

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:	)	
	)	
PETITION OF AMEREN ENERGY MEDINA	)	AS 21-_____
VALLEY COGEN, LLC (OLD MEREDOSIA)	)	(Adjusted Standard - Land)
FOR ADJUSTED STANDARDS	)	
FROM 35 ILL. ADMIN. CODE PART 845	)	

**NOTICE OF FILING**

<b>To: Don Brown, Clerk</b>	<b>Christine Zeivel</b>
Illinois Pollution Control Board	Illinois Environmental Protection Agency
100 West Randolph St.	1021 North Grand Avenue East
Suite 11-500	P.O. Box 19267
Chicago, Illinois 60601	Springfield, IL 62795-9276

Please take notice that on May 11, 2021, the Petitioner filed electronically with the Office of the Clerk of the Illinois Pollution Control Board, the attached Petition of Ameren Energy Medina Valley Cogen, LLC for Adjusted Standards from 35 Ill. Admin. Code, Part 845, Certificate of Service, and Appearance, copies of which are served upon you.

Dated: May 11, 2021

Respectfully submitted,  
**Ameren Energy Medina Valley Cogen, LLC,  
Petitioner.**

By:           /s/ CLAIRE A. MANNING            
One of Its Attorneys

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**CERTIFICATE OF SERVICE**

I, the undersigned attorney, certify that I have filed the documents described above electronically with the Illinois Pollution Control Board and served the Illinois Environmental Protection Agency with the same documents by First Class Mail, postage prepaid, on May 11, 2021.

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PETITION OF AMEREN ENERGY MEDINA ) AS 21-\_\_\_\_\_  
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FOR ADJUSTED STANDARDS )  
FROM 35 ILL. ADMIN. CODE PART 845 )

**PETITION FOR ADJUSTED STANDARDS**

Ameren Energy Medina Valley Cogen, LLC ("Ameren" or "the Company"), by and through its attorneys, Claire A Manning, Anthony D. Schuering, and Garrett L. Kinkelaar of Brown, Hay + Stephens, LLP, and pursuant to Section 28.1 of the Environmental Protection Act, 415 ILSC 5/28.1 (the "Act") and 35 Ill. Admin. Code § 104.400 *et seq.*, requests that the Illinois Pollution Control Board (the "Board") adopt adjusted standards from certain standards set forth in 35 Ill. Admin. Code Part 845 as this Part applies to coal combustion residuals surface impoundment ("CCRSI") at the inactive Old Ash Pond at Meredosia Power Station (the "Old Meredosia").

**I. BACKGROUND**

Old Meredosia, the subject of this Petition, is located at Ameren's former Meredosia facility in Morgan County – previously a coal fired power station operated by Ameren and predecessor companies. Ameren stopped generating power at the facility in 2011. Since that time, the facility has been inactive and the power station infrastructure decommissioned and removed. With the guidance, approval, and authorization of the Illinois Environmental Protection Agency ("IEPA"), the former ash ponds (which ceased accepted accepting coal combustion residue or "CCR" in 2011) were closed, consistent with closure plans developed and approved by the IEPA. The facility is now in post-closure care, with a groundwater monitoring network and reporting as approved by the IEPA. The Meredosia Station Closure

Plan (“MSCP”) included a groundwater monitoring network that covers the area of Old Meredosia. The Meredosia Station Closure Plan Documents are attached hereto as **Exhibit 1**.

The Meredosia facility has three former ash ponds: Bottom Ash Pond, Fly Ash Pond, and Old Meredosia. Bottom Ash Pond and Fly Ash Pond will be subject to Part 845 of the Board’s new regulations concerning Coal Combustion Residue (“CCR”) as inactive CCR Surface Impoundments and, as such, will need to obtain operational permits for post-closure care activities pursuant to that Part.

As further explained below, Old Meredosia is not subject to Part 845 as it was closed prior to the regulatory authority of the IEPA, the USEPA and the Resource Conservation and Recovery Act (“RCRA”); thus, RCRA does not apply. Further, Old Meredosia does not constitute a CCR Surface Impoundment as defined in Section 3.143 of the Illinois Environmental Protection Act, 415 ILCS 5/3.143.<sup>1</sup>

**II. REGULATIONS FROM WHICH ADJUSTED STANDARDS ARE SOUGHT (35 ILL. ADMIN. CODE 104.406(A))**

Ameren requests adjustments to all sections of 35 Ill. Admin. Code Part 845, effective April 21, 2021, and, in lieu thereof, requests that Old Meredosia be recognized as closed and that it continues to be part of the groundwater monitoring network as applicable to the Bottom Ash and Fly Ash CCRSI, as approved by the IEPA for the Meredosia Station Closure Plan – and as will be applicable to the Bottom Ash and Fly Ash CCRSIs’ Part 845 post-closure care operational permit. Ameren also proposes that the Adjusted Standard require that Old Meredosia be recognized in the

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<sup>1</sup> Accordingly, should the Board agree with Ameren, Ameren would welcome a Board order stating so and dismissing its Petition, as the Board has done in previous cases where unnecessary regulatory relief mechanisms were sought. If the Board does not agree, Ameren believes the proposed Adjusted Standard presents a prudent, practical, and environmentally sound regulatory path for Old Meredosia.

financial assurance instrument it provides pursuant to Part 845, Subpart I.

**III. PART 845 IS A REGULATION OF GENERAL APPLICABILITY DESIGNED TO IMPLEMENT PART OF THE STATE RCRA PROGRAM (35 ILL. ADMIN. CODE 104.406(B))**

35 Ill. Admin. Code Part 845 was promulgated to implement part of the State's programs related to the Resource Conservation and Recovery Act ("RCRA"). *See* 415 ILCS 5/28.1 (2006). 40 C.F.R. Part 257, as currently in effect, does not apply to Old Meredosia because it ceased to accept CCR and was closed in the early 1970s, decades before the October 19, 2015 effective date of 40 C.F.R. Part 257 and prior to the effective date of RCRA.

**IV. THE LEVEL OF JUSTIFICATION REQUIRED FOR THESE ADJUSTED STANDARDS (35 ILL. ADMIN. CODE 104.406(C))**

The regulations from which Ameren seeks the adjusted standards do not specify a level of justification. Therefore, the level of justification specified by Section 28.1(c) of the Act applies:

- (1) factors relating to the petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to the petitioner;
- (2) the existence of those factors justifies an adjusted standard;
- (3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
- (4) The adjusted standard is consistent with any applicable federal law.

415 ILCS 5/28.1(c). Ameren must also justify all the requested adjustments consistent with Section 27(a) of the Act. 415 ILCS 5/28.1(a) (2006). Section 27(a) of the Act requires the Board to consider the following factors in promulgating regulations:

[T]he Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the

nature of the existing air quality, or receiving body of water, as the case may be, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution. 415 ILCS 5/27(a).

**V. DESCRIPTION OF THE NATURE OF PETITIONER'S ACTIVITIES (35 ILL. ADMIN. CODE 104.406(D))**

Old Meredosia has not accepted coal ash for approximately 50 years. The rest of the former Meredosia Station (the Fly Ash Pond and the Bottom Ash Pond), each of which are adjacent to Old Meredosia, stopped receiving ash for disposal in December 2011. *See* Meredosia Site Map, **Figure 1-2** within **Exhibit 2**. Ameren submitted a revised Closure Plan for both of these ponds to the IEPA on February 16, 2017, which the IEPA approved on March 8, 2017. *See generally* Meredosia Station Closure Plan Documents, **Exhibit 1**. The closure project for these two remaining ponds was substantially complete on December 5, 2018. *Id.* Ameren subsequently submitted CQA Closure Completion Report on January 31, 2019. Pursuant to the approved Plan, Ameren began submitting Annual Reports documenting post-closure activities in March 2020. Ameren expended \$12.0 million to close the Meredosia facility pursuant to the Meredosia Station Closure Plan. *Id.* With the closure of these two remaining ponds, the Meredosia facility is fully closed.

Specifically important to this adjusted standard petition is the fact that Old Meredosia ceased receiving CCR, closed, and was capped with local material before October 21, 1976. Old Meredosia was closed well before there were any regulations under the Act specifying requirements for closure of ash ponds or specific to the development of the groundwater protection standards now in place at Meredosia. At the time, there was no IEPA program engaged in the regulation or approval of ash pond closures.

Presently, Old Meredosia is no longer geomorphologically considered a pond due to its convex raised nature. *See* the Elevation Rendering of Meredosia Old Ash Pond, attached

hereto as **Exhibit 3**. Rather, Old Meredosia is mound of dirt covered by a forest now decades old.

Following the closure of the Fly Ash and Bottom Ash Ponds, Ameren began submitting Annual Reports documenting post-closure activities in March 2020 to the Illinois Environmental Protection Agency (“IEPA”). Ameren’s 2019 Annual Report for the Meredosia Power Station is attached hereto as **Exhibit 2**.

The Meredosia Closure Documents related to the Bottom Ash Pond and Fly Ash Pond include:

- Closure Plan for Meredosia Fly Ash and Bottom Ash Ponds.
- IEPA Approval Letter of Closure Plan for Meredosia Fly Ash and Bottom Ash Ponds.
- Construction Quality Assurance Report for Meredosia Fly Ash and Bottom Ash Ponds.

Constructed in 1948, Old Meredosia was removed from service in the early 1970s and capped with native materials. Old Meredosia ceased accepting CCR and was closed by the early 1970s. As such, it was closed before the federal RCRA statute was enacted on October 21, 1976 and before any IEPA program existed relative to closure of CCR surface impoundments. Old Meredosia is no longer geomorphologically a pond. Rather, it is now a mound of soil with a forest growing on it. Old Meredosia is separated from the Illinois River by the adjacent Fly Ash and Bottom Ash Ponds, each of which maintain groundwater monitoring systems. *See* Closure Plan for Meredosia Fly Ash and Bottom Ash Ponds within **Exhibit 1** and **Figure 1-1** within **Exhibit 2**. Additionally, the area encompassed by Old Meredosia is located within the Groundwater Management Zone of the Fly Ash and Bottom Ash Ponds that were closed with IEPA approval.

See Meredosia Site Map, **Figure 1-2** within **Exhibit 2**.

Notably, Old Meredosia has been closed for so long that it is not even included in the list of CCR surface impoundments maintained by the United States Environmental Protection Agency (“USEPA) and referenced in the Court’s opinion in *Util. Solid Waste Activities Grp. v. Env’tl. Prot. Agency*, 901 F.3d 414, 434 (D.C. Cir. 2018). Although referred to as an ash pond, Old Meredosia is in reality a large mound of dirt in a densely wooded area which is completely covered with mature trees and other flora. See the Elevation Rendering of Meredosia Old Ash Pond, attached hereto as **Exhibit 3**.

To date, the IEPA has never requested that Ameren take any action with regards to closure of Old Meredosia, even as Ameren proceeded to obtain closure of the other two ponds at the Meredosia facility. Further, the USEPA’s risk assessment of Ameren’s Meredosia facility acknowledges the closer of Old Meredosia. See Site Assessment – Meredosia Power Station (May 10, 2011), attached hereto as **Exhibit 4**.

## **VI. DESCRIPTION OF THE IMPACT OF PETITIONER'S ACTIVITIES ON THE ENVIRONMENT (35 ILL. ADMIN. CODE 104.406(G))**

The following discussion summarizes relevant technical details concerning site geology and groundwater quality at the former Meredosia Station and the environmental impacts of Old Meredosia.

### **A. Site Geology**

Although originally referred to as an ash pond, Old Meredosia is now a large mound of dirt in a densely wooded area which is completely covered with mature trees and other flora. Moreover, Old Meredosia does not contain water, does not act as impoundment, is considered closed by the USEPA, and is not on the USEPA’s risk assessment. See generally Site Assessment – Meredosia Power Station (May 10, 2011), attached hereto as **Exhibit 4**.

Further, based on a study conducted by Geotechnology Inc and submitted to IDNR in 2017 (attached hereto as **Exhibit 5**), the ash strata within Old Meredosia are above the groundwater table. Based on this groundwater modeling, impacts on groundwater from Old Meredosia are not anticipated. In addition, Old Meredosia is located within a Groundwater Management Zone (“GMZ”) authorized by the IEPA upon the closure of the other ponds at Meredosia and, as such, any impacts would be subject to monitoring and annual reporting.

### **B. Groundwater Quality**

The nearest potable well to the Meredosia facility is approximately 1,000 feet away in an upgradient direction. The Meredosia facility has a groundwater monitoring network which can provide information relative to groundwater impacts. Pre-Filed Answers of Gary King, R20-19, pg. 16 (Sep. 24, 2020). The Meredosia facility has a GMZ that includes Old Meredosia. When Ameren submitted its closure plan for the Meredosia Fly Ash and Bottom Ash Ponds, Ameren included a discussion identifying the existence of Old Meredosia. Id. IEPA did not require any actions specific to closing Old Meredosia as part of the closure of the Fly Ash and Bottom Ash ponds.

Geotechnology Inc. performed a liquefaction analysis study on the Meredosia facility that was submitted to the Illinois Department of Natural Resources (IDNR) on September 20, 2017. This study was prepared to support a request by Ameren to change the dam classification status for the berms at the Meredosia facility. It included information and investigation relevant to Old Meredosia. In summary, six – approximately 25 feet deep cone penetration test (CPT) soundings were performed as to Old Meredosia and eight, approximately 25 feet CPT soundings were performed as to the Fly Ash Pond. Direct push samples from the impounded ash were collected to a depth of approximately 24 feet in Old Meredosia and approximately 24 feet in the Fly Ash Pond. *See* Geotechnology Inc. Letter to IDNR Regarding Liquefaction Analysis Report for the

Meredosia Fly Ash and Closed Ash Ponds, pg. 2, attached hereto as part of **Exhibit 6**.

Geotechnology analyzed the CPT data for liquefaction potential and dynamic (post liquefaction) settlement utilizing a design PGA of 0.08g and an earthquake magnitude of 7.5. The analysis incorporated the results of the laboratory tests to refine the fines content within the soundings. Based on the liquefaction results there were not potentially liquefiable layers identified within the impounded ash. Ameren records show the design of the old pond, with a top of berm elevation of 460 and bottom at 450, well 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'+/-) in the liquefaction study, as well as out of the record flood elevation of 446.86'.

Further, when responding to the IEPA's specific question regarding whether "Ameren obtained site specific data on what the water level is with in the footprint of the [Old Meredosia]?", Ameren's expert, Gary King provided pre-filed testimony addressing the question, stating:

Geotechnology analyzed the CPT data for liquefaction potential and dynamic (post liquefaction) settlement utilizing a design PGA of 0.08g and an earthquake magnitude of 7.5. The analysis incorporated the results of the laboratory tests to refine the fines content within the soundings. Based on the liquefaction results there were not potentially liquefiable layers identified within the impounded ash. Ameren records show the design of the old pond, with a top of berm elevation of 460 and bottom at 450, well 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'+/-) in the liquefaction study, as well as out of the record flood elevation of 446.86'. In responding to the study and Ameren's request, on April 12, 2019, IDNR concluded there are no structures at the Meredosia Power Station which are jurisdictional under the Part 3702 rules stating as follows:

\* \* \*

Old Ash Pond [Old Meredosia] - The investigation shows that the material within the structure is no longer capable of acting as a fluid. By definition, the structure is no longer intended to provide impoundment and is not considered to be a dam.

*See Id.* at p. 24.

### **1. Groundwater Monitoring Network**

With IEPA's approval, Ameren established groundwater management zones under Part 620.250 at its Meredosia facility as part of the process of closing the surface impoundments. The area encompassed by Old Meredosia is located within the GMZ of the two other ponds at the Meredosia site that were closed with IEPA approval. *See Meredosia Site Map, Figure 1-2* within **Exhibit 2**. Ameren provides reports annually as to the Meredosia site relative to groundwater impacts.

### **2. Groundwater Flow**

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 Old Meredosia and the Fly Ash Pond and 0.002 to 0.007 ft/ft in the vicinity of the Bottom Ash Berm. *See Exhibit 2*, pg. 7 and related **Figures 2-1** through **2-4** within **Exhibit 2**.

## **VII. DESCRIPTION OF EFFORTS TO COMPLY (35 ILL. ADMIN. CODE 104.406(E))**

The Board regulations require Ameren to describe the efforts necessary to comply with the regulations of general applicability. Ameren expended \$12.1 million for its closure of the Fly Ash and Bottom Ash Ponds at Meredosia which surround and provide monitoring for Old Meredosia. Old Meredosia has been closed for almost fifty years – and was understandably not required to “re-close” by the IEPA with its approval of the Meredosia Station Closure Plan. Since Part 845 was a rule of general applicability, the Board was reluctant to deal with site specific issues in its promulgation of Part 845. Without the regulatory relief requested

herein, Old Meredosia will arguably be subject to regulatory requirements related to closure that have been developed for existing ash ponds – ash ponds which have not been dewatered, have not been covered, have not been sitting idle for over fifty years and, importantly, are nonetheless covered by a groundwater management zone which was developed for the closure of the Meredosia Power Station generally.

**VIII. NARRATIVE DESCRIPTION OF PROPOSED ADJUSTED STANDARD  
(35 ILL. ADMIN. CODE 104.406(F))**

Petitioner requests that Old Meredosia be recognized as closed and recognized as exempt from Part 845 but that it nonetheless continues to be part of the groundwater monitoring network as applicable to the Bottom Ash and Fly Ash CCRSI, as approved by the IEPA for the Meredosia Station Closure Plan – and as will be applicable to the Bottom Ash and Fly Ash CCRSIs' Part 845 post-closure care operational permit. Ameren also proposes that the Adjusted Standard require that Old Meredosia be recognized in the financial assurance instrument Ameren provides for the IEPA approved Meredosia Station Closure Plan pursuant to Part 845, Subpart I.

**IX. OLD MEREDOSIA IS NOT A “SURFACE IMPOUNDMENT”**

One of the many ambiguities generated by the IEPA's proposal is how the IEPA will apply the term “CCR surface impoundment”. As explained below, the IEPA's interpretation of the term has caused confusion as to the overall applicability of proposed Part 845. The term is defined at 415 ILCS 5/3.143 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.”

As an alternative to an adjusted standard for Old Meredosia, Ameren would be amenable to a Board clarification that Old Meredosia is not a “surface impoundment” as defined by Section

3.143 of the Act.

As amended by P.A. 101-0171, the Illinois Environmental Protection Act (“Act”), uses the exact same definition of “CCR surface impoundment” as is found in the CCR Rule: “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); 40 C.F.R. § 257.53 (emphasis added). In P.A. 101-0171, the Illinois Legislature adopted the exact same definition of “CCR surface impoundment” as used in the federal CCR Rule, clearly intending the scope of the Illinois CCR program to be identical to that of the federal rule. Crucially, the Illinois Legislature, like the U.S. EPA, chose to use present tense language—a regulated unit is one that “is designed to hold an accumulation of CCR and liquids. . .”. *Id.* (emphasis added).

Additionally, the USEPA explained in the preamble to the CCR Rule that while it chose to regulate “inactive” surface impoundments (those that contain *both CCR and water*, but no longer receive CCR), it chose not to regulate “closed” surface impoundments because they are “capped or otherwise maintained” and *no longer contain water*, although they may continue to contain CCR. 80 Fed. Reg. at 21,343.

However, applying this definition, IEPA has identified Old Meredosia as being subject to Part 845, despite that site not being subject to the CCR Rule. The site no longer allows for the impoundment of water and has a generally raised elevation, and thus is not “a natural topographic depression, man-made excavation, or diked area” under 40 C.F.R. § 257.53. Further, Old Meredosia is the site of a long-standing forest and clearly does not meet the contemplated definition of “surface impoundment” under Section 3.143.

**X. STATEMENT OF JUSTIFICATION (35 ILL. ADMIN. CODE 104.406(H))**

Consistent with Section 28.1(c) of the Act, Petitioner has demonstrated that it is entitled to

adjusted standards from the Board's landfill regulations. 415 ILCS 5/28.1(c).

**A. Factors relating to Petitioner are substantially different from factors relied upon by the Board in Part 845, thus justifying an adjusted standard.**

As a general proposition, and as stated above, Old Meredosia is substantially different than the CCRSIs intended to be covered by the Board's Part 845 regulations – which as noted by the participants at hearing is a “rule of general applicability” relative to the closure and post-closure care of existing CCRSIs, consistent with federal rules that derived from RCRA. Yet, as explained at length below, Old Meredosia is not subject to RCRA, as it was closed before its enactment. Further, unlike the existing ash ponds Sections 22.59 and 3.143 of the Act are intended to regulate, Old Meredosia has not accepted CCR for almost fifty years. As such, it no longer contains water, cannot be considered an embankment or an impoundment, is recognized by USEPA as closed, is not identified by the USEPA on its list of legacy ponds. Yet nonetheless, the area encompassing Old Meredosia is within the groundwater management zone established by the Meredosia Station Closure Plan so that any unexpected impacts from Old Meredosia will be understood and addressed pursuant to that Plan, as part of the Part 845 obligations of the adjacent and existing CCRSIs at Meredosia. Ameren offers that this set of circumstances does not exist at any other site in the State.

Further, unlike “legacy ponds” (a term that was loosely used in the Part 845 hearing without regard to any specific facts or sites), Old Meredosia is not a pond of any sort and currently has a forest of trees growing on it. Simply put, it is not a “pond” at all and poses little to no environmental risk—certainly nothing like the risks related to “legacy ponds” that the USWAG court referenced in its opinion. In fact, Old Meredosia is not even among the inventory of sites discussed in that case. *See Util. Solid Waste Activities Grp. v. Env'tl. Prot. Agency*, 901 F.3d at 434 (citing Regulatory Impact Analysis for EPA's Proposed RCRA Regulation of Coal Combustion Residues,

Information Request Responses from Electric Utilities (April 30, 2010), available at [https://archive.epa.gov/epawaste/nonhaz/industrial/special/fossil/web/xlsx/survey\\_database\\_041212.xlsx](https://archive.epa.gov/epawaste/nonhaz/industrial/special/fossil/web/xlsx/survey_database_041212.xlsx)).

As stated in the preceding section, Old Meredosia is not a “surface impoundment” as defined by Section 3.143 of the Act. The Act uses the exact same definition of “CCR surface impoundment” as is found in the CCR Rule: “*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); 40 C.F.R. § 257.53 (emphasis added). Old Meredosia’s geomorphology clearly illustrates that the location is not “*a natural topographic depression*” nor is it designed “*hold an accumulation of CCR and liquids*”. Further, Old Meredosia’s closure predates the entire regulatory structure established by the USEPA and IEPA.

These factors, unique to Old Meredosia, are clearly and substantially different from those factors relied upon by the Board when is promulgated Part 845, and thus an adjusted standard is appropriate for the Petitioner.

**B. The requested standard will not result in substantially and significantly more adverse environmental or health effects.**

There will not be any resulting substantial or adverse environmental or health effects of not applying Part 845 to Old Meredosia. In reality, imposing Part 845 obligations on Old Meredosia will likely result in greater harm to the environment.

Old Meredosia does not hold water now, groundwater impacts are not anticipated, and the area is within the Groundwater Management Zone established at pursuant to the Meredosia Station Closure Plan. The area encompassing Old Meredosia is within a Groundwater Management Zone that is in place at for the more recently closed ash ponds (discussed in detail above). Any risks

from the area will be identified and addressed through said Groundwater Management Zone. Additionally, the nearest potable well to the Meredosia facility is approximately 1,000 feet away in an upgradient direction. Pre-Filed Answers of Gary King, R20-19, pg. 16 (Sep. 24, 2020).

In 2017, Ameren engaged Geotechnology to conduct a liquification analysis study the results of which demonstrated that the ash strata within Old Meredosia is above the groundwater table, the material within the structure is no longer capable of acting as a liquid and the structure is no longer considered an impoundment. Id. at 24.

When Ameren submitted its closure plan for the Meredosia Fly Ash and Bottom Ash Ponds, Ameren included a brief discussion identifying the existence of Old Meredosia. IEPA did not require any actions specific to investigating or closing Old Meredosia as part of the closure of the Fly Ash and Bottom Ash ponds. The IEPA never asked Ameren to address any issues at Old Meredosia, nor did it ever seek to include it in the Closure Plan during its review and approval. Further, the USEPA acknowledges the Meredosia Old Ash Pond as closed. *See Site Assessment – Meredosia Power Station* (May 10, 2011).

The IEPA's proposed closure rules, if required to be applied to Old Meredosia at Meredosia, would cause more environmental harm than it would achieve in environmental benefit. It is unnecessary to regulate the Old Meredosia under Part 845, particularly because doing so could mean clearing nearly acres of trees and heavy vegetation to re-close the unit. Construction could last years or more, potentially consuming large amounts of diesel fuel construction equipment used in the closure. Re-closure would therefore result in no environment benefit and would create environmental harms. As stated by Ameren's expert, Gary King: "There is a mature forest of trees growing on the Old Ash Pond. Photos of those trees are included below. Destruction of these trees would be an environmental harm." Pre-Filed Answers of Gary King, R20-19, p. 15 (Sep. 24,

2020).

**XI. CONSISTENCY WITH FEDERAL LAW (35 ILL. ADMIN. CODE  
104.406(I))**

Ameren's proposed standards are consistent with federal law because the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901, *et. seq.*, and hence the federal CCR rules, do not apply to Old Meredosia. RCRA, the enabling source federal statute for the federal CCR rule, quite simply put is a cradle to grave statute and does contemplate within its regulatory ambit areas which were closed and ceased accepting waste prior to its promulgation. An analysis of relevant law on this point follows.

RCRA is “essentially a codification of common law public nuisance remedies” which “incorporates the legal theories used for centuries to assess liability for creating a public nuisance . . . .” *Cox v. City of Dallas, Tex.*, 256 F.3d 281, 291–92 (5th Cir. 2001) (*quoting* S.Rep. No. 98-172, at S (1979), reprinted in 1980 U.S.C.C.A.N 5019, 5023). Under RCRA, “[a]ll individuals and all forms of business entities which generate, transport, store, or dispose of hazardous wastes” in a manner regulated by RCRA must comply with its regulations. *Modern federal environmental statutes—The Resource Conservation and Recovery Act (RCRA)*, 1 *Envtl. Ins. Litig.: L. and Prac.* § 1:46 (2020).

Under RCRA, the act of open dumping is prohibited, and an action can be brought against any person engaging in open dumping. *See* 42 U.S.C. § 6972(a)(1)(A) (permitting suit against any person alleged to be in violation of RCRA), § 6945(a) (RCRA provision prohibiting open dumping). However, to be found liable under RCRA, one must actively engage in contaminating the site. *See S. Rd. Assocs. v. Int'l Bus. Machines Corp.* (“*South Road*”), 216 F.3d 251, 254 (2d Cir. 2000). It is not enough that contamination may have occurred prior to the enactment of RCRA. *See Ascon Properties, Inc. v. Mobil Oil Co.* (“*Ascon*”), 866 F.2d 1149, 1159 (9th Cir. 1989).

Indeed, RCRA's ban on open dumping can only be applied prospectively, not retroactively. *Mervis Indus., Inc. v. PPG Indus., Inc.* (“*Mervis*”), No. 1:09-CV-0633-SEB-JMS, 2010 WL 1381671, at \*3 (S.D. Ind. Mar. 30, 2010) (“[T]he RCRA's prohibition on open dumping is prospective only and may not be applied to conduct that occurred prior to the Act's effective date.”); *See also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 488 (1996) (RCRA “permits a private party to bring suit only upon an allegation that the contaminated site presently poses an “imminent and substantial endangerment to health or the environment,” and not upon an allegation that it posed such an endangerment at some time in the past.”).

To the extent Ameren's activities could be considered open dumping under RCRA—a point which Ameren vigorously disputes—any activity which could form the basis for RCRA liability occurred prior to the enactment of RCRA. Specifically, Ameren stopped depositing coal ash into Old Meredosia in the 1970s, several years before RCRA was enacted. *See* Pub.L. 94-580, § 2. As a result, Ameren's depositing of coal ash into Old Meredosia is the type of conduct which RCRA cannot apply to—since RCRA is “prospective only”, *Mervis*, 2010 WL 1381671 at \*3, it cannot create “retroactive liability” *Ascon*, 866 F.2d at 1159, based on Ameren's conduct which ceased prior to the enactment of RCRA.

Here, Old Meredosia is similarly situated to the land in *Ascon* and *Mervis*. In *Ascon*, the plaintiff filed suit against defendant based on allegedly unlawful disposal of hazardous materials which occurred prior to the enactment of RCRA. *See* 866 F.2d at 1151. The district court dismissed the RCRA count, holding that RCRA had not been violated because “the [alleged] activity did not occur prior to the enactment” of RCRA. *Id.* at 1158–59. The Ninth Circuit affirmed, explaining that RCRA's ban on open dumping does not impose “retroactive liability” for open dumping. *Id.* at 1159; *See also Mervis*, 2010 WL 1381671 at \*3 (“[T]he RCRA's prohibition on open dumping

is prospective only and may not be applied to conduct that occurred prior to the Act's effective date.”).

In *Mervis*, the plaintiff attempted to sue a glass manufacturer for violating RCRA based on glassmaking operations it ceased in the 1930s, even though the defendant was actively attempting to remediate the site. *See* 2010 WL 1381671 at \*1. The District Court granted defendant’s motion to dismiss, explaining that RCRA could not apply to the prior glassmaking activities because RCRA “is prospective only and may not be applied to conduct that occurred prior to [RCRA]’s effective date.” *Id.* at \*3.

Moreover, compliance with state-sponsored remediation plans cannot form the basis for RCRA’s applicability. *See South Road*, 216 F.3d at 257. In *South Road*, the plaintiff alleged (1) that the defendant violated RCRA by causing a prior exceedance of groundwater protection standards, and (2) that defendant “continued to introduce wastes” by complying with its “state-ordered remediation program”. *Id.* at 257. The Second Circuit held that neither was sufficient to state a claim for violation of RCRA. First, the Court concluded—as the *Ascon* Court did—that a prior dumping of waste was not enough to state a claim for violating RCRA. 216 F.3d at 257. Second, the Court held that any remediation done pursuant to a “state-sponsored or state-authorized plan or program” does not create a claim under RCRA. *Id.*

In this case, Ameren currently has groundwater monitoring wells around Old Meredosia due to closure plans which were approved by the IEPA for all ash ponds at its Meredosia facility. If, as a part of maintaining those monitoring wells, or remediating exceedances which those monitoring wells record, Ameren were to remediate all or part of Old Meredosia, it still could not serve as the basis for concluding that Ameren had violated RCRA. *See South Road*, 216 F.3d at 257. In effect, the only way for RCRA to apply to Old Meredosia would be for Ameren to begin

depositing coal ash into Old Meredosia—something it cannot and will not do, since it no longer generates coal ash at its Meredosia facility. *See South Road*, 216 F.3d at 254 (to be found liable under RCRA, the defendant must be actively engaged in contaminating the ground).

**XII. AMEREN'S RIGHT TO A HEARING (35 ILL. ADMIN. CODE 104.406(J))**

Ameren recognizes the public interest relevant in this proceeding and does not intend to waive its right to hearing but will further and fully develop the facts contained in this Petition at hearing, through the testimony of expert witnesses, who will be timely named, and testimony presented, as the Board or its hearing officer prescribes.

**XIII. DOCUMENTS RELIED UPON (35 ILL. ADMIN. CODE 104.406(K))**

Ameren has attached as exhibits relevant portions of the sources relied upon in this petition and will supplement this petition, with testimony or further argument, as required pursuant to Board procedures.

**XIV. CONCLUSION**

WHEREFORE, for all the foregoing reasons Ameren Energy Medina Valley Cogen, LLC respectfully requests that its Petition for adjusted standards be granted and the Board provide Ameren the relief requested herein.

Dated: May 11, 2021

Respectfully submitted,  
**Ameren Energy Medina Valley Cogen, LLC,**  
**Petitioner.**

By:           /s/ CLAIRE A. MANNING            
One of Its Attorneys

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
)  
PETITION OF AMEREN ENERGY MEDINA ) AS 21-\_\_\_\_\_  
VALLEY COGEN, LLC (OLD MEREDOSIA) ) (Adjusted Standard - Land)  
FOR ADJUSTED STANDARDS )  
FROM 35 ILL. ADM. CODE PART 845 )

**NOTICE OF FILING**

To: Don Brown, Clerk  
Pollution Control Board  
100 West Randolph St.  
Suite 11-500  
Chicago, Illinois 60601

Christine Zeivel  
Illinois Environmental Protection Agency  
1021 North Grand Avenue East  
P.O. Box 19267  
Springfield, IL 62795-9276

Please take notice that on May 11, 2021, the Petitioner filed electronically with the Office of the Clerk of the Illinois Pollution Control Board, the attached Entry of Appearance with the Illinois Pollution Control Board in the above captioned proceedings, copies of which are hereby served upon you.

Dated: May 11, 2021

Respectfully submitted,  
**Ameren Energy Medina Valley Cogen, LLC,  
Petitioner.**

By:  /s/ CLAIRE A. MANNING

**BROWN, HAY & STEPHENS, LLP**

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**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF: )  
)  
PETITION OF AMEREN ENERGY MEDINA ) AS 21-\_\_\_\_\_  
VALLEY COGEN, LLC (OLD MEREDOSIA) ) (Adjusted Standard - Land)  
FOR ADJUSTED STANDARDS )  
FROM 35 ILL. ADM. CODE PART 845 )

**APPEARANCE**

NOW COMES, CLAIRE A. MANNING, ANTHONY D. SCHUERING, and GARRETT L. KINKELAAR, of BROWN, HAY & STEPHENS, LLP and hereby enter their appearance as attorneys for the Petitioner, AMEREN ENERGY MEDINA VALLEY COGEN, LLC, in the above-captioned matter.

Dated: May 11, 2021

Respectfully submitted,  
**Ameren Energy Medina Valley Cogen, LLC,**  
**Petitioner.**

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**CERTIFICATE OF SERVICE**

Please take notice that on May 11, 2021, the Petitioner filed electronically with the Office of the Clerk of the Illinois Pollution Control Board, the foregoing Notice of Filing and Entry of Appearance, copies of which are hereby served upon the following:

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Illinois Environmental Protection Agency  
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\_\_\_\_\_  
/s/ CLAIRE A. MANNING

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