BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: Service List

PLEASE TAKE NOTICE that I have today electronically filed, with the Office of the Clerk of the Pollution Control Board, AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri's Responses to Questions for the Illinois Environmental Protection Agency, copies of which are herewith served upon you.

Dated: August 3, 2020

Respectfully submitted,
AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri.

By /s/Claire A. Manning

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
Registration No. 3124724
Anthony D. Schuering
Registration No. 6333319
205 S. Fifth Street, Suite 1000
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
cmanning@bhslaw.com
aschuering@bhslaw.com

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, AmerenEnergy and Union Electric Company, d/b/a Ameren Missouri's Responses to Questions for the Illinois Environmental Protection Agency, were electronically filed on August 3, 2020 with the following:

Don Brown, Clerk of the Board
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, IL 60601
Don.Brown@illinois.gov

and that copies were sent via email on August 3, 2020, to the parties on the service list.

Dated: August 3, 2020

Respectfully submitted,
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205 S. Fifth Street, Suite 1000
P.O. Box 2459
Springfield, IL 62705-2459
(217) 544-8491
cmanning@bhslaw.com
aschuering@bhslaw.com

SERVICE LIST

Don Brown, Clerk of the Board Don.brown@illinois.gov Vanessa Horton, Hearing Officer Vanessa.Horton@illinois.gov Illinois Pollution Control Board James R. Thompson Center Suite 11-500 100 West Randolph Chicago, Illinois 60601	Stefanie N. Diers – Assistant Counsel Stefanie.diers@illinois.gov Christine M. Zeivel – Assistant Counsel Christine.zeivel@illinois.gov Illinois Environmental Protection Agency 1021 N. Grand Ave., East, P.O. Box 19276 Springfield, Illinois 62794-9276
Virginia I. Yang - Deputy Counsel virginia.yang@illinois.gov Nick San Diego - Staff Attorney nick.sandiego@illinois.gov Robert G. Mool bob.mool@illinois.gov Paul Mauer - Senior Dam Safety Eng. Paul.Mauer@illinois.gov Renee Snow - General Counsel renee.snow@illinois.gov Illinois Department of Natural Resources One Natural Resources Way Springfield, IL 62702-1271	Matthew J. Dunn, Chief mdunn@atg.state.il.us Stephen Sylvester Sr. Asst. Attorney General ssylvester@atg.state.il.us Andrew Armstrong, Chief aarmstrong@atg.state.il.us Kathryn A. Pamenter KPamenter@atg.state.il.us Office of the Illinois Attorney General 69 West Washington Street, Suite 1800 Chicago, IL 60602
Michael L. Raiff mraiff@gibsondunn.com Gibson Dunn and Crutcher, LLP 2001 Ross Avenue, Suite 2100 Dallas, TX 75201	Alisha Anker - V.P. Reg. & Market Affairs aanker@ppi.coop Prairie Power 3130 Pleasant Run Springfield, IL 62711
Michael Smallwood Msmallwood@ameren.com Ameren 1901 Choteau Ave. St. Louis, MO 63103	Cynthia Skrukrud Cynthia.Skrukrud@sierraclub.org Jack Darin Jack.Darin@sierraclub.org Christine Nannicelli christine.nannicelli@sierraclub.org Sierra Club 70 E. Lake Street, Ste. 1500 Chicago, IL 60601-7447
Jeffrey Hammons Jhammons@elpc.org Environmental Law & Policy Center 1440 G Street NW Washington, DC 20005	Chris Newman newman.christopherm@epa.gov USEPA Region 5 77 West Jackson Blvd. Chicago, IL 60604

Melissa Legge mlegge@earthjustice.org Earthjustice 48 Wall Street, 15th Floor New York City, NY 10005	Mark A. Bilut mbilut@mwe.com McDermott, Will & Emery, LLP 227 West Monroe Street Chicago, IL 60606-5096
Kim Knowles kknowles@prairierivers.org Andrew Rehn arehn@prairierivers.org Prairie Rivers Network 1902 Fox Drive, Suite 6 Champaign, IL 61820	Abel Russ – Attorney aruss@environmentalintegrity.org Environmental Integrity Project 1000 Vermont Avenue NW, Suite 1100 Washington, DC 20005
Kiana Courtney KCourtney@elpc.org Environmental Law and Policy Center 35 E. Wacker Drive, Suite 1600 Chicago, IL 60601	Jennifer Cassel jcassel@earthjustice.org Thomas Cmar tcmar@earthjustice.org Earthjustice 311 South Wacker Drive, Suite 1400 Chicago, IL 60606
Keith I. Harley kharley@kentlaw.edu Daryl Grable dgrable@clclaw.org Chicago Legal Clinic, Inc. 211 West Wacker Drive, Suite 750 Chicago, IL 60606	Mychal Ozaeta mozaeta@earthjustice.org Earthjustice 707 Wilshire Blvd., Suite 4300 Los Angeles, CA 90017
Deborah Williams Regulatory Affairs Director deborah.williams@cwlp.com City of Springfield Office of Public Utilities 800 East Monroe, 4th Floor Municipal Bldg. East Springfield, IL 62757-0001	Alec M Davis - Executive Director adavis@ierg.org Jennifer M. Martin jmartin@heplerbroom.com Kelly Thompson kthompson@ierg.org IERG 215 E. Adams St. Springfield, IL 62701
Stephen J. Bonebrake sbonebrake@schiffhardin.com Joshua R. More jmore@schiffhardin.com Ryan C. Granholm rgranholm@schiffhardin.com Schiff Hardin, LLP 233 South Wacker Drive Suite 6600 Chicago, IL 60606-6473	Susan M. Franzetti sf@nijmanfranzetti.com Kristen Laughridge Gale kg@nijmanfranzetti.com Vincent R. Angermeier va@nijmanfranzetti.com Nijman Franzetti, LLP 10 South LaSalle Street, Suite 3600 Chicago, IL 60603

Faith Bugel fbugel@gmail.com 1004 Mohawk Wilmette, IL 60091	Walter Stone - Vice President Walter.Stone@nrg.com NRG Energy, Inc. 8301 Professional Place, Suite 230 Landover, MD 20785
Melissa S. Brown melissa.brown@heplerbroom.com Jennifer M. Martin Jennifer.Martin@heplerbroom.com HeplerBroom, LLC 4340 Acer Grove Drive Springfield, IL 62711	

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AMEREN'S RESPONSES TO QUESTIONS POSED BY THE BOARD TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri (collectively, "Ameren"), by their attorneys Claire A. Manning and Anthony D. Schuering of BROWN, HAY & STEPHENS, LLP, pursuant to 35 Ill. Adm. Code 102.108 and hereby submits responses to questions posed by the Illinois Pollution Control Board ("IPCB" or the "Board") to the Illinois Environmental Protection Agency ("IEPA").

On June 23, 2020, the IPCB Hearing Officer issued an Order, and Attachment A to that Order contained a list of questions posed by the Board to the IEPA. The Order invited any participants in this proceeding "to respond to the attached questions, as well as any other pre-filed questions in the record." Ameren has reviewed all the questions posed to the IEPA by the Board and by other participants. After concluding its review, Ameren has decided to answer four questions posed by the Board to the IEPA. The questions Ameren will be answering go to the heart of the applicability of P.A. 101-0171—and by extension, the Board's regulations—to former ash ponds that were closed pursuant to the direction, oversight, and approval of the IEPA prior to the enactment of these amendments to the Illinois Environmental Protection Act (the "Act"). Ameren hopes that its answers will assist the Board in developing a full and complete

record, and in promulgating regulations that are consistent with the enabling legislative enactment.

IPCB Question 1(d)

Board Question No. 1(d): *Clarify whether all 73 CCR impoundments would be subject to the proposed regulations.*

RESPONSE: Not all of the 73 sites identified by the IEPA as CCR surface impoundments, as listed on pages 37-39 of the IEPA's Statement of Reasons ("SOR"), would qualify as "CCR surface impoundments" pursuant to the new provisions of the Act which were enacted by the legislature in P.A. 101-0171. Section 22.59(g) of the Act only tasks the IPCB with enacting regulations that apply to CCR surface impoundments, which means that former ash ponds that do not meet the definition of a CCR surface impoundment cannot be subject to the regulations which are implemented under the directive at Section 22.59(g).

While Section 22.59 is the primary focus of the Board's regulatory proceeding, the Board must look to the definitions of "CCR" and "CCR surface impoundments" as defined in the Act. Both definitions were added to the Act, along with Section 22.59, in P.A. 101-0171. The term "CCR" was defined to mean "fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal for the purpose of generating electricity by electric utilities and independent power producers." 415 ILCS 5/3.142. The term "CCR surface impoundment" was added to mean "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR." 415 ILCS 5/3.143. (emphasis added).

Prior to the legislature's passage of P.A. 101-0171, the IEPA (and the entities which the IEPA regulated) used different terminology. Depressions in the ground that held fly ash were simply referred to as "ash ponds." In developing its list of 73 sites, it appears that the IEPA

provided the Board with its historic inventory of "ash ponds", without regard to whether the ash ponds qualified under the new definition of CCR surface impoundment. This is evident from the IEPA's listing of the first ten "surface impoundments"—all of which are owned by entities affiliated with Ameren and which were closed pursuant to IEPA direction, oversight, and approval well before the enactment of P.A. 101-0171.

Unlike other industry participants in this proceeding, Ameren no longer operates *any* coal-fired power generating facilities in Illinois. Therefore, Ameren no longer generates or disposes of CCR. In implementing Ameren's decision to stop operating power generating facilities in Illinois, Ameren spent hundreds of thousands of dollars and countless hours to conduct effective and environmentally-responsible closure of *all* of its former ash ponds—all done with the direction, oversight, and approval of the IEPA.

The IEPA has identified Ameren as owning two CCR surface impoundments at its former power generating facility in Venice, Illinois, five CCR surface impoundments at its former power generating facility in Hutsonville, Illinois, and three CCR surface impoundments its former power generating facility in Meredosia, Illinois. *See* SOR, p. 37. Ameren concedes that it continues to own these former ash ponds, and that some of those ponds qualify as CCR surface impoundments. However, several of those former ash ponds clearly do not qualify as CCR surface impoundments.

Taking Ameren's Hutsonville facility as an example, the five ash ponds listed have historically been referred to as Pond A, Pond B, Pond C, Pond D, and the Bottom Ash Pond. Three of those five ponds—Pond B, Pond C, and the Bottom Ash Pond—are not covered by the Act, and cannot be covered by these regulations, since those three former ash ponds cannot reasonably be considered to be CCR surface impoundments, as defined by Section 3.143 of the

Act. Those three former ash ponds were all "clean closed" pursuant to closure plans approved by the IEPA, meaning that all fly ash (now deemed "CCR") was removed from the ash ponds and consolidated in to one ash pond—Pond A. These closures occurred years before the effective date of P.A. 101-0171. Thus, while Pond A would be subject to Section 22.59 and the Board's regulations because it is a CCR surface impoundment, Pond B, Pond C, and the Bottom Ash Pond clearly cannot be deemed CCR surface impoundments since, as of the effective date of P.A. 101-0171, none "treat[ed], store[d], or dispose[d] of CCR." Moreover, as of the effective date of P.A. 101-0171, none was "designed to hold an accumulation of CCR and liquids", which is the other requirement of a CCR surface impoundment under Section 3.143.

A similar situation exists at Ameren's Meredosia facility, where the IEPA counted three former ash ponds, even though one of those ponds (historically referred to as the Bottom Ash Pond) was clean closed prior to the effective date of P.A. 101-0171. Thus, four of the ten listed Ameren units do not qualify as Surface Impoundments.[1]

There are other reasons that the IEPA's list may be overly broad. Ameren has previously discussed two other applicability issues with the IEPA which are relevant to two of the ten listed Ameren sites (Old Ash Pond at Meredosia and Hutsonville Pond D), and which illustrate why the assertion that all former ash ponds qualify as CCR surface impoundments under the IEPA rule proposal is untenable. The Old Ash Pond at Ameren's Meredosia facility is a prime example of a former ash pond that closed prior to the effective date of the Act and no longer functions as an ash pond (or surface impoundment) at all. Constructed in 1948, the Old Ash Pond was removed from service in the early 1970s and capped with native materials. Notably, the Old Ash Pond

[1] That the IEPA is treating these clean-closed former ponds as covered by the new provisions of the Act is evident from final fee determinations it made outside this regulatory proceeding. Pursuant to those unilateral determinations, the IEPA continues to seek annual fees of $275,000 for these four ponds and $90,000 in fees required annually. Ameren is separately challenging these determinations.

has been closed for so long, it is not even included in the list of CCR surface impoundments maintained by the United States Environmental Protection Agency and referenced in the Court's opinion in *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 434 (D.C. Cir. 2018)—the same opinion the IEPA highlights in its Statement of Reasons. *See* SOR, pp. 8–11.

Although referred to as an ash pond, the Old Ash Pond is now a large mound of dirt in a densely wooded area which is completely covered with mature trees and other flora. Nonetheless, the IEPA has asserted that a wooded area, which is topographically convex, is a CCR surface impoundment. Further, the IEPA's interpretation would require significant disturbance of this wooded area, including removal of all trees and other flora, in the name of environmental protection.

As to Pond D at Ameren's Hutsonville facility, it is already subject to Board regulations, and is in post-closure care in accordance with 35 Ill. Adm. Code Part 840. *See In the Matter of Ameren Ash Pond Closure Rules*, R 09-21 (Jan. 20, 2011). Obviously, Pond D cannot be subject to two conflicting regulatory regimes.

IPCB Questions 1(g) and 1(h)

Board Question No. 1(g): How many of these impoundments would be "Inactive CCR surface impoundment" per the proposed definition under Section 845.120?

Board Question No. 1(h): How many of these impoundments would be "Inactive Closed CCR surface impoundment" per the proposed definition under Section 845.120?

RESPONSE: These two questions posed by the Board zero in on a distinction that underlies the IEPA's proposed rules related to closure status. As currently proposed, unless a CCR surface impoundment has completed closure prior to October 19, 2015, the IEPA does not consider it closed. Rather, it is considered an "inactive CCR surface impoundment", since the IEPA has defined "inactive *closed* CCR surface impoundment" to mean "an inactive CCR

surface impoundment that completed closure before October 19, 2015 with an Agency-approved closure plan."

There is no legislative authority for this distinction, and the IEPA's SOR does not provide an explanation. Nor does the IEPA's proposed rules or SOR reconcile the distinction created by the October 19, 2015 date with the statutory language found at Section 22.59(e), which exempts certain owners and operators of CCR surface impoundments—those who have submitted a closure plan before May 1, 2019, and completed closure within two years of the effective date of the amendments—from obtaining a construction permit for closure. Evident from its fee determinations made pursuant to Section 22.59(j), the IEPA has created other indicators it relies upon to conclude whether closure has been completed, notwithstanding the fact that the indicates which the IEPA has created are neither prescribed in the Act, nor fully developed in IEPA's proposed rules.

The list of Ameren's former ash ponds again provides a key example. Ameren has closed *all* its former ash ponds and did so with the oversight and approval of the IEPA both at the time the closure occurred and prior to the effective date of P.A. 101-0171. Nonetheless, the IEPA has assessed fees against Ameren pursuant to Section 22.59(j) for several of these ponds as if they are *not* closed. Specifically, the following Ameren former ash ponds are being assessed the higher fee tier level ($75,000 in initial fees and $25,000 in annual fees), fees that are only applicable to CCR surface impoundments that have not completed closure: Pond B, Pond C, and the Bottom Ash Pond at Hutsonville, as well as the Old Ash Pond at Meredosia. Each pond is discussed above.

This disjointed approach by the IEPA is untenable. The fees which IEPA is empowered to assess against each pond were designed to reimburse IEPA for the level of effort required to

oversee closure of the pond on an ongoing basis. As such, assessing fees against inactive closed ponds where little to no effort is required makes no regulatory or public policy sense, and is wholly unsupported by the underlying statutory language.

IPCB Question 20

Board Question No. 20: Subsection 845.210(d)(4) allows the owner or operator of inactive closed CCR surface impoundments to use a post-closure care plan previously approved by the Agency. Please comment on whether such approved plans must meet the requirements of the proposed rules.

RESPONSE: Requiring post-closure plans to meet the requirements of Section 845.210 of the proposed rules raises a significant concern that the rules will be impermissibly retroactive. The authority to adopt rules and regulations is "defined and limited by the enabling statute." *Julie Q. v. Dep't of Children & Family Services*, 2011 IL App (2d) 100643, ¶ 35, *aff'd*, 2013 IL 113783, ¶ 35. As a result, any administrative rule must be able to be reconciled with the statute under which the rule is adopted. *See Hadley v. Illinois Dep't of Corr.*, 224 Ill. 2d 365, 385 (2007). The IEPA's proposed rules are being proposed pursuant to Section 22.59(g) of the Act, which provides no indication that the proposed rules are intended to be retroactively applied to CCR surface impoundments which are currently in post-closure care. 415 ILCS 5/22.59(g). Moreover, requiring post-closure care plans to meet the requirements of these proposed rules would impose an entirely new substantive standard—and accompanying liability—on the owners and operators of many CCR surface impoundments who spent untold amounts of time and money complying with the old standards imposed by the IEPA. This type of retroactive application would impose new liability for past conduct—something that the IEPA cannot do. *See People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 36.

The IEPA's reliance on extratextual indicators, discussed above, appears at least in part to be an implicit acknowledgment that its actions are impermissibly retroactive. Using Ameren's

Old Ash Pond as an example, the IEPA is attempting to assert that a wooded piece of ground—which, momentarily setting all other factors aside, is not even the right shape to be considered a CCR surface impoundment—is nonetheless a CCR surface impoundment because the Old Ash Pond was never subjected to any iteration of IEPA's closure process. However, to reach this conclusion, the IEPA must ignore the fact that, when the Old Ash Pond was closed, there was no closure process overseen by the IEPA. The IEPA must ignore this fact because, if it does not, it would be doing exactly what our Supreme Court said in *J.T. Einoder, Inc.* that the IEPA cannot do—retroactively apply a new standard in a way which will create liability for wholly past conduct. *J.T. Einoder, Inc.*, 2015 IL 117193 at ¶ 36.

Dated: August 3, 2020

Respectfully submitted,
AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company, d/b/a Ameren Missouri.

By /s/Claire A. Manning

BROWN, HAY & STEPHENS, LLP
Claire A. Manning
Registration No. 3124724
Anthony D. Schuering
Registration No. 6333319
205 S. Fifth Street, Suite 1000
P.O. Box 2459
Springfield, IL 62705-2459
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aschuering@bhslaw.com