triggered, the corrective action may leave potentially unsafe levels of pollution in groundwater in perpetuity.

The Agency may intend to exclude coal ash-contaminated groundwater from qualifying as "background," but its proposed rule falls short of accomplishing that goal. Proposed Section 845.630(a)(1) provides that the owner or operator of CCR impoundments "must install a groundwater monitoring system that consists of a sufficient number of wells, installed at appropriate locations and depths, to yield groundwater samples that: [a]ccurately represent the quality of background groundwater that has *not been affected by leakage from a landfill containing CCR* or CCR surface impoundment" (emphasis added). Neither the proposed rules nor the Act define "landfill containing CCR" or contain a definition of "landfill." While it would be fair to interpret "landfill containing CCR" as encompassing any CCR dumped on land, whether in a formal, delineated landfill or—as has been a frequent practice at coal plant sites—haphazardly dumped on the land as "fill,"[57] there is a risk that it would be interpreted as limited to clearly delineated or formally-identified landfills. If the latter interpretation were adopted, it would risk a "background" concentration affected by leakage from unconsolidated CCR fill—which the Board has identified as a source of contamination[58]—and risk either inadequate remediation or no cleanup whatsoever. Because the undefined term "landfill containing CCR" might give owners or operators a green light to game the system by placing background wells in CCR-contaminated groundwater, the Board should revise the rules to make clear that "background" concentrations must not be affected by leachate or releases from any CCR.

A related inconsistency comes in the same section. Proposed Section 845.630(c)(2) provides that the "groundwater monitoring system must include a sufficient number of monitoring wells necessary to meet the performance standards specified in subsection (a) . . . [and] must contain . . . additional monitoring wells as necessary to accurately represent the quality of background groundwater that has *not been affected by leakage from the CCR surface impoundment. . .* " (emphasis added). Here, the Agency's proposal fails to clearly require what it has just specified above, that is, that the quality of groundwater at background wells must not be

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[54] *See* Proposed 35 I.A.C. § 845.600(a)(2); *see also id.* § 845.600(b) (for new surface impoundments, the Agency proposes that the groundwater protection standard would be background).
[55] *See* Proposed 35 I.A.C. § 845.650(d)(1).
[56] *See* Proposed 35 I.A.C. § 845.670(c)(2, (d)(2) (requiring any selected remedy to achieve the groundwater protection standards); 40 C.F.R. § 257.102(c) (providing that closure by removal is not complete until "constituent concentrations . . . . have been removed and groundwater monitoring concentrations do not exceed the groundwater protection standard[s] . . .").
[57] *See, e.g., In the Matter of: Sierra Club et al v. Midwest Generation, LLC*, PCB No. 2013-15, Interim Order at 28, 41, 56–57, and 67–68 (Order dated June 20, 2019) (finding that "it is more likely than not" that coal ash fill areas at the Joliet 29 plant, the Powerton plant, the Will County plant, and the Waukegan plant "are causing or contributing to [groundwater quality standards] exceedances" at those sites).
[58] *See id.*

affected by leakage from a CCR surface impoundment OR a "landfill containing CCR." The rule's directives regarding what constitutes background groundwater quality must be internally consistent as well as clear that groundwater affected by leakage from any CCR is not background.

The failure to define "areas affected by release" likewise threatens to undermine mandates to clean up contamination. Proposed Section 845.740(a) provides that "CCR removal and decontamination of the CCR surface impoundment are complete when the CCR in the surface impoundment and *any areas affected by releases from the CCR surface impoundment* have been removed" (emphasis added). While the term "release" is defined in the Act, the Agency here proposes no standards for how an owner/operator is to determine what areas have been "affected by releases" from the CCR surface impoundment. The proposal is also somewhat muddy as to whether the Agency is calling for only CCR to be removed or whether other materials (underlying soil, for example) that likely were "affected by releases" from the impoundment must also be removed. The lack of standards for determining what an "area affected by releases" is and the ambiguity regarding how such areas must be handled could lead to owners or operators failing to remove CCR-contaminated soil, risking continued contamination.

Finally, another problematic provision in the proposed rules is the provision describing permit conditions. Proposed Section 845.200(b)(3) provides, "In granting permits, the Agency shall impose conditions as may be necessary to accomplish the purpose of the Act and as are not inconsistent with this Part" (citing 415 ILCS 5/39(a)). This provision cannot be squared with the Coal Ash Pollution Prevention Act's far more direct and comprehensive mandate that all requirements applicable to coal ash surface impoundments must be set out in permits. Specifically, 415 ILCS 5/22.59(g)(3) states that "[t]he rules must . . . specify which types of permits include requirements for closure, post-closure, remediation and *all other requirements applicable to CCR surface impoundments*" (emphasis added). The rules must, as such, make clear that permits shall include conditions mandating compliance with *all* requirements applicable to surface impoundments, not only those conditions the Agency deems "necessary to accomplish the purpose of this Act." In addition to being statutorily mandated, this directive makes sense: owners/operators, the Agency, and Illinois residents should be able to look to a single document to find how a particular impoundment is to comply with the broad standards of the rules. This provision should be amended consistent with 415 ILCS 5/22.59(g)(3).

This discussion is not comprehensive; it offers just a few examples of the ambiguities and inconsistencies that plague the proposed rules. These ambiguities and inconsistencies raise significant questions that could result in Illinois communities facing coal ash pollution in greater amounts, and for longer periods, than allowed by the Act.

VII. THE PROPOSED RULES UNLAWFULLY INCORPORATE FEDERAL PROPOSALS TO WEAKEN COAL ASH PROTECTIONS.

The Proposed Rules are also unlawful and inadequately protective because they would incorporate provisions from *proposed* Trump Administration rollbacks to the Federal Coal Ash Rule. The Coal Ash Pollution Prevention Act directs the Board to adopt rules governing coal ash

impoundments in Illinois that are "at a minimum . . . at least as protective . . . as the federal regulations . . . or amendments thereto promulgated by the Administrator of the [US EPA] in Subpart D of 40 CFR 257 governing CCR surface impoundments."[59] That is, the Federal Coal Ash Rule is the floor for Illinois' regulations, and that floor is set by regulations that have been *promulgated* by US EPA—not those that have only been proposed. Likewise, the WIIN Act only allows US EPA to approve state coal ash programs that are "at least as protective as" the criteria US EPA has promulgated.[60]

Yet here, the Agency proposes to incorporate various provisions from several proposed rollbacks to the federal rule which may never be finalized—or may be finalized in a very different form than initially proposed—and which would undercut the protections required in the Coal Ash Pollution Prevention Act. In one instance, the Agency's proposal would weaken standards even further than proposals at the federal level. Those provisions, which include mandates concerning where coal ash may be stored once excavated, whether coal ash may be added to unlined impoundments even after they're directed to cease receiving ash, and how long industry may take to excavate impoundments, must not be included in the final rules.

A. The Trump Administration's Proposed Rollbacks

In the nearly two years since the D.C. Circuit issued its directive to strengthen the Federal Coal Ash Rule, the Trump Administration has published multiple proposals[61] that would significantly weaken the protections of the Federal Coal Ash Rule. Two of those proposed rollbacks that are most pertinent here include (i) the "Phase II" Proposal,[62] published on August 14, 2019,[63] and (ii) the "Part B" Proposal,[64] published in March 2020. The Phase II Proposal would modify the 2015 CCR Rule's approach to "temporary" on-site coal ash piles and relax the 2015 CCR Rule's definition of "beneficial use," enabling more coal ash disposal activities to avoid the Rule's regulatory requirements for landfills and impoundments. The Part B Proposal would allow utilities to (1) avoid closing certain unlined ponds by making a "demonstration" that the unlined pond should be treated as if lined, (2) use large volumes of additional coal ash, instead of clean soil, to fill in unlined ash ponds already deemed to be unlawful "open dumps," and (3) allow utilities to "close" units without having completed clean-up of contamination caused by the unit.[65]

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[59] 415 ILCS 5/22.59(g)(1) (emphasis added).
[60] 42 U.S.C. § 6945(d)(1)(B).
[61] These rollbacks include, in addition to "Phase II" and "Part B," two other proposals. *See* EPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure, 84 Fed. Reg. 65,941, 65,961 (Dec. 2, 2019) ("Part A Proposal"); EPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Federal CCR Permit Program, 84 Fed. Reg. 9940 (Feb. 20, 2020).
[62] 84 Fed. Reg. 40,353 (Aug. 14, 2019) ("2019 Phase II Proposal").
[63] *Id.* at 40,355-56, 40,362; *see also* Comments of Earthjustice et al., Docket ID No. EPA-HQ-OLEM-2018-0524 (Oct. 15, 2019) and discussion *infra*.
[64] EPA, Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure, 85 Fed. Reg. 12,456 (Mar. 3, 2020) (hereafter "Part B Proposal").
[65] *Id*. at 12,456-71.

B. The Agency's Proposed Rules

Here, the Agency proposes to adopt multiple problematic provisions of US EPA's proposed "Phase II" and "Part B" rollbacks. First, the Agency proposes to incorporate portions of the Phase II rollbacks allowing CCR to be "temporarily stored" in piles. CCR piles, under the existing Federal CCR Rule that sets the floor for Illinois requirements, are regulated as CCR landfills. *See* 40 C.F.R. § 257.53 (defining CCR landfills as including "CCR piles"). As such, they are covered by the multiple protections governing CCR landfills, including location restrictions, operating and design standards including fugitive dust control requirements, and corrective action requirements. *See* id. §§ 257.60–.70, 257.80–.81, 257.90–.98. Such extensive controls are necessary because CCR piles are known sources of air and water pollution,[66] including right here in Illinois.[67]

While the Agency proposes to require more specific controls for CCR piles than US EPA does in its severely-flawed Phase II rollback, the proposal falls short of ensuring necessary protections. First, it includes language that companies could attempt to use as loopholes or, at a minimum, attempt to exploit as ambiguous. For example, berms to guard against run-on and run-off pollution are only required "where appropriate." *See* proposed Section 845.740(b)(4)(B)(v). The term "appropriate" leaves unclear what happens in a dispute between the Agency and owner/operator over the meaning of the term. The requirement that CCR piles must only be tarped over the edge of the storage pad "where possible," *id.* at (b)(4)(B)(iv), is problematic for the same reasons. Moreover, "good practices" during loading and unloading at piles is left undefined, notwithstanding clear, evidence-based specific mandates, such as maximum-drop distances, which—if piles are allowed—should be put in place to limit dust pollution.

To make matters worse, there is no clear limit on how large coal ash piles can be or how long such inadequately-controlled piles may be left in place. The Agency's proposed definition of "CCR storage pile" relies on the definition of "temporary accumulation" to, in theory, keep piles in place for merely a short time. But the definition of "temporary accumulation" does not place any limit on the length of time considered "temporary," nor does it establish an upper limit on the amount of CCR that can be accumulated. *See* Proposed Section 845.120. The only requirement in the definition that addresses the length of time a CCR pile may be in place is that the entity managing the pile has a "record in place" that "document[s] that all of the CCR will be completely removed according to a specific timeline," without any outer limit on that timeline or other requirements ensuring that complete removal of the CCR from the pile actually takes place. *See id*. In short, unlike other Illinois mandates, such as those in the Act's definition of coal

[66] The massive coal ash pile at AES's coal plant in Puerto Rico is a devastating example: it has caused severe fugitive dust pollution as well as polluted groundwater above groundwater protection standards for selenium, lithium, and molybdenum. Pollution from the massive ash pile lead Puerto Rico to require removal of that pile in legislation signed on January 2, 2020.

[67] *See, e.g., In the Matter of: Sierra Club et al v. Midwest Generation, LLC*, PCB No. 2013-15, at 42, 48–51, 86 (Order dated June 20, 2019) (finding that a CCR pile at the Powerton coal plant, in place for a mere "two to three" months, contributed to exceedances of Class I Groundwater Quality Standards for arsenic, boron, sulfate, and total dissolved solids, and boron and sulfate pollution in excess of background levels).

combustion byproduct,[68] these is nothing to ensure these inadequately controlled "temporary" piles are, in fact, temporary. Given the major risks coal ash piles pose to communities' and workers' health and the environment, Illinois must not follow the Trump Administration's lead of allowing inadequately-controlled CCR piles of unlimited size and duration to mar our state. That is not the "responsible removal" the Coal Ash Pollution Prevention Act calls for, nor is it consistent with the requirement that the promulgated federal CCR Rule serve as the floor for Illinois' regulations. *See* 415 ILCS 5/22.59(g)(1), (10).

Another highly problematic instance where the current proposed rules follow the lead of the Trump Administration is in allowing more coal ash to be placed in unlined impoundments before they are closed. Unlined impoundments are unsafe open dumps that must close.[69] Under the promulgated federal CCR Rule, placing more coal ash into unlined impoundments is prohibited.[70] It is also unsupported: US EPA itself recognized that placing large volumes of ash in impoundments slated for closure raises potentially "significant risks" that were not considered in its CCR risk assessment. Allowing more CCR to be dumped into unlined impoundments, whether under the Part B rollback's guise of "contouring" for closure or not, is inconsistent with the Coal Ash Pollution Prevention Act and an endangerment to Illinois communities that the Board must not permit.

Finally, the proposed rules incorporate the "Part B" proposal to allow unlimited time for owners/operators to clean up groundwater at CCR impoundments undergoing closure by removal, but would weaken protections *even more* than the Part B proposal by allowing unlimited time for owners/operators to excavate CCR and failing to explicitly require achievement of groundwater protection standards at impoundments closing by removal. This is simply not as protective as the Federal CCR Rule. Under that rule, closure by removal is not complete until the groundwater protection standards are achieved, and there are time limits by which removal of coal ash, areas affected by releases, and achievement of the groundwater protection standards must be completed. *See* 40 C.F.R. §§ 257.102(c), (f). Under Proposed Section 845.760(c)(3).[71] In contrast, the Agency proposes no limit on the number of extensions an owner operator may obtain to complete removal, with no mention whatsoever of how long an owner/operator has to achieve compliance with the groundwater protection standards—nor even an explicit requirement that those standards must be achieved. This is impermissible. Communities must not languish with CCR removed gradually over decades while it continues leaching pollutants into groundwater. The rules must set an outer limit on how long excavation

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[68] *See* 415 ILCS 5.3.135(a-5)(5) (providing that "[coal combustion byproduct] is not to be accumulated speculatively. CCB is not accumulated speculatively if during the calendar year, the CCB used is equal to 75% of the CCB by weight or volume accumulated at the beginning of the period").

[69] *See USWAG*, 901 F.3d at 426–30.

[70] *See* 40 C.F.R. § 257.101(a)(1) (providing that once closure is required, owners or operators "must cease placing CCR and non-CCR wastestreams into such CCR impoundment and either close or retrofit. . . ."); Part B Proposal, 85 Fed. Reg. at 12,462 (explaining that "the current CCR regulations expressly prohibit ''placing CCR'' in a CCR unit required to close for cause pursuant to § 257.101 after dates established in the CCR regulations . . . [and] do not distinguish between placement that might be considered beneficial use and placement that might be considered disposal. All further placement of CCR into the unit— whether for beneficial use or disposal— is prohibited once the provisions of § 257.101 are triggered.").

[71] Proposed § 845.760(c)(3) states, "CCR surface impoundments that are closing by removal may extend the time to complete closure multiple times, in two-year increments. For each two-year extension sought, the owner or operator must substantiate the factual circumstances demonstrating the need for the extension."

of ash may take, explicitly require achievement of the groundwater protection standards at impoundments closed by removal, and require owners/operators to justify any extension of time needed to achieve those standards at those sites.

The current Administration's Phase II and Part B regulatory rollback proposals are weak proposals: they are not well supported, they are legally suspect, and they diminish protections when both available evidence and the D.C. Circuit's decision in *USWAG* make it increasingly clear that protections must be enhanced, not gutted.[72] The Illinois Attorney General, together with several other state Attorneys General, has vehemently opposed several of these rollbacks, including the "Part B" rollbacks discussed here.[73] It is increasing clear that relying on the federal government to protect Illinois communities and waters is risky business.[74] Neither the Coal Ash Pollution Prevention Act nor the WIIN Act authorize these rules to include proposed, but not finalized, federal regulatory mandates that would weaken protections from coal ash impoundments. Illinois must rise above the federal EPA to ensure adequate, meaningful protections for its communities and environment.

* * *

Thank you for considering these comments.

Dated: June 15, 2020

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[72] *See*, *e.g.*, Cap and Run.

[73] *See* Comment from Attorneys General of Maryland, Illinois, and Michigan, Hazardous and Solid Waste Management System: Disposal of CCR; A Holistic Approach to Closure Part B: Alternate Demonstration for Unlined Surface Impoundments; Implementation of Closure (EPA-HQ-OLEM-2019-0173; FRL-10005-81-OLEM), dated April 17, 2020, *available at* https://www.regulations.gov/document?D=EPA-HQ-OLEM-2019-0173-0101; Comment from Attorneys General of Maryland, Pennsylvania, Illinois, Michigan, and Vermont, Re: Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Deadline to Initiate Closure (EPA-HQ-OLEM-2019-0172; FRL-10002-02-OLEM); Effluent Limitations Guidelines *and Standards for the Steam Electric Power Generating* Point Source Category (EPA-HQOW-2009-0819; FRL-10002-04-OW), Docket ID No. EPA-HQ-OLEM-2019-0172 (Jan. 21, 2020), *available at* https://www.regulations.gov/document?D=EPA-HQ-OW-2009-0819-8323.

[74] *See* Environmental Law & Policy Center, "EPA Region 5 Clean Water Enforcement Declines: Trend Coincides with Increase in Significant Noncompliance," (April 2020), *available at* http://elpc.org/wp-content/uploads/2020/04/Region5Report_FINAL_April2020.pdf.

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CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hammons, an attorney, certifies that I have served by email the Clerk and by email the individuals with email addresses named on the Service List provided on the Board's website, available at https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16858, a true and correct copy of the **INITIAL PUBLIC COMMENTS OF ENVIRONMENTAL LAW & POLICY CENTER, PRAIRIE RIVERS NETWORK, AND SIERRA CLUB**, before 5 p.m. Central Time on June 15, 2020. The number of pages in the email transmission is 32 pages.

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