BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	R 2020-019
STANDARDS FOR THE DISPOSAL OF COAL	)	
COMBUSTION RESIDUALS IN SURFACE	)	(Rulemaking – Land)
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, **AMEREN'S POST-HEARING REPLY BRIEF**, copies of which are herewith served upon you.

Dated: November 6, 2020

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

By /s/Claire A. Manning

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing documents were electronically filed on November 6, 2020 with the following:

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and that copies were sent via email on the same date to the parties on the service list.

Respectfully submitted,
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
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STANDARDS FOR THE DISPOSAL OF	)	R 2020-19
COAL COMBUSTION RESIDUALS IN	)	(Rulemaking -Land)
SURFACE IMPOUNDMENTS:	)	
PROPOSED NEW 35 ILL. ADM.	)	
CODE PART 845	)	

AMEREN'S POST-HEARING REPLY BRIEF

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, and for its Post-Hearing Reply Brief, states as follows:

I. INTRODUCTION

Ameren commends the Board for its tireless dedication and attention to each of the participants and public commenters in this important proceeding. Surmounting all challenges brought about by the COVID pandemic, the Board has provided all participants with the opportunity to present evidence on this regulatory record which will form the basis of the Board's Opinion and Order – and, concomitantly, its Part 845 rules. As the Board well knows, it is from that regulatory record – as well as the language of the Illinois Environmental Protection Act (the "Act"), here Section 22.59 and Section 27, 415 ILCS 5/22.59 and 5/27, that the Board must draw its justification and authority for the decision it makes in that Opinion and Order. On the basis of the enabling legislation and the Board's regulatory record, Ameren asks that the Board make certain changes to the IEPA's proposal in order to accommodate, and give legal effect to, the status of Ameren's state-authorized closed surface impoundments.

Ameren is cognizant of the nature of this proceeding: a rule of general applicability where the Board is called upon to develop a rule applicable to *CCR surface impoundments* – pursuant to

P.A. 101-0171 and the provisions that became Section 3.143 and Section 22.59 of the Act. It is not an identical in substance rule, nor is it a federally required rule. As Ameren pointed out in its Post-Hearing Comments, one of the Board's "most fundamental tasks" is to identify the intended applicability and scope of its regulations. *See* Proposed Opinion, *In the Matter of: Development, Operating and Reporting Requirements for Non-Hazardous Waste Landfills*, R88-7 (Mar. 1, 1990) at 34, available at https://perma.cc/UQ59-HR4T; *See also* Final Order, *In the Matter of: Groundwater Quality Standards*, R89-14, at 6 (Nov. 7, 1991), available at https://perma.cc/UXC9-5A79 (interpreting statutory language in order to "more clearly alert[] the public to what is being regulated"). In performing this task, the Board must apply the enabling statute in a manner consistent with the enabling legislation and relevant law in order to assure the public and the regulated and environmental participants that any rule it adopts is valid and enforceable.

For over 50 years, the Board has served the valuable role of making sound environmental regulations on the basis of a public record—consistent with its statutory authority and responsibilities pursuant to Sections 5 and 27 of the Act, the enabling legislation it is implementing, and the record created at public hearing. Importantly, the Board performs that role as an independent body, wholly separate from the IEPA, the USEPA, and the Office of Attorney General ("AG"). It is the Board's rule that will be implemented, and it is the Board's rule that is subject to appeal. As such, it is the Board's responsibility alone to assure the legal soundness of its rule.

This is a very important rulemaking which Ameren does not take lightly. Indeed, as evident from the record in this proceeding, Ameren has been a leader in closing its former ash ponds—the first one to have closed *any* and the only one to have closed *all* its ash ponds. Ameren is the only entity in this proceeding that has, at all times relevant, been considered "inactive" and therefore

not subject to the federal rules at Part 257. Nonetheless, Ameren sought and achieved state regulatory authority that guided and authorized each of is closures (at a cost of over $26.1 million dollars). As the IEPA importantly acknowledged in its Post-Hearing Comment, "Ameren has expended considerable resources to close inactive CCR surface impoundments at inactive generating facilities *under State authority*" IEPA Post-Hearing Comment, p. 10 (Emphasis added). Those closures were all done pursuant to the input, review, and authorization of the IEPA—consistent with the Act, particularly the Groundwater Protection Act and related Board regulations, all while utilizing the Board's Part 840 rules (applicable to Ameren's closure of Hutsonville Pond D) as a roadmap. The closures, which Ameren achieved pursuant to state authority when no federal regulation applied, are at the heart of Ameren's objections to the IEPA's rule proposal.

For this important Board rule to be valid upon promulgation, the Board must avoid the taint of retroactivity associated with the rule, as written or proposed to be applied, that would require Ameren to *undo* that which it already did, and force it to re-close—pursuant to state authority—that which was already closed pursuant to state authority. It is in that context and spirit that Ameren has offered its recommended language changes, and here addresses comments made as to Ameren's proposals.

II. AMEREN'S PROPOSED CHANGE TO SECTION 845.120 AND REQUESTED CLARIFYING LANGUAGE IN SECTION 845.100 ARE REQUIRED TO ENSURE THE BOARD'S RULE IS NOT IMPERMISSIBLY RETROACTIVE.

A. Section 845.120.

Ameren's proposed change to Section 845.120 would remove the October 19, 2015 triggering date for purposes of determining whether previously closed ash ponds would qualify as "Inactive ***Closed*** Surface Impoundments." This would affect two of Ameren's closed ponds—Hutsonville Pond A and the Meredosia Bottom Ash Pond. As proposed, Hutsonville Pond A and Meredosia Bottom Ash Pond would **not** be considered Inactive Closed Surface Impoundments,

simply because completion of closure occurred after October 19, 2015, but prior to the enactment of the proposed Part 845 rules. If the Board adopts this proposal, those two ponds would be classified the same as Hutsonville Pond D and Venice North and South (i.e. "Inactive ***Closed*** Surface Impoundments"). Only the AG and IEPA directly commented on Ameren's proposed change to Section 845.120, both of whom opposed this change. The AG asserts that Section 22.59 of the Act requires using a retroactive applicability date, *See* AG Post-Hearing Comment, § 2, pp. 4–7, while the IEPA asserts that using a retroactive applicability date is required to gain the federal Environmental Protection Agency ("USEPA")'s approval of the proposed rules under the WIIN Act, *See* IEPA's Post-hearing Comment, § IV.I, pp. 50–53. Neither argument is availing.

1. Nothing in the *USWAG* decision requires a retroactive applicability date.

Addressing the AG's argument first, nothing about the Court's decision in *USWAG* requires the Board to use a retroactive applicability date for the definition of Inactive Closed CCR surface impoundments. The AG asserts that, in the *USWAG* Court's "definitive view, USEPA lacked authority under RCRA to exclude "legacy ponds" from regulation in the first place." AG's Post-Hearing Comment, p. 6. This statement is a misunderstanding of the Court's holding in *USWAG* regarding legacy ponds. The *USWAG* Court rejected the "legacy ponds exemption" as "unreasoned, arbitrary, and capricious" because "the administrative record belies the [USEPA]'s stated reason for its reactive, rather than preventative, approach" toward those ponds. *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414, 434 (D.C. Cir. 2018). The Court's holding is simply that the proffered reasons for excluding legacy ponds were illogical—nothing about that holding invokes RCRA.

Next, the AG attempts to give its incorrect interpretation of *USWAG* preclusive effect by stating that *any* federal court's opinion 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*." AG's Post-Hearing Comment, p. 6 (*quoting Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993)) (emphasis in original). As with its reading of *USWAG*, the AG is drastically over-reading the significance of *Harper*. The quote which the AG relies on says nothing of *all* federal courts. Instead, the Supreme Court is saying that, when "**this Court**", meaning the Supreme Court, "applies a rule of federal law to the parties before it, that rule 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 our announcement of the rule." *Harper*, 509 U.S. at 97. The Supreme Court was not making the type of broad pronouncement on the power of federal court decisions, as the AG claims. Instead, it was saying that it, as the highest court in the land, has the final say on how laws are interpreted.

Finally, the AG's assertion that *Waterkeeper Alliance, Inc. v. Wheeler* supports its drastic over-reading of *USWAG*, it—again—is mistaken. In *Waterkeeper Alliance, Inc.*, the Court discusses the portion of *USWAG* which (1) rejects treating unlined surface impoundments as being lined, (2) notes that Oklahoma's proposed plan contains a similar provision, and (3) explains that it must "apply the controlling interpretation of federal law . . . . ." *Waterkeeper All., Inc. v. Wheeler*, No. CV 18-2230 (JDB), 2020 WL 1873564, at *6 (D.D.C. Apr. 15, 2020) (*citing Nat'l R.R. Passenger Corp. v. Fraternal Order of Police, Lodge 189*, 142 F. Supp. 3d 82, 90 (D.D.C. 2015), *aff'd sub nom. Nat'l R.R. Passenger Corp. v. Fraternal Order of Police, Lodge 189 Labor Comm.*, 855 F.3d 335 (D.C. Cir. 2017)). The cite to *Nat'l R.R. Passenger Corp.* is to a discussion under the heading "Retroactive Application of *Judicial Decisions*[.]" 142 F. Supp. 3d at 90 (emphasis added).

The AG—despite spilling considerable ink on the distinction between legislative and judicial powers[1]—is conflating the retroactive application of judicial decisions, which is what the *Harper* case discussed, with the retroactive application of legislation that is not intended to be retroactively applied. Ameren's Post-Hearing Brief explains why the latter is legally infirm, and the AG's confusion on the topic illustrates the limited value of its analysis. When the law on the subject is correctly analyzed, the inescapable conclusion is that the Board does not have the authority to retroactively apply regulations under a statute which is not intended to be retroactively applied. *See* Ameren's Post-Hearing Brief, pp. 15–21. As such, the Board should adopt Ameren's proposed modification to the definition of Section 845.120.

2. Neither Section 22.59 of the Act nor the WIIN Act Requires a Retroactive Applicability Date.

Both the AG and the IEPA make similar arguments—that one statute or another requires the Board to impose a retroactive closure date in order to be "at least as protective" as the USEPA's Part 257 rules. AG's Post-Hearing Comment at pp. 4–7; IEPA's Post-Hearing Comment at pp. 50–51. In its Post-Hearing Comment, the IEPA notes the unequivocal fact that "Ameren has expended considerable resources to close inactive CCR surface impoundments at inactive generating facilities *under State authority*" IEPA's Post-Hearing Comment at p. 50 (Emphasis added). However, IEPA also erroneously opines that Ameren "fails to acknowledge federal authority under Part 257 and additional State authority and obligations pursuant to Section 22.59 of the Act." *Id*. In other words, the IEPA's proposal asserts that consistency with Part 257 requires that IEPA-authorized closures that occurred prior to October 19, 2015 should be treated differently than state-authorized closures that occurred after that date.

[1] *See* AG's Post-Hearing Comment at pp. 3–4.

Both are mistaken, and neither Section 22.59 of the Act, nor the WIIN Act, require a retroactive date to be applied, since Part 257 does not currently apply to inactive facilities like Ameren's, and never has. Ameren's original post-hearing comment analyzes why Section 22.59 does not permit a retroactive application, and—in the interest of efficiency—adopts that analysis in this reply by reference. The WIIN Act does not require a retroactive date be used, either, because as of today's date, Part 257 *still* does not regulate legacy ponds. As Ameren's original Post-Hearing Brief notes, it was *last month* when the USEPA began seeking "comments . . . and data on inactive surface impoundments at inactive facilities to assist in the development of **future regulations** for these CCR units." Ameren's Post-Hearing Brief, Att. B (emphasis added). It defies the plain text of the USEPA's notice (and common sense) to say that a retroactive date is required to be "at least as protective" as Part 257 when the USEPA has not yet introduced, let alone finalized, *any* regulations regarding legacy ponds as of the present day. For that reason, Ameren's revision to Section 845.120 should be adopted.

Finally, if the Board does not clarify that Ameren's former ash ponds which have already been clean closed are not CCR surface impoundments (as they no longer contain fly ash) they also would be caught in this regulatory quagmire. Clear from the record, only Ameren surface impoundments would be immediately affected by the Agency's insertion of the October 19, 2015 date; thus, Ameren's proposed change will only apply to its own facilities—those that that have closed subsequent to October 19, 2015, but prior to the effective date of the Board's rules.

3. Modifying the triggering date in Section 845.120 avoids unnecessary regulatory quagmires.

On page 51-53 of its Post-Hearing Comment, the IEPA sets forth what can only be described as an extremely tortuous discussion regarding groundwater monitoring requirements which the IEPA intends to apply to Ameren's former ash ponds that were closed by removal, no

longer contain CCR, and are within the groundwater monitoring networks. As Gary King pointed out, these clean closed ponds pose no reasonable risk of impact. Nonetheless, any unanticipated groundwater impacts will be dealt with in the post closure plans and groundwater monitoring requirements through those groundwater monitoring networks at Hutsonville and Meredosia. These requirements were the subject of the state authorized closures and are based upon the Groundwater Protection Act, the Board's Part 620 regulations – and are similar to the approach taken by the Board in Part 840.

Subsequent to its convoluted explanation, the IEPA concludes that"[G]iven these facts and circumstances, the [Agency] urges the Board to adopt the definition of "inactive closed CCR surface impoundment" as [the Agency] proposed. *Id*. at 53. Moreover, the IEPA makes this plea to the Board despite acknowledging that the USEPA, in its Preamble to Part 257, stated that (a) it *was not* its intention to regulate CCR surface impoundments that had already closed and (b) and that inactive CCR surface impoundments that have completed dewatering and capping operations *do not* require regulatory oversight. The Board's evaluation of Ameren's closure plans that led to its Ameren's clean closure of four ash ponds will demonstrate conclusively that these former ponds were both dewatered and capped in an environmentally protective manner—consistent with all relevant regulations and requirements.

4.Conclusion

Neither the AG, nor the IEPA's position—as set forth in the record and in their respective Post-Hearing Responses—provide a reasonable justification for the Board to retain the October 19, 2015 triggering date in Section 845.120. Both assert it is legally mandated, only to admit later that the use of the October 19, 2015 date is dictated by "prudence", not the law. *See* Pre-Hearing Comment, p. 51 (the IEPA states that it "believed it ***prudent*** to utilize the effective date of Part 257 (October 19, 2015) as the cut-off date for CCR surface impoundments that should be

considered closed under State authority.") (emphasis added). Prudence is not a legal standard, and the "gorilla in the room" approach being employed is a distraction. Whether the IEPA thinks it prudent, or reasonable, or advised, or some other synonym, should be of no moment to the Board's analysis, because Ameren has clearly demonstrated that the insertion of such date is impermissibly retroactive. Moreover, Ameren clearly shows the jeopardy of infirmity which a retroactive application would have on an otherwise valid rule. *See* Ameren Post Hearing Brief, at pp. 15-21.

The AG's arguments on this point are equally unavailing. Notwithstanding the flaws in its legal analysis, the AG mischaracterizes Ameren's position by inferring that Ameren proposes that its surface impoundments be unregulated. *See* AG's Post-Hearing Comment at p. 4. Quite the contrary, Ameren has *sought* state regulation and state authorization and oversight for the closure of its surface impoundments for over a decade. Ameren acknowledges and does not contest that each of its existing surface impoundments (Venice North and South, Meredosia Bottom Ash, and Hutsonville Pond A and D) will now be regulated by Board rule. It is simply proposing that such regulation be prospective, not impermissibly retroactive.

Ameren carefully crafted its proposed revision to the IEPA's definition of Inactive Closed Surface Impoundment to remove a significant infirmity in a manner which narrowly solves a retroactivity problem without jeopardizing a prospective application of requirements of Part 845 to surface impoundments that exist as of the effective date of the Board's rules. Ameren's proposed revision to Section 845.120 accomplishes this goal, and the Board should adopt it.

B. Section 845.100

As to Ameren's four former ash ponds that closed via authorized clean closure, Ameren's position is that they are no longer subject to regulation under Part 845, since Part 845 can only apply to "CCR surface impoundments" as defined in Section 3.143 of the Act. In that vein, Ameren proposed an amendment to proposed Section 845.100 to make this clear by adding a

provision which states "A former ash pond that was closed by removal of CCR pursuant to a state-approved closure plan prior to the effective date of this Part is not a surface impoundment as defined in Section 3.143 of the Act, and is not subject to this Part." Ameren's Post-Hearing Brief, p. 22. The logic is straightforward—since the ash ponds do not contain CCR, they do not "store, treat, or dispose" of CCR; and, since they were specifically engineered and decommissioned as CCR surface impoundments, they can no longer be said to be "designed" to hold CCR. In response to this assertion, the IEPA has objected to Ameren's use of the words "ash pond" or "former ash pond" as being ambiguous or vague. *See* IEPA Post-Hearing Comment at pp. 53–54.

Instead, the IEPA believes, Ameren should have used the statutory term "CCR surface impoundment". *See Id.* As the IEPA knows, a defined term in a statute must be construed and applied in accordance with that definition. *See People v. Chenoweth*, 2015 IL 116898, ¶ 21. Indeed, defined terms—like "CCR surface impoundment"—"cannot be blindly transferred from one context to another." *State ex rel. Leibowitz v. Family Vision Care, LLC*, 2019 IL App (1st) 180697, ¶ 42 (*citing Cohen v. Chicago Park District*, 2017 IL 121800, ¶ 22).

Ameren's use of the phrase "ash pond" is equal parts selective, purposeful, and correct, since the ash ponds in question cannot qualify as CCR surface impoundments under the Act. The term "CCR surface impoundment" became effective as to Ameren in July 2019, with the enactment of P.A. 101-0171. As to that new definition, Ameren agrees that its former ash ponds which continue to contain CCR—Venice North and South, and Hutsonville Ponds A and D—properly qualify as CCR surface impoundments subject to regulation under Section 22.59: The rest do not.

III. THE IEPA MAKES NO CREDIBLE ARGUMENT AS TO WHY THE BOARD SHOULD NOT EXEMPT HUTSONVILLE POND D FROM COVERAGE UNDER THE BOARD'S PART 845 RULES BECAUSE IT IS ALREADY SUBJECT TO HE BOARD'S PART 840 RULES.

While the IEPA acknowledges that the Board's Part 840 rules created a model which has been followed for many of the closure and post closure care plans it approved as to Ameren, it provided no credible argument why it should be opposed to the elimination of a dual regulatory structure relevant to Hutsonville Pond D. It provided no credible response to Gary King's examples of duplicative and contradictory regulatory provisions. As to penalties, the IEPA missed Mr. King's point entirely, stating that Part 840 and Part 845 do not contain penalty provisions, the Act does. While that is true, the Act allows for separate penalties for each and every violation of the Act, thus subjecting Ameren to duplicate penalties and compliance for each and every violation, pursuant to two separate regulatory structures—a virtually impossible task where the provisions conflict. As stated in Ameren's Post-Hearing Brief, no member of the regulated community should be subject to the two separate and competing regulatory schemes without guidance from the Board on how to address the conflicts inherent in the competing structures. Unfortunately, IEPA's proposed rule does not provide such guidance.

The IEPA's response did point out that P.A. 101-0171 authorized financial assurance, where there was no statutory authority for the Board to adopt financial assurance provisions when it adopted Part 840. Accordingly, to accommodate this point, Ameren is willing to accept applicability under Part 845 for purposes of financial assurance, but requests that the Board allow it to remain subject Part 840 for the remaining requirements, as it has operated pursuant to those provisions since the Board promulgated them. Accordingly, the revised new language would read: *Except for Subpart I*, this Part does not apply to any CCR surface impoundment that is subject to 35 Ill. Adm. Code Part 840.

IV. AMEREN'S PROPOSED DELETION OF SECTION 845.740(b)

The IEPA's Public Hearing Comment states that Gary King testifies as if the proposed provision at Section 845.740(b) is only applicable to Ameren. As a prefatory note, the fact that Mr. King—an expert witness retained by Ameren—testified as to the impact of the IEPA's proposal on Ameren should certainly come as no great shock. However, since the IEPA appears to question this point, Ameren recognizes that it is not the sole member of the regulated community which will be impacted by the IEPA's proposal. The point which the IEPA left unaddressed is that the impact on Ameren is emblematic of the unintended consequences which proposed Part 845, as currently drafted, creates. Unless relief is provided, the proposed Part 845 sets up a regulatory quagmire related to four of Ameren's former ash ponds—Meredosia Bottom Ash Pond, and Ponds B, C, and the Bottom Ash Pond at Hutsonville. This quagmire results from retroactive application of the closure by removal requirements in Section 845.740, particularly the requirement in Section 845.740(b) that groundwater monitoring be continued for a minimum of three years after closure by removal. Since unit specific monitoring was not required when the IEPA approved the closure plans, Ameren did not do what it was not required to—initiate monitoring. Instead, Ameren relied on the larger networks which were performing the monitoring required by the IEPA.

If the Board does not adopt changes to the rules giving Ameren relief, Ameren could anticipate engaging in unit specific monitoring sometime in 2021. Completion of three years would take until at least 2024, which would be long after July 30, 2021. As a result, based on Section 22.59(e), Ameren would need to obtain construction permits and operating permits for CCR surface impoundments, despite the fact that these former ash ponds have not served as ash ponds in many years (and do not meet the definition of a CCR surface impoundment).

Ameren's amendment—to delete Section 845.740(b)—is based upon two justifications. First, the proposed rule reflects a *proposed* amendment to Part 257 that has not yet been adopted. Second, the proposed Section 845.740(b) (which, itself, is based on a proposed provision of Part 257) cannot lawfully be applied retroactively as to Ameren. The Agency admits that the proposed rule is not required by federal law. If the Board's Part 845 rules are clarified so that they will only be applied prospectively as to facilities closed pursuant to state authority prior to the promulgation of Part 845, Ameren would withdraw its objection.

V. AMEREN'S PROPOSAL RELATIVE TO THE MEREDOSIA OLD ASH POND.

The IEPA objects to Ameren's proposal to remove Meredosia Old Ash Pond (now a forested mound of native materials) from the reach of Part 845, but does not contest that RCRA is inapplicable to CCR surface impoundments that ceased accepting waste prior to October 21, 1976. The IEPA also admits that Part 257 is RCRA regulatory program, yet it nonsensically argues, given its previous arguments, that Section 22.59(m) casts a "broader net". That may be true as to certain aspects, but not here—where IEPA had a decade long history of working with Ameren to close its ash ponds, including those at Meredosia. Moreover, the mound is covered with trees, is within Meredosia's groundwater management network, does not contain water, does not act as impoundment, is considered closed by the USEPA, and is not on the USEPA's risk assessment. Further, given the unconverted record testimony of Gary King, there is more environmental risk to "closure" of this mound pursuant to Part 845 than there is to leaving it be. Ameren renews its request for modification, as proposed in its Post-Hearing Comment.

VI. AMEREN'S PROPOSAL REGARDING IEPA RECORD-KEEPING FEES.

The IEPA and AG object to the site-specific and task-specific accountability and record keeping measures Ameren suggests. In addition to questioning the Board's authority to adopt rules

related to keeping records of its costs, the IEPA states that Section 22.59(j) allows for the collection of fees and "does not provide for any sort of accounting of how the money collected is utilized or whether it adequately covers the Agency's costs." IEPA's Post-Hearing Comment at pp. 57–58. The AG also argued that Ameren's proposal in this regard is "beyond the scope" of Section 22.59, given "that the General Assembly has already established flat, per-impoundment" fees. AG's Post-Hearing Comment at p. 9. Further, the AG asserts that "[T]he amount 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." The AG is correct that the Board is not authorized to *change* fees established by the legislature, and the AG is also correct that, as set, the fees applied to certain categories of surface impoundments. However, nowhere in Section 22.59 does it forbid the Board from demanding accountability of the IEPA with respect to the millions of dollars it will collect via these fees. Ameren continues to believe that the IEPA should be accountable to the legislature, to the fee-payers, and to the general public. These are not controversial beliefs, and the record-keeping requirements which Ameren has proposed accomplish those goals.

VII. RESPONSE TO COMMENTS MADE BY THE ENVIRONMENTAL COMMUNITY SPECIFIC TO AMEREN'S FORMER ASH PONDS.

At the outset, Ameren wants to thank the environmental groups and community for their participation in this proceeding. Ameren recognizes that the Board, as well as the regulated community, is aided in its responsibilities by understanding and appreciating and responding to environmental issues raised in its public regulatory hearings. Here, as expected, very little record information of concern was presented as to Ameren's surface impoundments at Venice, Hutsonville and Meredosia. Nonetheless, Ameren wanted to take this opportunity to address some general issues raised.

First, as explained above, Ameren fully intends that each of the CCR surface impoundments that it has not clean closed previous to this rulemaking be covered as Inactive Closed CCR surface impoundments, reflecting their state-authorized closed status. Each of those surface impoundments are now in post-closure care, and that post-closure care has obligations that are quite similar—and sometimes identical—to either or both Part 257 and the Board's Part 840. Moreover, each have developed closure plans which comply with the Board's very strict Part 620 groundwater rules, which the IEPA pointed out in its Post-Hearing Comments, are in some instances are stricter than those set forth in Part 257. Pursuant to its Post-Closure plans, Ameren reports its groundwater monitoring results to the Agency and those groundwater monitoring results are publicly available. While there have been exceedances at some of the former ash ponds, the exceedances are dealt with in post closure care. *See* IEPA Answers to Questions, p. 28; *See also Id.* (Agency explaining that post-closure care at Hutsonville Pond D lasts until the compliance standards of 35 Ill. Adm. Code 840.116 are achieved and, at Venice, post-closure cares lasts a minimum of 15 years after closure but also has stipulations against statistical increases and requires protection of human health and the environment.)

Many commenters addressed clean closure issues. Many of those commentors preferred sites be closed by removal rather than leaving the CCR in place. As testified at hearing by many, there are benefits to both approaches. It appears from the record that Ameren is the only company that has clean closed any ash ponds in Illinois—certainly pursuant to the authority of the State. The closure plans were placed in the Record of this proceeding and can be thoroughly evaluated by the Board. Upon removal of the ash at Hutsonville and Meredosia, the ash was placed in nearby Hutsonville Pond A and Meredosia Fly Ash Pond, both of which we hope will be classified as Inactive Closed Surface Impoundments pursuant to Ameren's proposed amendment to the IEPA's

definition. As the record demonstrates, there is no environmental benefit to requiring Ameren to undo the closures it responsibly achieved for the sake of now applying federal rules that never applied upon Ameren's closure and do not currently apply.

Many commenters also addressed the proximity of groundwater to ash. To aid the Board in its consideration, Ameren asked Dr. Rosanna Saindon of Geotechnology Inc. to provide input, attached hereto as Attachment A. Dr. Saindon's input is an illustration of Ameren's surface impoundments, which are shallow in depth and ash within the closed basins are not saturated by groundwater as some public commentors generally assume. As stated above, any groundwater impacts are captured (and mitigated, when necessary) pursuant to the site's post-closure care plan.

Finally, in ELPC's Post-Hearing Comment, it presented information from various Hydrogeologic Assessments prepared by Natural Resource Technology (NRT); the documents included one related to Venice. In reviewing that document, Ameren believes that the information demonstrates that post-closure care at the site is working as it should.

VIII. CONCLUSION

Ameren appreciates the Board and staff's diligent attention in these proceedings. Ameren understands the daunting task you face as you attempt to craft a rule that provides environmental protection in a manner that addresses the record evidence and properly implements the enabling legislation pursuant to the Board's own authority in Sections 5 and 27 of the Act.

Throughout much of these proceedings, however, both the Board's authority, and indeed state law, took a back seat to arguments that federal law controlled. Certainly that's true where the legislature has authorized Identical in Substance Rulemaking. However, as the IEPA has noted multiple times, this is a rulemaking of general applicability, not an Identical in Substance Rulemaking. Most perplexingly, the IEPA's proposal sought to have state law, state authority,

and even the Board's authority take a back seat to federal authority, which in many ways is the boogeyman in the room.

Here, state law simply authorized, as it often does, that the Board's rule be at least as comprehensive and protective as the federal rule. It does not mean we need to guess at what the USEPA may or may not approve, especially where no information as to those discussions has been presented on the record. It does not mean that we need to disregard costs of the proposed rulemaking. Finally, the procedural posture of this rulemaking does not obligate the Board to retroactively apply new standards to actions which were taken in reliance on state authorization prior to the instant regulations being crafted.

While the Board's authority under Sections 5 and 22.59 have been thoroughly discussed in this proceeding, it must be noted that the Board also has substantial discretionary authority under Section 27 of the Act. Under Section 27, the Board is empowered to take into account, among other things, "the *existing physical conditions of a particular site . . . and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.*" 415 ILCS 5/27 (emphasis added). That provision, and the Board's authority pursuant to the Act, has stood the test of time, as has the Board's independent, thoughtful, and forward-thinking decision-making process.

Ameren appreciates the opportunity to appear in front of the Board and requests consideration of its recommended changes to the IEPA's rule proposal.

Dated: November 6, 2020

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

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ATTACHMENT A – GROUNDWATER SUMMARY PROVIDED BY DR. ROSANNA SAINDON

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
STANDARDS FOR THE DISPOSAL OF	)	R 2020-19
COAL COMBUSTION RESIDUALS IN	)	(Rulemaking -Land)
SURFACE IMPOUNDMENTS:	)	
PROPOSED NEW 35 ILL. ADM.	)	
CODE PART 845	)	

PUBLIC COMMENTS OF DR. ROSANNA SAINDON - GEOTECHNOLOGY INC.

My name is Dr. Rosanna Saindon and since 2009 I have been employed by Geotechnology, Inc., a geo-environmental consulting firm. I was the Geotechnology Senior Engineer for the Construction Quality Assurance (CQA) portion of the Ameren Hutsonville Energy Center Ash Pond D closure project and the Project Manager for CQA portion of Ameren Hutsonville Energy Center Ash Ponds A, B, C, and Bottom Ash Pond closure project. I was the Geotechnology Project Manager that teamed with CDG Engineers on the Ameren Meredosia Energy Center Fly Ash and Bottom Ash Pond closure design and the Project Manager for the CQA portion of the project. I am a licensed engineer in both Illinois and Missouri and graduated in 2004 from the University of Missouri - Rolla with a doctorate in geological engineering. It is my understanding that the Illinois Environmental Protection Agency (IEPA) has proposed rules pertaining to the closure of coal combustion residuals (CCR) impoundments and that the Pollution Control Board is accepting public comments on that proposal.

Reportedly, one or more participants in this proceeding have made global assertions regarding the safety of closing impoundments in place. Ameren Corporation and its subsidiaries (collectively "Ameren") have closed multiple ash ponds at the following sites: Venice, Meredosia, and Hutsonville. At the request of Ameren, we have reviewed some of the above-referenced assertions and prepared summary responses which are contained in this comment letter.

We have conducted a two-dimensional calculation for groundwater flow in the alluvial aquifer and in the closed and dewatered CCR ponds at the Venice, Meredosia, and Hutsonville sites based on hydraulic conductivity, groundwater measurements, and physical measurements of the ponds (data primarily provided by others as noted in publicly available design documents for each site). The closed ponds discussed herein are relatively shallow. During normal river conditions most or all of the CCR (depending on the individual basin) within the basins is above the water table. Due to the hydrogeologic conditions at the sites, groundwater will preferentially flow around and below the basins due to a variety of factors including the hydraulic conductivity of CCR as compared to surrounding granular deposits and the location of the groundwater table.

Meredosia Power Station: Old Ash Pond, Fly Ash Pond and Bottom Ash Berm

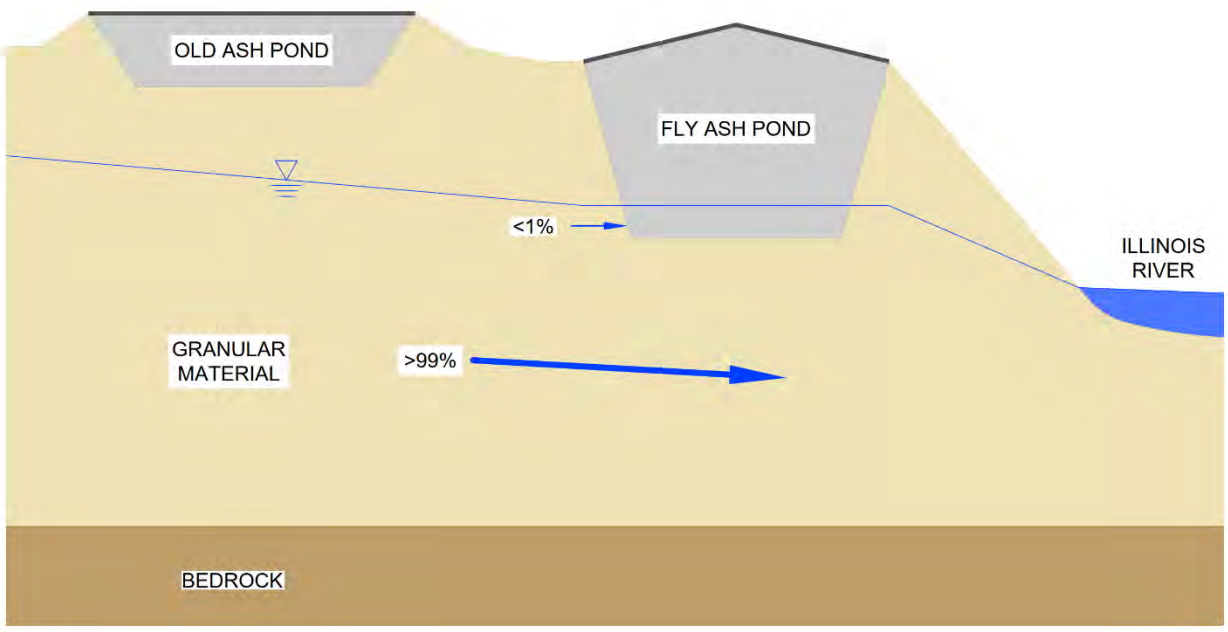
The groundwater flow direction and gradient are based on groundwater elevations observed during several monitoring events. While flow direction at the site can vary due to proximity to the

Illinois River, during normal river conditions the groundwater flow direction is typically toward the Illinois River, generally to the northwest. Horizontal gradients range from 0.001 to 0.003 ft/ft in the vicinity of the Old Ash Pond and the Fly Ash Pond and 0.002 to 0.007 ft/ft in the vicinity of the Bottom Ash Berm.

Old Ash Pond: In 2017, Geotechnology, Inc. performed a liquefaction analysis on the Meredosia facility that included the advancement of six approximately 25 feet deep cone penetration test (CPT) soundings performed in the Closed Ash Pond and eight approximately 25 feet CPT soundings performed in the Fly Ash Pond. Historical design records reflect that the Old Ash Pond had a top of berm elevation of 460' (elevations recorded as mean sea level) with the bottom of the ash pond at 450', which is above the groundwater elevation as indicated by CPT O002 (-29' to water table, i.e. 441'+/-) and CPT O003 (-26' to water table, i.e. 444'+/-) reflected in the liquefaction analysis, as well as the out of the historical record flood elevation of 446.86'. Design elevations for the Old Ash Pond are depicted in the following Figure 1.

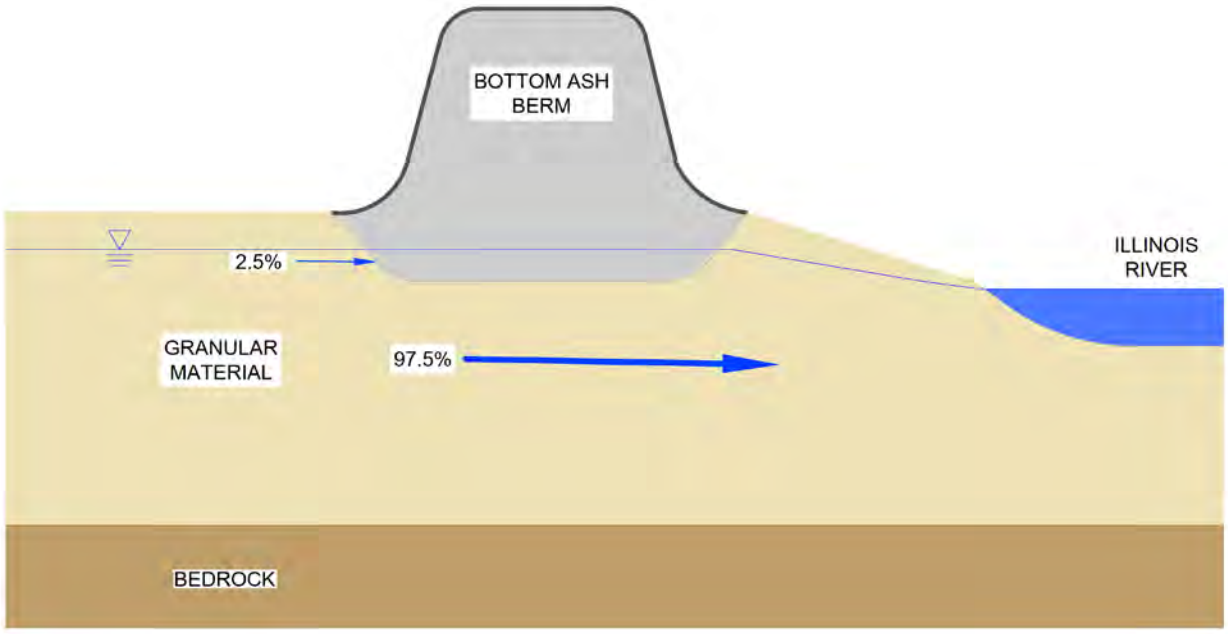
Fly Ash Pond: As shown on Figure 1, groundwater model results indicated that approximately 99 percent of groundwater moving northwest across the site preferentially flows under (and around) the Fly Ash Pond due to the lower horizontal hydraulic conductivity of the CCR material.

Figure 1 - Meredosia Old Ash Pond and Fly Ash Pond



Bottom Ash Berm: The majority of CCR material has been removed from the Bottom Ash Pond and placed in the capped Fly Ash Pond. This clean-closed most of the Bottom Ash Pond and left a capped berm containing CCR materials known as the Bottom Ash Berm. As shown in Figure 2 below, the groundwater model results indicated that approximately 97 percent of groundwater moving northwest across the site preferentially flows under (and around) this berm area due to the lower horizontal hydraulic conductivity of the CCR material.

Figure 2 – Meredosia Bottom Ash Berm

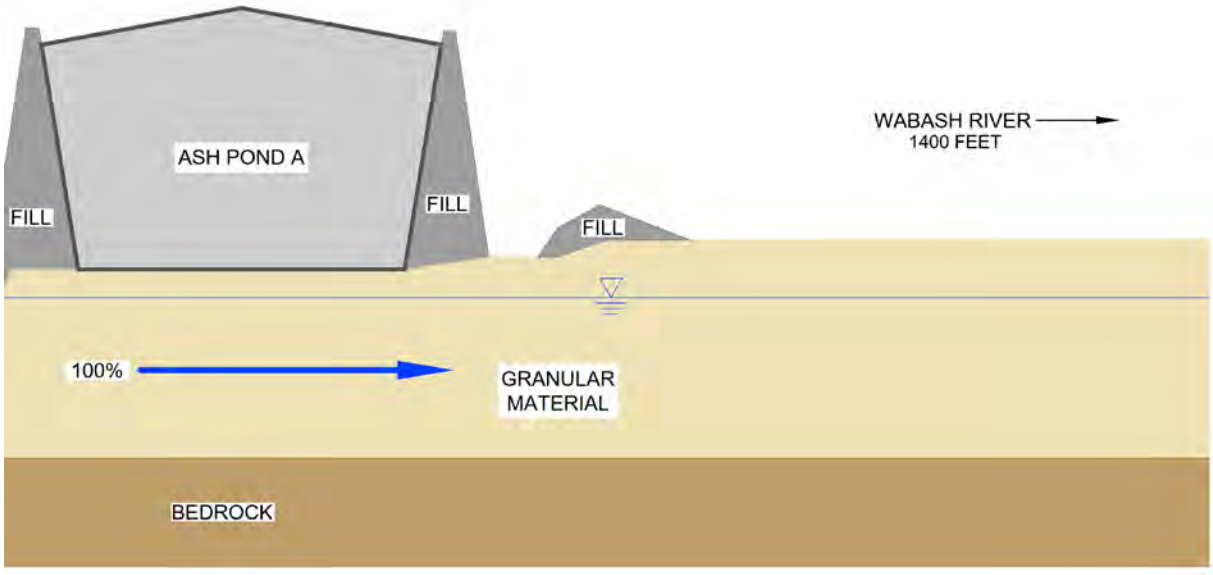


Hutsonville Power Station – Ash Ponds A, B, C, D and Bottom Ash Pond

The groundwater flow direction is typically toward the Wabash River, generally to the northeast. Horizontal gradients range from 0.003 to 0.005 ft/ft in the vicinity of Ash Pond A.

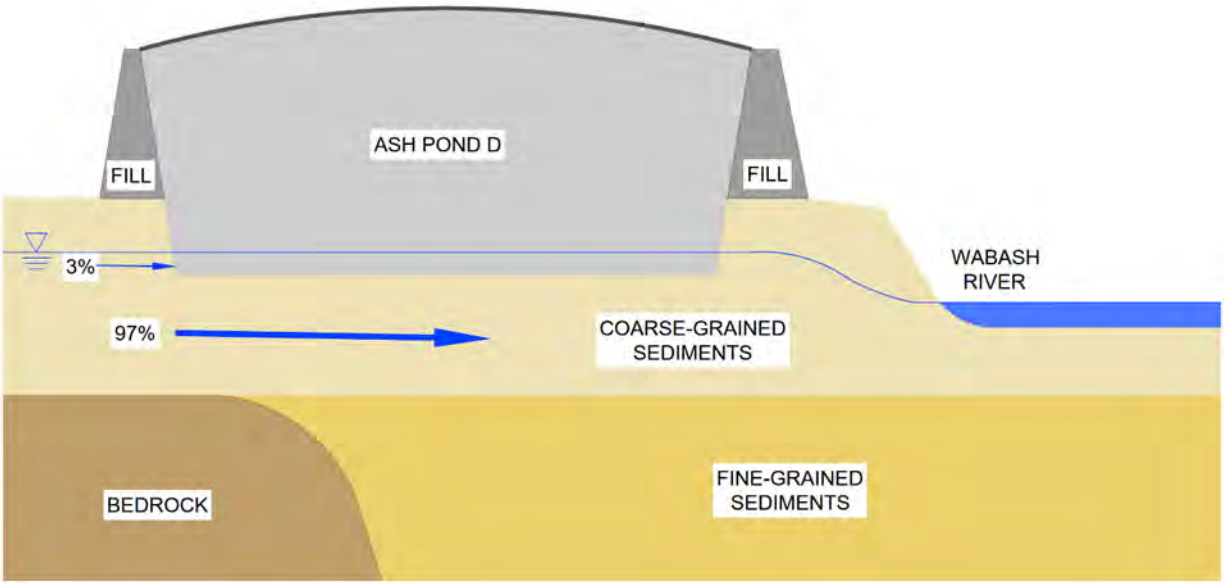
Ash Pond A, B, C, and Bottom Ash Pond: Based on site cross sections prepared by Hanson Professional Services, Inc., the bottom of CCR in Ash Pond A is at an approximate elevation of 450'. Ash Pond A contains a synthetic bottom liner and cap that isolates the CCR material from groundwater. Groundwater elevations can fluctuate in this area, with a maximum observed elevation of 448', but were generally lower (441' to 444'). Based on this information, the bottom elevation of the CCR is higher than the normal groundwater table. As shown on Figure 3 below, groundwater flows under the capped and dewatered Ash Pond A and is not in contact with CCR material from such pond. CCR materials were removed from Ash Pond B, Ash Pond C, and the Bottom Ash Pond and placed in Ash Pond A prior to capping Ash Pond A. Ash Pond B, Ash Pond C, and the Bottom Ash Pond were clean-closed.

Figure 3 - Hutsonville Ash Pond A



Ash Pond D: As shown in Figure 4, the groundwater model results indicated that approximately 97 percent of groundwater moving northeast across the site preferentially flows under (and around) the capped Ash Pond D due to the lower horizontal hydraulic conductivity of the CCR material.

Figure 4 - Hutsonville Ash Pond D



Venice Power Station – Ash Ponds 2 and 3

The groundwater flow direction and gradient were based on groundwater elevations observed during several monitoring events. Results from this assessment indicate that the groundwater flow direction at the site can vary due to proximity to the Mississippi River. During normal river conditions, the groundwater flow direction is typically toward the Mississippi River, generally to the west. Horizontal gradients range from 0.003 to 0.009 ft/ft.

Ash Ponds 2 and 3: As shown on Figure 5 below, the groundwater model results indicated that approximately 99 percent of groundwater moving northwest across the site preferentially flows under (and around) Ash Ponds 2 and 3 due to the lower horizontal hydraulic conductivity of the CCR material.

Figure 5 - Venice Ash Ponds 2 and 3