BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	R 2020-019
STANDARDS FOR THE DISPOSAL	)	
OF COAL COMBUSTION RESIDUALS	)	(Rulemaking - Land)
IN SURFACE IMPOUNDMENTS:	)	
PROPOSED NEW 35 ILL. ADM.	)	
CODE 845	)	

NOTICE OF FILING

TO: Persons identified on Board's CCR service list on its website: https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16858.

PLEASE TAKE NOTICE that today I have filed with the Illinois Pollution Control Board the attached Post-Hearing Comments of the Illinois Attorney General's Office a true and correct copy of which is attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS
By KWAME RAOUL,
Attorney General of the State of Illinois

BY: /s/ *Stephen J. Sylvester*

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CERTIFICATE OF SERVICE

I, STEPHEN J. SYLVESTER, an attorney, do certify that on October 30, 2020, I caused true and correct copies of the Notice of Filing and Post-Hearing Comments of the Illinois Attorney General's Office served via email upon the persons with email addresses named on the Service List provided on the Board's website, available at:

https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=16858.

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POST-HEARING COMMENTS OF THE ILLINOIS ATTORNEY GENERAL'S OFFICE

The Illinois Attorney General's Office, on behalf of the People of the State of Illinois ("People"), hereby files its Post-Hearing Comments in this proceeding.

The People first would like to acknowledge the Board's extraordinary efforts to conduct the public hearings in this proceeding during the ongoing COVID-19 pandemic and applaud it for rising to all of the logistical and technological challenges to meet the statutory deadline set forth in Section 22.59(g) of the Environmental Protection Act ("Act"). 415 ILCS 5/22.59(g). The Board, its staff, the Illinois Environmental Protection Agency, and the other participants in the rulemaking contributed to make this a remarkably efficient and thorough proceeding. We offer the following comments on several legal issues we consider to be of particular importance.

1. The Board should disregard any testimony, comments or invitations to make any binding determinations or adjudications relating to the applicability of Section 22.59 and the proposed Part 845 Regulations to any specific CCR surface impoundment.

This matter is a rulemaking of general applicability. On March 30, 2020, as required by Section 22.59(g) of the Act, 415 ILCS 5/22.59(g), the Agency proposed this "*rule of general applicability* for [CCR] surface impoundments at power generating facilities" citing to Section 102.202 of the Board's Procedural Rules, 35 Ill. Adm. Code 102.202, which is entitled "Proposal Contents for Regulations of General Applicability." (*See* Statement of Reasons at 1) (Emphasis added). As this is a rulemaking of general applicability, the focus should not be on the applicability

of Part 845 to specific facilities.

As noted in the People's previously filed comment in this matter, during the pendency of this rulemaking, there are a number of enforcement matters involving CCR disposal that the Board is or should be aware of: 1) active cases pending before the Board;[1] 2) cases that have been referred by the Illinois EPA to the Illinois Attorney General's Office; and 3) a declaratory judgment action challenging the applicability of Section 22.59 of the Act, 415 ILCS 5/22.59 (2018), to four specific ponds at the retired Hutsonville and Meredosia plants. *AmerenEnergy Medina Valley Cogen, LLC, and Union Electric Company* v. *Illinois EPA, Director John J. Kim and William E. Buscher*, 2020MR615 (Sangamon County Circuit Court). These matters are all on separate tracks, and the Board should not weigh in on the merits of them during this rulemaking of general applicability.

Nonetheless, overtures were made during the hearings concerning the applicability of both Section 22.59 and the proposed Part 845 Regulations to particular sites (e.g., whether certain CCR disposal facilities were in fact "CCR surface impoundments", as defined in Section 3.143 of the Act. 415 ILCS 5/3.143). (*See, e.g.*, Ex. 2, Illinois EPA's Pre-filed Answers to Ameren, Question Set No. 1, at 140-141, questions nos. 6-7, Question Set No. 3, at 142-143, questions nos. 1-4, Question Set No. 4, at 143-144, questions nos. 1-2; Ex. 3, Illinois EPA's Pre-filed Answers to Dynegy, at 55-56, question no. 84). Moreover, there were specific questions regarding the chart the Illinois EPA prepared identifying 73 "CCR surface impoundments" in response to a Board pre-filed question. (Ex. 2. Illinois EPA's Pre-filed Answers to the Board, question no. 1(k), p. 150, and Illinois EPA's chart, pp. 181-182). Dynegy contended, and Lynn Dunaway agreed, with respect to the Illinois EPA's chart "that there are ongoing disputes. So there has not been a final adjudication

[1] There are four cases pending before the Board: 1) *Sierra Club et al. v. Midwest Generation*, PCB 13-15; 2) *Sierra Club et al. v. City of Springfield*, PCB 18-11; 3) *Sierra Club v. Illinois Power Generating Co. et al.*, PCB 19-78; and 4) *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, PCB 19-93.

by the Board or other tribunal about whether the ponds -- 73 ponds listed on that table are, in fact, subject to proposed Part 845?" (Transcript of 8/11/20 hearing at 73:7-76:17). Ameren, by contrast, seemed to think that, in this rulemaking of general applicability, the Board had the authority to adjudicate whether the 73 facilities identified in Illinois EPA's list are "CCR surface impoundments", as defined in Section 3.143 of the Act, 415 ILCS 5/3.143, even though it has a pending lawsuit attempting to argue that very same issue with respect to its CCR disposal facilities. (Transcript of 8/11/20 hearing at 83:23-84:7).

It is well established that the Board serves "both quasi-judicial and quasi-legislative functions." *County of Will v. Pollution Control Bd.*, 2019 IL 122798, ¶ 42. "When it promulgates regulations, it acts in a quasi-legislative capacity." *Id.*; *Shell Oil Co. v. Illinois Pollution Control Bd.*, 37 Ill. App. 3d 264, 270 (5th Dist. 1976) ("When an administrative agency exercises its rule-making powers, it is performing a quasi-legislative (as opposed to a quasi-judicial) function"). "The Board acts in a quasi-judicial capacity when it determines rights or liabilities in an individual case based on the particular facts of the case," for example in "granting or denying a variance and reviewing an Agency decision to grant or deny a permit." *E.P.A. v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 748 (2d Dist. 1999). In this rulemaking proceeding, the Board is clearly acting in its "quasi-legislative capacity." This is not an adversarial proceeding intended to adjudicate contested issues of fact and/or opinions regarding the applicability of Section 22.59 for specific entities and their individual CCR surface impoundments. Those types of cases are brought pursuant to Title VIII of the Act,[2] where the "Board conducts hearings on complaints charging putative violations of the Act," and it "acts in a quasi-judicial capacity."

[2] The Board and Circuit Courts have concurrent jurisdiction to hear civil environmental enforcement cases with the circuit court. 415 ILCS 5/5(d); *People v. NL Indus.*, 152 Ill. 2d 82, 103 (1992), *opinion modified on denial of reh'g* (Nov. 30, 1992); *see also Janson v. Illinois Pollution Control Bd.*, 69 Ill. App. 3d 324, 327–28 (3d Dist. 1979).

County of Will, 2019 IL 122798 at ¶ 42.

The Board has made clear that "*[i]t is the responsibility of companies doing business in Illinois to determine whether they are complying with Illinois' environmental laws*." *People v. Panhandle Eastern Pipe Line Co.*, PCB 99-191, Slip op. at 20 (Nov. 15, 2001) (emphasis added); *see also Toyal Am., Inc. v. Illinois Pollution Control Bd.*, 2012 IL App (3d) 100585, ¶ 49. Accordingly, to the extent that any participant asks the Board for a determination on the applicability of Section 22.59 of the Act and the proposed Part 845 Regulations to any particular sites, the Board should decline any such overtures, as such questions are more appropriately resolved in an adjudicatory forum.

2. Ameren's proposals to limit Part 845's applicability are contrary to the General Assembly's express intent that the Rules be "at least as protective and comprehensive" as Federal Rules.

Ameren has proposed an amendment to Section 845.100 providing that a "former ash pond" closed by removal "pursuant to a state-approved closure plan prior to the effective date of this Part" is not a "surface impoundment" under the Act, and therefore is unregulated by Part 845. (*See* Ex. 55, King Pre-filed Test. (Aug. 27, 2020) at 20-21; Ex. B). In other words, Ameren contends that, if an impoundment has been closed by removal under a State-approved plan at any point prior to Part 845's effective date in 2021, it will be unregulated—even if that "former ash pond" is otherwise regulated under the federal Part 257 regulations. Relatedly, Ameren proposes to strike the date "October 19, 2015"—a reference to the effective date of the federal Part 257 regulations—from the definition of "Inactive Closed CCR surface impoundment" in Section 845.120, and replace it with a reference to "the effective date of this Part." (*Id*. at 19).

The Board must not depart from the plain language of the Act by reading into it exceptions, limitations, or conditions that conflict with the express legislative intent. *See Alternate Fuels, Inc.*

v. Dir. of Ill. E.P.A., 215 Ill. 2d 219, 238 (2004). In addition, statutes should be read to yield logical and meaningful results and to avoid constructions that render specific language meaningless or superfluous. *Rochelle Disposal Serv., Inc. v. Ill. Pollution Control Bd.*, 266 Ill. App. 3d 192, 198 (2d Dist. 1994). Ameren's proposal is contrary to the plain language of Section 22.59 and should be rejected.

In Section 22.59(g)(1), the General Assembly instructed the Board to adopt rules for "CCR surface impoundments" that, "at a minimum," are "at least as protective and comprehensive as the federal regulations or amendments thereto promulgated by the Administration of the United States Environmental Protection Agency in Subpart D of 40 CFR 257 governing CCR surface impoundments." 415 ILCS 5/22.59(g)(1). It follows naturally from this directive that "CCR surface impoundments," as defined in both Section 3.143 and the proposed Part 845 Regulations, must at a minimum include all CCR surface impoundments regulated under 40 C.F.R. Part 257. In order to be "as protective and comprehensive as the federal regulations," Part 845 must at least regulate all of the impoundments covered by the federal regulations. If Part 845 did not, then it would be neither as "protective," nor as "comprehensive," as the federal regulations, and accordingly would be inconsistent with the Act.

To determine which impoundments are covered by the federal regulations, the only applicable temporal frame of reference is October 19, 2015—i.e., the date on which "Subpart D of 40 CFR 257" became effective. *See* 80 Fed. Reg. 37988, 37989 (July 2, 2015). The Agency's proposal to use October 19, 2015 throughout the definitions in Section 845.120 as a cut-off date in determining the CCR surface impoundments covered by the State's rules is therefore not just appropriate, but required by the General Assembly's mandate in Section 22.59(g)(1) of the Act.

Ameren implies that an exception should be made for so-called "legacy ponds"—CCR

surface impoundments located at plants that were inactive as of October 19, 2015. When USEPA promulgated Part 257 in 2015, it exempted these "legacy ponds" from regulation. *See* 40 C.F.R. 257.50(e). Under *Utility Solid Waste Activities Group v. Environmental Protection Agency*, 901 F.3d 414 (D.C. Cir. 2018) ("*USWAG*"), however, it would be inappropriate for the Board to give any legal effect to that exemption in this proceeding. In *USWAG*, the court invalidated "the provisions of [Part 257] that . . . exempt from regulation inactive impoundments at inactive facilities," including 40 C.F.R. 257.50(e), vacating and remanding them to USEPA. *Id*. at 449.

Ameren fundamentally misapprehends this holding's significance. At hearing, Ameren's witness testified that the D.C. Circuit's vacatur of the "legacy pond" exemption did not, in his legal opinion, have any retroactive effect. (Transcript of 9/30/20 hearing T 266:13-17). Under federal law, the exact opposite is true. When a federal court renders its opinion, it "is the controlling interpretation of federal law and *must be given full retroactive effect* in all cases still open on direct review and *as to all events, regardless of whether such events predate or postdate [its] announcement of the rule*." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (emphasis added). Indeed, that principle already has been applied to the vacaturs ordered in *USWAG,* in *Waterkeeper Alliance, Inc. v. Wheeler*, No. CV 18-2230 (JDB), 2020 WL 1873564, at *6 (D.D.C. Apr. 15, 2020), in which the court vacated USEPA's approval of Oklahoma's CCR regulations under the WIIN Act, for failure to comply with the law as announced in *USWAG*.

In the D.C. Circuit's definitive view, USEPA lacked authority under RCRA to exclude "legacy ponds" from regulation in the first place. The Illinois EPA's use of the October 19, 2015 date in defining the universe of regulated CCR surface impoundments, whether at "active" or "inactive" plants, accordingly is the correct legal approach, as required by Section 22.59(g)(1) and the federal law it incorporates by reference.

Ameren also has attempted to argue that using October 19, 2015 as a cut-off date would represent an inappropriate retroactive application of Section 22.59 but, again, it misapprehends the applicable law. In Illinois, courts apply the test set out by the United States Supreme Court in *Landsgraf v. USI Film Products*, 511 U.S. 244 (1994), to determine whether a statute may be applied retroactively. *Commonwealth Edison Co. v. Will Cty. Collector*, 196 Ill. 2d 27, 39 (2001). There is no absolute bar on a statute being applied retroactively. In *Landsgraf*, the Court held as follows:

> When a case implicates a . . . statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules.

511 U.S. at 280.

Even assuming, *arguendo*, that regulation under Section 22.59 and Part 845 of facilities where CCR and its constituents remain today on land and/or in groundwater could be considered "retroactive," the General Assembly's intent here was clear. The General Assembly "has expressly prescribed the statute's proper reach." *Id*. In Section 22.59(g)(1) of the Act, the General Assembly instructed the Board to adopt rules for CCR surface impoundments that, "at a minimum," are "at least as protective and comprehensive as the federal regulations or amendments thereto promulgated by the Administrator of the United States Environmental Protection Agency in Subpart D of 40 CFR 257 governing CCR surface impoundments." Again: in order to be "as protective and comprehensive as the federal regulations," the Part 845 regulations must apply, at a minimum, to the same universe of impoundments covered by the federal regulations. Ameren's proposed revisions—which would render Part 845 less protective and less comprehensive than the federal rules—should be rejected.

3. Use of the Site Remediation Program (SRP) or the related Tiered Approach to Corrective Action Objectives (TACO) are not appropriate for facilities regulated under Section 22.59 of the Act and these proposed Part 845 Regulations.

During the hearings, the Agency's Lynn Dunaway testified that the proposed Part 845 Regulations would trump the requirements of the Site Remediation Program ("SRP"). (Transcript of 8/13/20 hearing at 11:22-13:1; *see also* Ex. 2, Illinois EPA's Pre-filed Answers to the Little Village Environmental Justice Organization at 9, question no. 13).

The SRP is a voluntary program in which any person may enroll, unless they are excluded by Section 58.1(a)(2) of the Act, 415 ILCS 5/58.1(a)(2). However, in *State Oil Co. v. People*, 352 Ill. App. 3d 813, 817 (2d Dist. 2004), the Court discussed a group of exclusions found in Section 58.1(a)(2) of the Act. *Id.* The Court held that since the gas station was subject to underground storage tank laws covered by the exclusion set forth in 58.1(a)(2)(iii), "*section 58.1(a)(2) exempts the station from the whole of Title XVII*" (i.e. the SRP). *Id*. (emphasis added). Similarly, Section 58.1(a)(2)(ii) of the Act excludes owner or operators of CCR surface impoundments from proceeding under the SRP, because they are (or soon will be) permitted treatment, storage or disposal sites that are subject to state and federal closure requirements:

> (2) Any person, including persons required to perform investigations and remediations under this Act, may elect to proceed under this Title unless . . . (ii) the site is a treatment, storage, or disposal site for which a permit has been issued, or that is subject to closure requirements under federal or State solid or hazardous waste laws . . .

415 ILCS 5/58.1(a)(2)(ii). In addition, Section 740.105(a)(2) of the Board Waste Disposal Regulations, provides a similar exclusion for entry into the SRP for facilities, where the "investigative and remedial activities for which Agency review, evaluation and approval are requested are required under a current State or federal solid or hazardous waste permit or are closure requirements for a solid or hazardous waste treatment, storage or disposal site under

applicable State or federal laws and implementing regulations." 35 Ill. Adm. Code 740.105(a)(2).

Pursuant to Sections 58.5(c) and 58.11(c) of the Act, 415 ILCS 5/58.5(c) and 58.11(c), the Board promulgated regulations regarding remediation objectives for regulated substances known as the Tiered Approach to Corrective Action Objectives ("TACO"). The TACO standards are also excluded, as they were intended for use in conjunction with the SRP. *See* 35 Ill. Adm. Code 742.105(b). Finally, Section 742.105(h) of the Board Waste Disposal Regulations specifically prohibits the use of the TACO standards at permitted landfills:

> h) This Part may not be used in lieu of the procedures and requirements applicable to landfills under 35 Ill. Adm. Code 807 or 811 through 814.

35 Ill. Adm. Code 742.105(h). For all of the foregoing reasons, the People believe that the Board should be clear that the requirements of proposed Part 845 control over any and all contrary provisions in the SRP (Title XVII of the Act) for CCR surface impoundments subject to Section 22.59 of the Act and these proposed Part 845 Regulations. In addition, in these proposed Part 845 Regulations, similar to the prohibition on the use of the TACO standards for landfills, the Board should preclude the use of TACO for CCR surface impoundments subject to Section 22.59 of the Act and the proposed Part 845 Regulations, given the specific groundwater protection standards set forth herein.

4. Ameren's proposal to require the Agency to maintain records regarding site-specific costs is beyond the scope of Section 22.59.

Ameren also has proposed that the Board adopt regulations requiring the Agency to track costs it incurs in implementing Part 845 on a site-specific basis. (*See* Ex. 55, King Pre-filed Test. (Aug. 27, 2020) at 23-24; Ex. B). Ameren's proposal is unauthorized by the Act and would burden the Agency with unnecessary work, given that the General Assembly has already established flat, per-impoundment, fees in Section 22.59(j) of the Act.

In Ameren's pre-filed testimony (*id*.) and pre-filed answers (Ex. 57, King Pre-filed Answers (Sep. 24, 2020) at 17-20; 26-27), it cited to a single existing regulatory program as precedent for requiring the Agency to track its costs on a site-specific basis: the SRP. The General Assembly, however, adopted an entirely different financing mechanism for the SRP than it did in Section 22.59. Under Section 58.7(b)(1)(D) of the Act, the Agency is authorized to recover from an SRP applicant the Agency's "reasonable costs incurred and documented by the Agency" in reviewing and evaluating activities carried out at the applicant's specific site. 415 ILCS 5/58.7(b)(1)(D). Accordingly, it was appropriate for the Board to adopt regulations setting out what is necessary for the Agency to adequately "document" costs incurred at each specific site enrolled in the SRP. *Id*.

Section 22.59, however, does not include any analogous provisions. As with many other programs under the Agency's purview, Section 22.59(j) sets a flat permitting fee for each regulated facility. There is no need, then, for the Board to adopt in this context the SRP's atypical cost-tracking provisions.

Ameren has cited two purported statutory bases for the Board's adoption of the proposed cost-tracking regulations: Sections 22.59(g) and 5(f) of the Act. (Ex. 57, King Pre-filed Answers to Illinois EPA (Sep. 24, 2020) at 27, question no. 6.g.). Neither supports Ameren's proposal.

First, Ameren contends that Section 22.59(g) authorizes the Board to impose "reporting" requirements on the Agency, but it misreads the statute. Section 22.59(g) provides as follows:

> The Board shall adopt rules establishing construction permit requirements, operating permit requirements, design standards, reporting, financial assurance, and closure and post-closure care requirements for CCR surface impoundments.

415 ILCS 5/22.59(g). It is clear that the "reporting" rules referred to here, like the "design standards" and "closure and post-closure care requirements" also referenced, are rules "for CCR surface impoundments" themselves—i.e., rules establishing requirements for periodic reporting to

the Agency on the condition of impoundments. That has nothing to do with "reporting" on the Agency's internal staffing and expenditures in its program to regulate CCR surface impoundments.

Second, Section 5(f) provides as follows:

> (f) The Board may prescribe reasonable fees for permits required pursuant to this Act. Such fees in the aggregate may not exceed the total cost to the Agency for its inspection and permit systems. The Board may not prescribe any permit fees which are different in amount from those established by this Act.

415 ILCS 5/5(f). Ameren seizes upon the language in the second sentence that the Board may not prescribe fees that "exceed the total cost to the Agency for its inspection and permit systems." *Id*. The Board, however, should not prescribe *any* fees in this rulemaking. The amounts of fees due for each class of impoundment have already been "established" by the General Assembly in Section 22.59(j), and the Board is not authorized to alter them. *Id*. Consequently, any concerns that Ameren may have with the amount of the fees required by Section 22.59 should be raised with the General Assembly, not in this rulemaking proceeding.

Respectfully submitted,

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