OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

April 7, 2021

Kim Schultz
Executive Director
Joint Committee on Administrative Rules
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Dear Director Schultz:

We are writing to further express the opposition of the Office of the Attorney General ("Office" or "AGO") to Ameren's proposed modifications of the Illinois Pollution Control Board's ("Board") Second Notice Proposed Regulations for Standards for the Disposal of Coal Combustion Residuals ("CCR") in Surface Impoundments (35 Ill. Adm. Code 845) ("Part 845"). Ameren's proposed modifications, previously submitted to the Joint Committee on Administrative Rules ("JCAR") and filed with the Board on March 30, 2021, are attached hereto as Exhibit A. These comments supplement our earlier comment letter, sent to you on March 2, 2021, and attached hereto as Exhibit B. Specifically, these comments address Ameren's unfounded legal argument that application of Part 845 to its closed impoundments would constitute an impermissible retroactive application of Section 22.59 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/22.59.[1] To the contrary, Ameren's proposed modifications would violate the Act's plain language.

The "primary objective in construing a statute is to ascertain and give effect to the intent of the legislature, bearing in mind that the best evidence of such intent is the statutory language, given its plain and ordinary meaning." *People v. Eppinger*, 2013 IL 114121, ¶ 21. "In addition to the statutory language, legislative intent can be ascertained from consideration of the statute in its entirety, its nature and object, and the consequences of construing it one way or the other." *Id.*

These principles extend to issues of retroactivity. A statute may operate retroactively if that is what the General Assembly intended. *Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994); *Commonwealth Edison Co. v. Will Cty. Collector*, 196 Ill. 2d 27, 39 (2001) (adopting *Landgraf*

[1] Section 22.59 of the Environmental Protection Act was created by Public Act 101-171, § 5, and became effective on July 30, 2019.

test). *Landgraf* and the Illinois cases that follow it concern statutory interpretation, and they express a presumption against retroactivity, not a prohibition. *See People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29 ("[I]f the legislature has clearly indicated the temporal reach of the amended statute, that expression of legislative intent must be given effect, absent a constitutional prohibition.").[2]

In this case, the statute is clear. Section 22.59(g)(1) of the Act plainly requires the Board to adopt State regulations "at least as comprehensive and protective as the federal regulations" governing CCR surface impoundments. 415 ILCS 5/22.59(g)(1); *see* 40 C.F.R. Part 257. The first step in implementing Section 22.59 is determining the scope of the federal regulations.[3] As discussed below, that scope also is clear: all CCR surface impoundments that existed as of October 19, 2015 are covered. That is why the Board appropriately included the October 19, 2015 date in its rules as triggering applicability of requirements based on the federal regulations. Ameren's proposed modifications to exempt impoundments that existed on October 19, 2015 from those requirements would violate Section 22.59(g)(1).

These comments, first, address why inclusion of the October 19, 2015 date in Part 845 is required by Section 22.59(g)(1) of the Act, including an explanation of the legal effect of *Utility Solid Waste Activities Group v. Environmental Protection Agency*, 901 F.3d 414 (D.C. Cir. 2018) ("*USWAG*"). Second, these comments address why the Board's inclusion of the October 19, 2015 date in Part 845 is not retroactive, let alone impermissibly so.

1. The Federal Part 845 Regulations Apply to All CCR Surface Impoundments That Existed on October 19, 2015, Even if Those Impoundments Have Since Closed.

The United States Environmental Protection Agency ("USEPA") promulgated the Part 257 regulations with an effective date of October 19, 2015. *See* 80 Fed. Reg. 37988, 37989 (July 2, 2015). USEPA adopted the regulations pursuant to the Resource Conservation and Recovery Act ("RCRA"), the federal "statutory framework calling for regulation of solid waste generation, storage, and disposal." *USWAG*, 901 F.3d at 420. The Part 257 regulations contain detailed criteria for the design, location, operation, closure, and post-closure care of CCR surface impoundments, as well as for monitoring and corrective action of groundwater contamination caused by releases from impoundments.

It is important to note that Part 257 imposes requirements on the owner of a CCR surface impoundment until such time as groundwater contamination associated with the impoundment has been addressed. Even after closure of an impoundment, either by removal of CCR, or by

[2] Ameren has not even attempted to argue that application of Part 845 to its closed impoundments and associated groundwater contamination would be unconstitutional. Rather, Ameren has argued against applying Section 22.59 retroactively based on *Einoder* and *Landgraf*, which concern issues of statutory interpretation, not constitutionality.

[3] In this sense, the statute is similar to one requiring an "identical-in-substance" rulemaking. The difference is that, in an "identical-in-substance" rulemaking, federal regulations are both the "ceiling" and the "floor." In this rulemaking, the federal regulations are the "floor," but the Board is authorized to adopt additional requirements concerning CCR surface impoundments in the State.

closure in place, the owner must, at a minimum, continue to monitor groundwater and perform appropriate corrective action until the applicable groundwater quality standards are met. *See* 40 C.F.R. 257.102(c) (closure requirements for impoundments closed by removal of CCR); 40 C.F.R. 257.104 (post-closure care requirements for impoundments closed in place). For impoundments closed in place, owners further must provide at least thirty years of post-closure care. 40 C.F.R. 257.104.

When USEPA promulgated Part 257 in 2015, it divided impoundments into two categories: impoundments at plants that were generating electricity as of October 19, 2015 ("active plants"), and impoundments at plants that had ceased generating electricity ("inactive plants"). Specifically, USEPA provided that impoundments at inactive plants—referred to in the *USWAG* decision as "legacy ponds"—were exempt from the Part 257 regulations. 40 C.F.R. 257.50(e). In 2018, though, the U.S. Court of Appeals for the D.C. Circuit vacated the exemption as arbitrary and capricious. *USWAG*, 901 F.3d at 433, 449.

Putting aside *USWAG* for the moment, the case of impoundments at "active plants" demonstrates why Part 845 must regulate CCR surface impoundments that existed as of October 19, 2015—not as of the 2019 effective date of Section 22.59 or the 2021 effective date of Part 845, as Ameren variously has argued. Every CCR surface impoundment at an active plant was covered in 2015 and will remain covered by the federal regulations until such time as groundwater contamination associated with the impoundment has been addressed. 40 C.F.R. 257.102(c); 40 C.F.R. 257.104.

This fact, alone, disproves Ameren's contention that the General Assembly intended to regulate only impoundments that had not been closed by the time Section 22.59 was enacted. The General Assembly instructed the Board to adopt State regulations at least as "comprehensive and protective" as the federal regulations. 415 ILCS 5/22.59(g)(1). Therefore, the General Assembly plainly intended that the Board regulate any CCR surface impoundment that existed at an active plant as of October 19, 2015—regardless of whether that impoundment was later closed in 2016, 2019, or any other year. Even if closed, such impoundments were, and are, still subject to groundwater monitoring, corrective action, and (if applicable) post-closure care requirements under the federal regulations.

No party disputes that Part 845 should apply to all impoundments at "active plants" as of October 19, 2015. The dispute between Ameren, on one side, and the Board, this Office, the Illinois Environmental Protection Agency, and the State's environmental groups, on the other side, is whether Part 845 also should apply to all impoundments at "**inactive** plants" as of October 19, 2015.

Ameren's position is that the "legacy pond" exemption of 40 C.F.R. 257.50(e) continues to maintain some sort of legal force after it was vacated almost three years ago in *USWAG*. Ameren's position has no legal foundation. In *USWAG*, the D.C. Circuit "vacated" the "legacy pond" exemption as arbitrary and capricious, holding that "[t]he risks posed by legacy ponds are at least as substantial as inactive impoundments at active facilities." *USWAG*, 901 F.3d at 433, 449. "To 'vacate,' as the parties should well know, means to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority; to set

aside." *Action on Smoking & Health v. C.A.B.*, 713 F.2d 785, 797 (D.C. Cir. 1983). Moreover, it is well-settled that D.C. Circuit decisions are applied retroactively:

> Because the decision of an Article III court announces the law as though it were finding it—discerning what the law is, rather than decreeing what it is changed to or what it will tomorrow be—**all parties charged with applying that decision, whether agency or court, state or federal, must treat it as if it had always been the law**.

Nat'l Fuel Gas Supply Corp. v. FERC, 59 F.3d 1281, 1289 (D.C. Cir. 1995) (emphasis added).

Indeed, a district court already has cited this "clear" precedent in applying ***USWAG* itself** retroactively. *Waterkeeper Alliance, Inc. v. Wheeler*, No. CV 18-2230, 2020 WL 1873564, at *6-*7 (D.D.C. April 15, 2020).

The "legacy pond" exemption that Ameren relies upon has no remaining legal existence. Ameren cited no contrary precedent to the Board. Instead, Ameren has relied exclusively on the fact that USEPA has not yet revised the Part 257 regulations to reflect *USWAG*'s vacatur of 40 C.F.R. 257.50(e). But even the October 1, 2020 pre-publication "Advanced Notice of Proposed Rulemaking" ("ANPR") that Ameren cited in comments to the Board undermines Ameren's position. The ANPR demonstrated that USEPA was contemplating (among other options) revising the regulations to clarify that they cover all CCR surface impoundments that existed at inactive plants as of October 19, 2015—exactly as would be expected from applying the *USWAG* decision consistent with precedent. *See* AGO Reply to Post-Hearing Comments (Nov. 6, 2020), at 8-9 (available at https://pcb.illinois.gov/documents/dsweb/Get/Document-103365).

It is true that USEPA has failed to act for nearly three years to fully implement the *USWAG* decision. It is also true that no one can predict with certainty what precise regulations USEPA will adopt concerning legacy ponds. The fact is, though, the Board cannot wait any longer under Section 22.59 to adopt Part 845.

What Ameren is asking the Board to do is to bet that USEPA ultimately will share Ameren's legally erroneous view of *USWAG*. That is a bad bet, and its downside is enormous for the State of Illinois and all other owners of CCR surface impoundments. If USEPA approves Part 845 as consistent with the federal Part 257 regulations, then Part 845 will operate in lieu of Part 257. If USEPA does not, then owners of CCR surface impoundments will be subject to both federal **and** state regulatory regimes. While Ameren has complained of "regulatory uncertainty" for its handful of disputed impoundments, its proposals are threatening far more uncertainty for all other owners in the State.[4]

[4] To the extent that Ameren may be arguing that earlier Board proceedings concerning its impoundments could stand in place of the federal regulations, this argument also is baseless. The federal regulations were promulgated under federal RCRA solid waste authorities; by contrast, those earlier Board proceedings were **not** based on RCRA requirements as implemented by USEPA through federal rulemaking.

The only way for the Board to ensure that Part 845 is as "comprehensive and protective" as the federal regulations—as is plainly required by Section 22.59(g)(1) of the Act—is to reject Ameren's proposed modifications, and to adopt Part 845 as proposed at second notice.

2. Applying Part 845 to Ameren's Impoundments is Not Retroactive, Let Alone Impermissibly So.

Ameren has argued that Part 845 should not be fully applied to its closed impoundments because it would have a retroactive impact. Part 845's **prospective** requirements for monitoring presently-contaminated groundwater, and providing appropriate post-closure care to impoundments closed in place, are not retroactive in effect. Moreover, even if Part 845's requirements were considered retroactive as to previously-closed impoundments, they would be permissible because the General Assembly's clear intent was that the State's regulations have at least the same temporal scope as the federal regulations. *See People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 29.

First, application of Part 845 to Ameren's closed impoundments is not retroactive. "An amended statute will be deemed to have retroactive impact if application of the new statute would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Id*. at ¶ 30. The Part 845 regulations do not impair any rights of Ameren's, because no party has a right to maintain groundwater contaminated by coal ash constituents from inadequately-lined impoundments. *See Tri-County Landfill Co. v. Illinois Pollution Control Bd.*, 41 Ill. App. 3d 249, 257 (2d Dist. 1976) ("No one even in the pursuit of an otherwise lawful business ever acquires a vested right to create or maintain a nuisance in connection therewith"). The regulations do not impose any liability for Ameren's past conduct; rather, liability would be imposed only for a failure to comply with the regulations going forward. The regulations do not impose any new duties with respect to a completed "transaction" because, as demonstrated by the scope of requirements under the federal Part 257 regulations, the "transactions" here are not completed until all contaminated groundwater has met applicable groundwater quality standards.

Ameren has focused on "closure" as ending regulatory obligations for its impoundments. This is wrong factually and legally. Simply closing an impoundment by capping in place, or removing CCR from an impoundment, does not by itself immediately address already-contaminated groundwater. Neither does it fulfill all the requirements of the federal Part 257 regulations.

Second, even if applying Part 845 to Ameren's closed impoundments were considered retroactive, it would not be impermissible. It would be required. The presumption against retroactivity in *Landgraf* and the Illinois cases that follow it is just that—a presumption of legislative intent. On the other hand, "if the legislature has clearly indicated the temporal reach of the amended statute, that expression of legislative intent must be given effect . . . ." *Einoder*, 2015 IL 117193, ¶ 29.

As discussed above, the General Assembly in Section 22.59(g)(1) clearly expressed its intent that the Board's regulations have the same temporal scope as the federal Part 257 regulations. That means that any CCR surface impoundment in existence as of October 19, 2015 must be fully

regulated under Part 845. Ameren's proposed modifications to remove that date from Part 845 must be rejected.

Sincerely,

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EXHIBIT A

Ameren's Requested Modifications to the Pollution Control Board's CCR Rules (Part 845)

In 2011, Ameren stopped generating coal power in Illinois. Over the next ten years, most of Ameren's Illinois coal ash ponds (containing Coal Combustion Residuals or "CCR") were then closed with the involvement of IEPA. Although no state or federal law required Ameren to do so, it nevertheless worked with IEPA to close these ponds in a manner that protected human health and the environment. The closures involved substantial IEPA review and input, culminating in IEPA closure authorization letters and follow-up documentation that the closures were completed as authorized.

Some ponds were ***closed by removal*****,** meaning all coal ash was removed and placed in nearby **closed in place** surface impoundments at the site. Other ponds were ***closed in place*** – and are subject to extensive post-closure care requirements, such as groundwater monitoring. ***Ameren spent well over $26 million closing these coal ash ponds.***

In 2019, Illinois passed its own CCR Law to regulate CCR Surface Impoundments. The Pollution Control Board has now promulgated rules (Part 845) implementing the CCR Law. Ameren requests two modest changes to Part 845 to ensure that the rules are consistent with the intent of the CCR Law and to appropriately account for all the work Ameren has done (on its own initiative) to close its ash ponds before passage of the CCR Law.

1. ***Clarify that Part 845 does not apply to former ash ponds that no longer contain CCR.***

   - ***Requested Addition to Section 845.100 (Scope and Purpose)***: "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."

   - ***Rationale***: IEPA can only regulate "CCR surface impoundments" under the new CCR Law. As defined, a CCR surface impoundment must "store, treat or dispose of" CCR. The Ameren ponds that were authorized to close by removal and do not contain CCR as of the effective date of the rules simply do not meet this definition and are therefore not subject to the CCR Law or Part 845. Ameren requested this change during the PCB's hearing, but the PCB order did not discuss this issue at all. It is critically important for the CCR Rules to provide regulatory clarity on this issue because IEPA is now seeking to apply Part 845 to clean closed ponds.

2. ***Eliminate October 19, 2015 as the triggering date for "closure" under Part 845.***

   - ***Requested Revision to Section 845.120 (Definitions)***: "Inactive Closed CCR surface impoundment" means an inactive CCR surface impoundment that completed closure before ~~October 19, 2015~~ the effective date of this Part with an Agency-approved closure plan."

   - ***Rationale***: Before Illinois passed the CCR Rule, the USEPA issued its own rules regarding coal ash pond closure (Part 257) that took effect on October 19, 2015. PCB is now attempting to apply Part 845 to any pond that had not completed closure when USEPA's Part 257 went into effect. In other words, PCB is attempting to make Part 845 ***retroactive to a point in time nearly 6 six years ago***. What this means is that Part 845 will end up negating the fact that many Ameren ash ponds that have actually been closed (with IEPA's authorization) will not be deemed closed under the new rules since they were not closed before October 19, 2015. This legal fiction, *which adversely impacts only Ameren because only Ameren closed its ponds*, must be eliminated.

EXHIBIT B

OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

KWAME RAOUL
ATTORNEY GENERAL

March 2, 2021

Kim Schultz
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Dear Director Schultz:

I am writing to express the support of the Office of the Attorney General ("Office" or "AGO") for the Illinois Pollution Control Board's ("Board") Second Notice Proposed Regulations for Standards for the Disposal of Coal Combustion Residuals ("CCR") in Surface Impoundments (35 Ill. Adm. Code 845) ("Part 845"). This rulemaking is on the Agenda for the March 16, 2021 meeting of the Joint Committee on Administrative Rules ("JCAR"). More specifically, this Office writes in opposition to comments recently submitted to JCAR by Ameren, seeking amendments to narrow the scope of Part 845 in a manner that would violate Section 22.59 of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/22.59.[1]

Section 22.59(g)(1) of the Act requires the Board to adopt State regulations "at least as comprehensive and protective as the federal regulations" governing CCR surface impoundments. 415 ILCS 5/22.59(g)(1); *see* 40 C.F.R. Part 257. As this Office explained in post-hearing comments to the Board:

> Section 22.59(g)(1)'s directive that the Board adopt regulations "at least as comprehensive and protective" as Part 257 speaks decisively to the statute's temporal reach. The federal Part 257 regulations do not merely cover CCR surface impoundments that contained CCR as of the effective date of the state Act's Section 22.59, or as of the future effective date of the Board's Part 845 regulations, as Ameren variously advocates for Part 845. **Instead, Part 257's regulation of CCR surface impoundments is keyed to *its* effective date of October 19, 2015. *See* 80**

[1] Section 22.59 of the Environmental Protection Act was created by Public Act 101-171, § 5, and became effective on July 30, 2019.

> **Fed. Reg. 37988, 37989 (July 2, 2015). The Board's regulations therefore must, at a minimum, reflect that same temporal scope, or they will violate Section 22.59(g)(1).**

AGO Reply to Post-Hearing Comments (Nov. 6, 2020), at 5-6 (emphasis added) (available at https://pcb.illinois.gov/documents/dsweb/Get/Document-103365).

Before the Board, Ameren sought changes to definitions in Part 845, so as to tie Part 845's regulation of CCR surface impoundments to its 2021 effective date. The Board correctly rejected Ameren's proposal, citing to the comments filed in opposition by this Office and the Illinois Environmental Protection Agency ("IEPA"). The Board properly retained Part 845's references to the federal Part 257 regulations' effective date of October 19, 2015, as is required by the Act. *See*, *e.g.*, Second Notice Opinion and Order (Feb. 4, 2021), at 16-17 (available at https://pcb.illinois.gov/documents/dsweb/Get/Document-103704). The Board concluded:

> Ensuring that all CCR surface impoundments fulfill the requirements of proposed Part 845 ensures protection of the environment and human health in the State and will help ensure approval by [the United States Environmental Protection Agency] of Illinois' rules.

Id. at 17. Ameren also unsuccessfully pressed its arguments in a lawsuit filed against IEPA in Sangamon County Circuit Court, which the Court dismissed with prejudice in a January 11, 2021 order (attached hereto as Exhibit A) for lack of ripeness and failure to state a claim.

Ameren's proposed amendments to Part 845 would make the State's regulations less "comprehensive and protective" than the federal Part 257 regulations, and therefore would violate Section 22.59(g)(1) of the Act, 415 ILCS 5/22.59(g)(1). For the foregoing reasons, this Office urges the members of JCAR to disregard Ameren's arguments against Part 845 and certify no objection based thereon.

Sincerely,

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