

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

In the Matter of: )  
 ) AS 2021-006  
Petition of Southern Illinois )  
Power Cooperative for an ) (Adjusted Standard)  
Adjusted Standard from )  
35 Ill. Admin. Code Part 845 )  
or, in the Alternative, a Finding of )  
Inapplicability )

**NOTICE OF ELECTRONIC FILING**

To: Attached Service List

PLEASE TAKE NOTICE that on July 28, 2023, I electronically filed with the Clerk of the Illinois Pollution Control Board (“Board”) the **ENVIRONMENTAL GROUPS’ OPPOSITION TO THE MOTION TO STAY**, copies of which are served on you along with this notice.

Dated: July 28, 2023

Respectfully Submitted,

/s/ Jennifer Cassel  
Jennifer Cassel  
IL Bar No. 6296047  
Earthjustice  
311 S. Wacker Dr., Suite 1400  
Chicago, IL 60606  
(312) 500-2198  
[jcassel@earthjustice.org](mailto:jcassel@earthjustice.org)

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**ENVIRONMENTAL GROUPS’ OPPOSITION TO THE MOTION TO STAY**

Earthjustice, Prairie Rivers Network, and Sierra Club (collectively, “Environmental Groups”) oppose the motion to stay filed by Southern Illinois Power Cooperative (“SIPC”) in this matter for the reasons explained herein.

The factors the Board may consider in determining whether to grant a stay in a Board proceeding are: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment on the Board proceeding.<sup>1</sup> “Additionally, the Board must consider any ongoing environmental harm should the stay be granted.”<sup>2</sup>

A stay is unwarranted here. First, Board decisions make clear that speculative future action with uncertain timing does not justify a stay. Second, neither comity nor prevention of multiplicity, vexation, and harassment justify a stay here. The proposed federal rule – if finalized – does not render this proceeding “moot” because existing Illinois and federal rules *already* apply to many, if not all, of the CCR disposal sites at issue here. The costs and time of proceeding with this docket accordingly are not time wasted, but rather necessary for the prompt resolution of the matter. Finally, ongoing environmental harm continues while application of the Part 845 rules is stayed due to this proceeding, which has been ongoing since May 2021. Further delay caused by a stay would only exacerbate that harm.

**1. Future rules of uncertain timing and content do not justify a stay.**

SIPC asserts that a proposed rule from the U.S. Environmental Protection Agency (“USEPA”) concerning legacy CCR impoundments and what USEPA terms “CCR Management Units,” or “CCRMU,”<sup>3</sup> justifies a stay of this proceeding. We disagree that a not-yet-finalized USEPA rule – that, for the reasons explained herein, we believe is unlikely to cover the CCR units at SIPC – provides an adequate basis for a stay.

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<sup>1</sup> See *Sierra Club, et. al. v. Midwest Generation, LLC*, PCB 2013-15, slip op at 4 (Apr. 16, 2020).

<sup>2</sup> *Id.* (Citation omitted).

<sup>3</sup> See e.g., U.S. EPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments: Proposed Rule, 88 Fed. Reg. 31,982, 31,984 (May 18, 2023) (“Proposed Rule”).

The timing of finalization of the proposed rule is not certain – and the fact that a consent decree<sup>4</sup> sets the timeline for the federal rule provides few assurances as to the actual timeline on which the rule will be finalized. While Environmental Groups expect and hope that USEPA will meet the timelines established in the consent decree,<sup>5</sup> there are many examples of USEPA agreeing to a date certain to publish final rules but then missing that deadline. For instance, pursuant to a consent decree, USEPA was under deadline to issue both proposed and final regulations setting effluent limit guidelines on toxic metals for electric generating units.<sup>6</sup> Those deadlines were extended multiple times.<sup>7</sup>

The Board has repeatedly denied requests to stay proceedings based on uncertain timing and outcomes in other proceedings.<sup>8</sup> While the Board should ensure that any action taken at SIPC would not violate state or federal rules, future regulatory action of uncertain timing and content likewise does not justify a stay in this docket.

**2. Neither comity nor prevention of multiplicity, vexation and harassment justify a stay in this matter.**

a. The coal ash ponds at SIPC are already regulated by the federal CCR rule.

Comity does not demand a stay here. First, evidence indicates that USEPA has *already regulated* the majority, if not all, of the coal ash units at SIPC; therefore, any new USEPA rules regulating other coal ash units have no bearing on the mandates for the site. Under the federal rules, a CCR surface impoundment is “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.”<sup>9</sup> An existing CCR surface impoundment is a “CCR surface impoundment that receives CCR both before and after October 19, 2015 . . . .”<sup>10</sup> An inactive CCR surface impoundment is “a CCR surface impoundment that no longer receives CCR on or after October 19, 2015, and *still contains* both CCR and liquids on or after October 19, 2015.”<sup>11</sup>

USEPA has explained that a pond “contains” liquids if any part of its base is in contact with groundwater:

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<sup>4</sup> *Statewide Organizing for Community eMpowerment et al. v. EPA et al.*, No. 22-cv-2562 (D.D.C., May 3, 2023).

<sup>5</sup> Commenter Earthjustice represents plaintiffs in the lawsuit that resulted in the consent decree.

<sup>6</sup> Consent Decree, *Defenders of Wildlife v. EPA*, No. 10-cv-01915 (D.D.C., Mar. 18, 2012).

<sup>7</sup> See *Defenders of Wildlife v. EPA*, No. 10-cv-01915 (D.D.C.) (status report filed Dec. 16, 2013).

<sup>8</sup> See *Sierra Club et al. v. Midwest Generation, LLC*, PCB 2013-015, slip op. at 14 (Apr. 17, 2014) (denying a motion to stay enforcement action and concluding that a “stay is unwarranted . . . because of the uncertain timing and duration of the rulemakings. There is no way to predict with any confidence when compliance with proposed rules will be required”); *Midwest Generation EME, LLC, v. Ill. EPA*, PCB 04-216 at 6 (Feb. 15, 2007) (denying a stay when movant did not provide a timeline for federal decision); *In re Petition of the Louis Berkman Company, d/b/a The Swenson Spreader Company, for an Adjusted Standard from 35 Ill. Adm. Code 215, Subpart F*, PCB AS No. 97-5, 1997 Ill. Env. Lexis 188, at \*4 (Apr. 3, 1997) (denying a motion to stay adjusted standards proceedings and explaining that “[t]he possibility that a compliance plan may be adopted is not a sufficient reason to stay the adjusted standard proceedings”).

<sup>9</sup> 40 C.F.R. § 257.53.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (emphasis added).

EPA interprets the word “contains” to mean “to have or hold (someone or something) within” based on the ordinary meaning of the word. (e.g., Oxford English Dictionary, Merriam-Webster). Accordingly, an impoundment “contains” liquid if there is liquid in the impoundment, even if the impoundment does not prevent the liquid from migrating out of the impoundment. *This means that if a CCR surface impoundment contains liquid because its base (or any part of its base) is in contact with groundwater, it would meet the definition of an inactive CCR surface impoundment.*<sup>12</sup>

USEPA reiterated and elaborated on that explanation in its proposed rule, detailing that:

A surface impoundment that, on or after October 19, 2015, has only decanted the surface water would normally still contain liquid if waste is saturated with water. *To the extent the unit still contains liquids, it would be covered by the existing definition of an inactive impoundment.* Under this proposed rule, such units would also be considered legacy CCR surface impoundments when located at inactive facilities. *This would apply whether the unit is considered “closed” under state law, is in the process of closing, or whether at some subsequent point, the unit is fully dewatered and no longer contains liquid.*<sup>13</sup>

Evidence presented by Illinois EPA (“IEPA”) in its recommendation in this proceeding indicates that most, and likely all, of the CCR surface impoundments at issue are *already regulated* under the federal CCR rule as either inactive CCR surface impoundments or existing CCR surface impoundments. This proceeding concerns eight CCR surface impoundments at SIPC’s Marion Station: Pond 3 (including Pond 3A), Pond 4, former Pond B-3, South Fly Ash Pond, Pond 6, the Initial Fly Ash Pond, the Replacement Fly Ash Holding Area, and the Fly Ash Extension.<sup>14</sup> As detailed in IEPA’s recommendation, the Agency has concluded that two of the surface impoundments meet the criteria of existing CCR surface impoundments (Pond 3 and the South Fly Ash Pond), and the remaining impoundments meet the criteria of inactive CCR surface impoundments (Pond 3A, Pond 4, former Pond B-3, Pond 6, the Initial Fly Ash Pond, the Replacement Fly Ash Holding Area, and the Fly Ash Extension).<sup>15</sup>

Regarding Pond 6, IEPA explains, “there are at least four feet of saturated CCR below the rest of the dry placed CCR in Pond 6,”<sup>16</sup> and given water elevations and the area of Pond 6, “at least 89,400 cubic yards of CCR in Pond 6 are expected to be saturated continuously.”<sup>17</sup> Regarding the Initial Fly Ash Pond (“IFAP”), IEPA states that, “[b]ased on . . . the location of the ponds with reported water elevations and the initial topographic surface of the area [], the

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<sup>12</sup> U.S. EPA, Letter re: Duke Energy’s Gallagher Generating Station, 2 (Jan. 2021) (Attach. A) (emphasis added).

<sup>13</sup> 88 Fed. Reg. 31,992 (emphasis added).

<sup>14</sup> IEPA Recommendation at ¶ 4.

<sup>15</sup> *Id.* at ¶ 22–161.

<sup>16</sup> *Id.* at ¶ 107.

<sup>17</sup> *Id.* at ¶ 109.

Agency believes it is likely that a portion of the CCR in the IFAP remains saturated.”<sup>18</sup> IEPA came to a similar conclusion regarding the Replacement Fly Ash Holding Area (“RFAP”).<sup>19</sup>

Collectively, IEPA’s analysis and the evidence it presents indicate that, even though Pond 6, the IFAP, the RFAP, and the Fly Ash Extension did not continue to receive CCR after October 19, 2015,<sup>20</sup> those coal ash ponds continued to contain both CCR and liquids after October 19, 2015. Accordingly, they are “inactive CCR surface impoundments” under the federal CCR rule.

Likewise, IEPA’s evidence and analysis indicate that Pond 3 and the South Fly Ash Pond are existing CCR surface impoundments under the federal CCR rule. “[A]erial photographs,” IEPA explains, “show the continued placement of CCR in Pond 3 after October 19, 2015.”<sup>21</sup> Similarly at the South Fly Ash Pond, aerial photos reveal that “CCR formed a delta near the inlet from Emery Pond . . . [and] these discharges continued until Fall 2020;” therefore, IEPA concludes, CCR continued to be placed at the South Fly Ash Pond after October 19, 2015.<sup>22</sup>

IEPA’s discussion of Ponds 3A, 4, and B3 suggests that they also may fall under the definition of an inactive CCR surface impoundment under the federal CCR rule. There are, IEPA states, “at least 6,800 cubic yards of CCR in the berm of Pond 3A” and “approximately 4,765 cubic yards of CCR in the Pond 3A sediment;” “The ponds sediment samples demonstrate that CCR is directly below the water in Pond 3A.”<sup>23</sup> Regarding Pond 4, IEPA reports that “Petitioner has stated and demonstrated that Pond 4 *receives* overflow from Pond 6 and still stores CCR,”<sup>24</sup> and that “[t]he pond sediment samples demonstrate that CCR is directly below the water in Pond 4 . . . .”<sup>25</sup> Finally, concerning Pond B-3, IEPA explains that the pond “received secondary and some primary discharges of fly ash for almost 20 years (1985 – 2003)” and identifies a communication from Agency staff that “instructed SIPC personnel to properly dispose or land apply under an Agency permit all sludges removed from the Pond that were drying as of September 16, 2017.”<sup>26</sup>

In summary, IEPA’s analysis and evidence presented in its Recommendation make clear – or, for a few CCR surface impoundments, strongly suggest – that the federal CCR rule *already* applies to the ash ponds at SIPC. Illinois’ Part 845 rules already regulate these ash ponds consistent with – indeed, more protectively than – USEPA policy. Thus, neither comity nor prevention of multiplicity, vexation or harassment justify a stay in this matter.

- b. Illinois rules already regulate these CCR units and potential revisions to Part 845 based on a still-proposed federal rule do not justify a stay.

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<sup>18</sup> *Id.* at ¶ 123.

<sup>19</sup> *Id.* at ¶ 151; *see also id.* at ¶ 154 (“The Petitioners make no claim that the IFAP, RFAP, and FAE ever had free liquids removed from within the CCR stored there”).

<sup>20</sup> *See* IEPA Recommendation at ¶¶ 104, 117, 136, 138, 148.

<sup>21</sup> *Id.* at ¶ 29.

<sup>22</sup> *Id.* at ¶¶ 86–87. The South Fly Ash Pond was primarily a secondary impoundment that received “significant amounts of CCR from the former Emery Pond.”

<sup>23</sup> *Id.* at ¶ 49.

<sup>24</sup> *Id.* at ¶ 58.

<sup>25</sup> *Id.* at ¶ 67.

<sup>26</sup> *Id.* at ¶ 74.

Second, Illinois' legislature made clear four years ago that addressing coal ash pollution from CCR surface impoundments is a priority for the state<sup>27</sup> and directed the Board to issue regulations for CCR surface impoundments that are “*at least as protective and comprehensive*” as federal requirements.<sup>28</sup> The Board issued those regulations, including mandates that are broader than existing federal rules; for example, the rules cover impoundments that are not covered by federal rules – inactive CCR surface impoundments from which all the liquids have previously drained out.<sup>29</sup> As IEPA asserts in its Recommendation, the CCR units at SIPC fall under those existing regulations.<sup>30</sup>

Even assuming – incorrectly, we maintain – that there are CCR surface impoundments at SIPC that will qualify as “CCRMU” under a final version of the Proposed Rule, there is no reason to put this proceeding on ice to wait for those regulations to be finalized. The protections of Part 845 for inactive CCR surface impoundments are broader than, and consistent with, both existing federal mandates for CCR surface impoundments and the proposed federal requirements for CCRMU, once identified. All subject such units to essentially the same groundwater monitoring requirements, corrective action directives, operating specifications, and closure and post-closure standards: e.g., effectively the same protections.<sup>31</sup> Accordingly, it is entirely possible that waiting for the Proposed Rule to be finalized will simply lead back to the same protections already required for these units under Part 845, making the delay in imposing them simply more time for these units to continue to pollute.<sup>32</sup> In the unlikely event that there are major changes between USEPA's Proposed Rule and a final federal rule, those changes may require a broader look at whether Part 845 requires amendments to its provisions for inactive impoundments—but the *possibility* that broader regulatory changes may be needed does not, as explained above, justify further delaying protections for SIPC's polluting CCR units.

Illinois has the authority to regulate the CCR surface impoundments at SIPC in a manner that is more protective and comprehensive than the federal CCR rule, and that is exactly what Part 845 does – and why existing Part 845 regulations should be implemented as written at the SIPC site. No stay is warranted.

### **3. Ongoing harm would only get worse if this proceeding is stayed.**

Evidence indicates that dangerous concentrations of CCR pollution are rampant at the site. IEPA reports that Petitioners' own consultant concluded that nearly a full alphabet of

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<sup>27</sup> See 415 ILCS 5/22.59.

<sup>28</sup> *Id.* at 5/22.59(g)(1) (emphasis added).

<sup>29</sup> See 35 Ill. Adm. Code 845.120.

<sup>30</sup> IEPA Recommendation at ¶¶ 22, 42, 44, 46, 51, 52, 60, 68, 70, 76, 80, 81, 82, 88, 95, 104, 110, 111, 115, 119, 124-126, 138, 142, 143, 148, 150.

<sup>31</sup> Compare 35 Ill. Adm. Code 845 with 40 C.F.R. § 257, subpart D and Proposed Rule, 88 Fed. Reg. at 32,033–32,044.

<sup>32</sup> IEPA asserts that it “does not believe the Petitioner has an adequate groundwater monitoring system,” and “Petitioner... fails to provide [] any evidence that the listed groundwater monitoring wells are constructed in locations that would intercept leachate originating from the CCR surface impoundment.” IEPA Recommendation at 47. Notwithstanding the inadequate groundwater monitoring system, Petitioner's own consultant “concludes that ‘concentrations of Arsenic, Boron, Calcium, Chloride, Cobalt, Lead, pH, Sulfate, Thallium, and TDS found above the Class I and Class II standards are the result of pond and contact water migration from the Site.’” *Id.* at 49.

harmful CCR pollutants – namely, arsenic, boron, calcium, chloride, cobalt, lead, pH, sulfate, thallium, and TDS – found above Illinois’ Class I and Class II groundwater quality standards “are the result of pond and contact water migration from the Site.”<sup>33</sup> The Agency “believes that it is likely that the numerous other unlined CCR surface impoundments operated by SIPC also have similar groundwater protection standard exceedances,”<sup>34</sup> though those exceedances have not been fully detected because the groundwater monitoring system at the site is inadequate.<sup>35</sup>

Because the application of Part 845 is stayed during the pendency of this adjusted standard proceeding,<sup>36</sup> staying this proceeding would further delay protections for the site – allowing pollution to continue unabated from the many SIPC coal ash ponds. Such ongoing pollution weighs against a stay in any circumstance, but the weight is even greater in this case, where coal ash pollution is of public concern<sup>37</sup> and portions of the surrounding community, Marion, “bear disproportionate burdens imposed by environmental pollution.”<sup>38</sup> The SIPC plant and the town of Marion are surrounded by other environmental justice communities within 15-20 miles, including Carbondale, Herrin, and Harrisburg, as identified by the IEPA EJ Start tool.<sup>39</sup> SIPC’s ongoing pollution, in an area proximate to environmental justice communities, weighs strongly against a stay here.

#### 4. Conclusion

For the reasons set out herein, the Board should deny Petitioners’ motion to stay this proceeding and require SIPC to meet the full slate of requirements under Part 845.

Respectfully Submitted,

/s/ Jennifer Cassel  
Jennifer Cassel  
IL Bar No. 6296047  
Earthjustice  
311 S. Wacker Dr., Suite 1400  
Chicago, IL 60606  
(312) 500-2198  
jcassel@earthjustice.org

/s/ Mychal Ozaeta

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<sup>33</sup> *Id.* at 49.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> 35 Ill. Adm. Code § 104.412(a).

<sup>37</sup> See, e.g., *In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R2020-019, Tr. Aug. 12, 2020 (Public Comment session) at 9:17–12:19 (comments of Christina Krost).

<sup>38</sup> 415 ILCS 5/22.59(a)(5).

<sup>39</sup> *EJ Tracker 2021*, Illinois EPA EJ Start,

<https://www.arcgis.com/apps/webappviewer/index.html?id=f154845da68a4a3f837cd3b880b0233c> (last accessed July 28, 2023).

Mychal Ozaeta  
ARDC No. 6331185  
Earthjustice  
707 Wilshire Blvd., Suite 4300  
Los Angeles, CA 90017  
(213) 766-1069  
mozaeta@earthjustice.org

/s/ Lauren Piette  
Lauren Piette  
IL Bar No. 6330290  
Earthjustice  
311 S. Wacker Dr., Suite 1400  
Chicago, IL 60606  
(312) 500-2193  
lpiette@earthjustice.org

*On behalf of Earthjustice*

Faith E. Bugel  
*Attorney for Sierra Club*  
1004 Mohawk  
Wilmette, IL 60091  
(312) 282-9119  
FBugel@gmail.com

Andrew Rehn  
Prairie Rivers Network  
1605 South State St, Suite 1  
Champaign, IL 61820  
(217) 344-2371 x 8208  
arehn@prairierivers.org



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Inapplicability )

**CERTIFICATE OF SERVICE**

The undersigned, Mychal Ozaeta, an attorney, certifies that I have served by email the Clerk and by email the individuals with email addresses named on the Service List provided on the Board's website, *available at* <https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=17037>, a true and correct copy of the **ENVIRONMENTAL GROUPS' OPPOSITION TO THE MOTION TO STAY**, before 5 p.m. Central Time on July 28, 2023. The number of pages in the email transmission is 15 pages.

Dated: July 28, 2023

Respectfully Submitted,

/s/ Mychal Ozaeta  
Mychal Ozaeta  
ARDC No. 6331185  
Earthjustice  
707 Wilshire Blvd., Suite 4300  
Los Angeles, CA 90017  
(213) 766-1069  
[mozaeta@earthjustice.org](mailto:mozaeta@earthjustice.org)

<b><u>SERVICE LIST</u></b>	
<p>Don Brown Clerk of the Board <a href="mailto:don.brown@illinois.gov">don.brown@illinois.gov</a> Illinois Pollution Control Board James R. Thompson Center Suite 11-500 100 West Randolph Chicago, Illinois 60601</p>	<p>Stefanie N. Diers Sara Terranova <a href="mailto:Stefanie.Diers@illinois.gov">Stefanie.Diers@illinois.gov</a> <a href="mailto:Sara.terranova@illinois.gov">Sara.terranova@illinois.gov</a> Illinois Environmental Protection Agency 1021 North Grand Avenue East P.O. Box 19276 Springfield, IL 62794-9276</p>
<p>Stephen J. Bonebrake Joshua R. More Amy Antonioli Bina Joshi ArentFox Schiff LLP 233 South Wacker Drive, Suite 6600 Chicago, Illinois 60606 (312) 258-5500 <a href="mailto:Steve.Bonebrake@afslaw.com">Steve.Bonebrake@afslaw.com</a> <a href="mailto:Joshua.More@afslaw.com">Joshua.More@afslaw.com</a> <a href="mailto:Amy.antonioli@afslaw.com">Amy.antonioli@afslaw.com</a> <a href="mailto:Bina.Joshi@afslaw.com">Bina.Joshi@afslaw.com</a></p>	

# **Attachment A**



Electronic Filing: Received, Clerk's Office 07/28/2023  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

77 WEST JACKSON BOULEVARD  
CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF:  
L-17J

Mr. Owen R. Schwartz  
Duke Energy  
1000 East Main Street  
Plainfield, Indiana 46168

Dear Mr. Schwartz,

This letter provides written confirmation of the discussion between the Environmental Protection Agency (EPA) and Duke Energy Gallagher staff during our conference calls on August 27 and September 17, 2021 regarding the history of the site and the closure of Coal Combustion Residuals (CCR) surface impoundments at Duke Energy's Gallagher Generating Station in New Albany, Indiana. This letter also serves to notify you that, based on the information provided in those telephone conversations, EPA has concluded that the North Ash Pond and the Primary Pond Ash Fill Area are subject to the requirements of 40 C.F.R. Part 257 Subpart D ("the CCR Regulations").

On the August 27 conference call, Duke Energy stated that two impoundments (i.e., North Ash Pond, Primary Pond Ash Fill Area) were removed from service, drained of ponded surface water, and subsequently covered with soil and grass in 1989. Further, EPA's understanding is that Duke has taken no engineering measures to remove any of the groundwater from either unit and both of these unlined units are sitting in approximately 20 feet of groundwater.

As an initial matter, we disagree with Duke Energy's argument that neither of these units are CCR surface impoundments within the meaning of the CCR Regulations. We understand that you interpret the definition of a CCR surface impoundment to exclude units such as the North Ash Pond, where liquid remains in the unit because the base of the unit intersects with groundwater. You argue that such units do not "hold" liquid because groundwater flows through the unit (instead of staying within the unit). EPA disagrees with your interpretation. The definition of a CCR surface impoundment does not require that the unit prevent groundwater from flowing through the unit, but merely requires that the unit be "designed to hold an accumulation of CCR and liquid." 40 C.F.R. § 257.53. Following your interpretation would lead to the incongruous result that impoundments where contaminants can migrate out in the groundwater would not be regulated by the CCR Regulations, while those that prevent that type of migration would be regulated.

### **Primary Pond Ash Fill Area**

The Primary Pond Ash Fill Area is not an existing CCR surface impoundment because (to EPA's knowledge) it has not received CCR after October 19, 2015. However, because it still contains CCR and liquids, it meets the definition of an inactive CCR surface impoundment. An inactive CCR surface impoundment is one "that no longer receives CCR on or after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015." EPA interprets the word "contains" to mean "to have or hold (someone or something) within" based on the ordinary meaning of the word. (e.g., Oxford English Dictionary, Merriam-Webster). Accordingly, an impoundment "contains" liquid if there is liquid in the impoundment, even if the impoundment does not prevent the liquid from migrating out of the impoundment. This means that if a CCR surface impoundment contains liquid because its base (or any part of its base) is in contact with groundwater, it would meet the definition of an inactive CCR surface impoundment. Under both the regulatory and dictionary definitions of the term, groundwater (or water) falls within the plain meaning of a "liquid." See 40 C.F.R. 257.53. Therefore, because the Primary Pond Ash Fill Area is sitting in approximately 20 feet of groundwater, it holds or contains liquids and is an inactive surface impoundment.

As an inactive CCR surface impoundment, the Primary Pond Ash Fill Area is regulated pursuant to 40 C.F.R. § 257.50(c), which specifies that "[t]his subpart also applies to inactive CCR surface impoundments at active electric utilities or independent power producers, regardless of the fuel currently used at the facility to produce electricity."

### **North Ash Pond**

On the September call, Duke Energy confirmed that the North Ash Pond has received CCR after the October 19, 2015 effective date of the CCR Rule. Therefore, that pond meets the definition of an existing CCR surface impoundment. An existing CCR surface impoundment is one that "receives CCR both before and after October 19, 2015." 40 C.F.R. § 257.53. Accordingly, the North Ash Pond falls within the ambit of 40 C.F.R. § 257.50(b), which specifies that "[t]his subpart applies to owners and operators of...existing CCR surface impoundments...that dispose or otherwise engage in solid waste management of CCR." Even if the North Ash Pond had not received CCR after October 19, 2015, it would be an inactive CCR surface impoundment for the same reasons that the Primary Pond Ash Fill Area is an inactive CCR surface impoundment and would fall within the ambit of 40 C.F.R. § 257.50(c).

### **Applicability of the Closure Requirements to these Impoundments**

For the reasons set out in the discussion above, the North Ash Pond and Primary Pond Ash Fill Area are regulated under 40 C.F.R. Part 257 Subpart D and Duke Energy will need to take action to bring these ponds into compliance by meeting all the requirements of the regulations. Significant among these is the requirement to close, because the North Ash Pond and the Primary Pond Ash Fill Area are unlined CCR surface impoundments. See, 40 C.F.R. § 257.101(a).

The applicable closure regulations are those that address closing with waste in place (assuming EPA's understanding is correct that Duke Energy's plan is to close both impoundments with waste in place). The Part 257 requirements applicable to impoundments closing with waste in place include general performance standards and specific technical standards that set forth individual engineering requirements related to the drainage and stabilization of the waste and to the final cover system. The general performance standards and the technical standards complement each other, and both must be met at every site. The general performance standards

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under 40 C.F.R. § 257.102(d)(1) require that the owner or operator of a CCR unit “ensure that, at a minimum, the CCR unit is closed in a manner that will: (i) Control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere; and (ii) Preclude the probability of future impoundment of water, sediment, or slurry.” The specific technical standards related to the drainage of the waste in the unit require that “free liquids must be eliminated by removing liquid wastes or solidifying the remaining wastes and waste residues” prior to installing the final cover system. 40 C.F.R. § 257.102(d)(2)(i).

If Duke Energy plans to close with waste in place and the base of the impoundment does, in fact, intersect with groundwater, Duke Energy will need to implement engineering measures to remove groundwater from the unit prior to the start of installing the final cover system, as required by 40 C.F.R. § 257.102(d)(2)(i). This provision applies both to the free-standing liquid in the impoundment and to all separable porewater in the impoundment, whether the porewater was derived from sluiced water or groundwater that intersects the impoundment. The definition of free liquids in 40 C.F.R. § 257.53 encompasses all “liquids that readily separate from the solid portion of a waste under ambient temperature and pressure,” regardless of whether the source of the liquids is from sluiced water or groundwater. The regulation does not differentiate between the sources of the liquid in the impoundment (e.g., surface water infiltration, sluice water intentionally added, groundwater intrusion). Furthermore, the performance standard at 40 C.F.R. § 257.102(d)(2)(i) was modeled on the regulations that apply to interim status hazardous waste surface impoundments, which are codified at 40 C.F.R. § 265.228(a)(2)(i). Guidance on these interim status regulations clarifies that these regulations require both the removal of free-standing liquids in the impoundment as well as sediment dewatering. See US EPA publication titled “Closure of Hazardous Waste Surface Impoundments,” publication number SW-873, September 1982.

Similarly, Duke Energy will need to ensure that the impoundments are closed in a manner that will “control, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere.” 40 C.F.R. § 257.102(d)(1). EPA views the word “infiltration” as a general term that refers to any kind of movement of liquids into a CCR unit. That would include, for example, any liquid passing into or through the CCR unit by filtering or permeating from any direction, including the sides and bottom of the unit. This is consistent with the plain meaning of the term. For example, Merriam-Webster defines infiltration to mean “to pass into or through (a substance) by filtering or permeating” or “to cause (something, such as a liquid) to permeate something by penetrating its pores or interstices.” Neither definition limits the source or direction by which the infiltration occurs. In situations where the groundwater intersects the CCR unit, water may infiltrate into the unit from the sides and/or bottom of the unit because the base of the unit is below the water table. This contact between the waste and groundwater provides a potential for waste constituents to be dissolved and to migrate out of (or away from) the closed unit that is similar to infiltration from above. In this case, the performance standard requires the facility to take measures, such as engineering controls that will “control, minimize, or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste” as well as “post-closure releases to the groundwater” from the sides and bottom of the unit.

Finally, because the North Ash Pond and the Primary Pond Ash Fill Area must close pursuant to 40 C.F.R. § 257.101(a), any further receipt of CCR into those units is prohibited. EPA also made this clear in the preamble to the March 15, 2018 proposed rule (83 FR 11605) where EPA stated:

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The current CCR rules require that certain units must close for cause, as laid forth in § 257.101(a)–(c). As written, the regulation expressly prohibits “placing CCR” in any units required to close for-cause pursuant to § 257.101....Note that the rule does not distinguish between placement that might be considered beneficial use and placement that might be considered disposal. All further placement of CCR into the unit is prohibited once the provisions of § 257.101 are triggered.

If you have any questions about the information provided in this letter or if you have additional information that you would like EPA to consider, you may contact Angela Mullins at [mullins.angela@epa.gov](mailto:mullins.angela@epa.gov). Alternatively, Duke Energy counsel can contact Laurel Celeste at [celeste.laurel@epa.gov](mailto:celeste.laurel@epa.gov) in EPA’s Office of General Counsel for any questions on the Agency’s position set forth in the letter.

Sincerely,

Edward Nam  
Director  
Land, Chemicals and Redevelopment Division

cc: Peggy Dorsey,  
Assistant Commissioner  
Office of Land Quality  
Indiana Department of Environmental Management