BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
STANDARDS FOR THE DISPOSAL OF COAL	)	R 2020-019
COMBUSTION RESIDUALS IN SURFACE	)	(Rulemaking – Water)
IMPOUNDMENTS: PROPOSED NEW 35 ILL.	)	
CODE 845	)	

NOTICE OF FILING

TO: All Parties on Attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board the **AMEREN QUESTIONS TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**, copies of which are herewith served upon you.

Dated: June 23, 2020

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

By: /s/Claire A. Manning

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AMEREN QUESTIONS TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOW COMES AmerenEnergy Medina Valley Cogen, LLC and Union Electric Company d/b/a Ameren Missouri ("Ameren"), by and through its Attorneys, CLAIRE A. MANNING and ANTHONY D. SCHUERING of BROWN, HAY + STEPHENS, and for its Questions to the Illinois Environmental Protection Agency, states as follows:

Question Set No. 1 – Surface Impoundments and Clean Closure

Public Act 101-0171 (the "CCR law") (eff. July 30, 2019), which serves as the basis for the instant proceedings before the Illinois Pollution Control Board ("Board"), added multiple sections to the Illinois Environmental Protection Act ("Act") for the regulation and closure of coal combustion residual ("CCR") surface impoundments. Of key relevance to Question No. 1 is the legislature's addition of Sections 3.143 and 22.59 to the Act. *See* P.A. 101-0171, 2, 20–28, *available at* http://www.ilga.gov/legislation/publicacts/101/PDF/101-0171.pdf (last accessed Jun. 19, 2020).

Throughout Section 22.59 of the Act, the legislature refers to the regulation of "CCR surface impoundments" and, in turn, the legislature added Section 3.142 to the Act to define CCR surface impoundments 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*. 415 ILCS 5/3.143 (West 2020) (emphasis added). 415 ILCS 5/3.142 (West 2020). This definition is identical to the federal definition of CCR surface impoundments found at 40 C.F.R. §257.53.

Section 22.59(j) of the Act assesses substantial fees against owners and operators of CCR surface impoundments (initial fees of $50,000 or $75,000; and annual fees of $25,000 or $50,000), the great amounts applicable to those surface impoundments that have not yet completed closure and the lesser amounts applicable to those surface impoundments that are in post-closure care. *See* 415 ILCS 5/22.59(j). Presumably, these fees are to compensate the Agency for the costs of its oversight and regulation of the surface impoundment. There is of course no federal corresponding fee provision in the federal CCR law.

1) Where an owner of an ash pond has completed closure via Agency-authorized clean closure (removal of all CCR) prior to July 30, 2019,

the effective date of the CCR law, does the Agency agree that the ash pond is not a surface impoundment?

2) If not, on what authority or interpretation does the Agency apply the definition of surface impoundment? Does the Agency consider the unit to treat CCR? Store CCR? Dispose of CCR?

3) If the Agency agrees that its authorized pre-CCR law clean closure resulted in the removal of all CCR, such that the unit no longer treats, stores or disposes of CCR, under what authority or interpretation does the Agency apply the definition of surface impoundment to the clean closed unit?

4) Where the Agency authorized clean closure by removal prior to the effective date of the Act (and accordingly did not require groundwater monitoring because all CCR had been removed) does the Agency now intend that the three year groundwater monitoring requirement it proposes in subsection (b) of Section 845.740 (closure by removal) apply retroactively to the unit that had contained no CCR as of July 30, 2019? If so, under what authority or interpretation?

5) Where the Agency authorized clean closure by removal prior to the effective date of the Act (and accordingly did not require post-closure care because all CCR had been removed) does the Agency now intend that the $75,000 initial fee assessment and $25,000 annual fee assessment (applicable to units that have not closed) apply? If so, under what authority or interpretation? If so, what level of regulatory effort does the Agency expect to expend for a former ash pond that no longer has any CCR?

6) Isn't it correct that the Agency approved a closure plan for Hutsonville under which Ameren closed Ash Pond B, Ash Pond C, and the Bottom Ash Pond by removing the CCR in those ponds and then placing the CCR from those ponds in Pond A? Isn't it correct that the Agency approved the closure of Pond A, requiring a final cover, and the CCR from the above three described ponds were placed in Pond A, under the final cover system? Isn't it correct that when the Agency approved the closure and post-closure plans that encompassed Ash Pond B, Ash Pond C, and the Bottom Ash pond that it did not require groundwater monitoring specific to any of the clean-closed units but did require groundwater monitoring for Pond A? Isn't it correct that the Agency approved Ameren's submittal documenting completion of closure for Pond A, Pond B, Pond C and the Bottom Ash Pond? Isn't it correct that the Agency approval of this documentation occurred before July 30, 2019? Isn't it correct

the Agency is now seeking to require Ameren to pay a fee of $225,000 for the Pond, B, Pond C and the Bottom Ash Pond ($75,000 each) on the basis that the portion of Section 22.59(j)(1) relevant to "each CCR surface impoundment that have not completed closure" applies to these three clean-closed former ponds? Isn't it true that Ameren has willingly paid the Agency's assessed $50,000 fee for Pond A pursuant to Section 22.59(j)(1) (applicable to "each closed CCR surface impoundment") but contests the application of Section 22.59(j)(1) to the three areas that were authorized to close by removal? Under what authority or interpretation does the Agency consider that these three areas have not "closed"?

7) On page 34 of the Agency's Statement of Reasons, the Agency indicates that the new CCR law "mandated fees and financial assurance for all CCR surface impoundments *regulated by the proposed regulations*" citing, in footnote 5, Sections 22.59 (f); (g); and (j)(1) (emphasis added). Given the above, under what authority or interpretation does the Agency consider Ameren former ponds B, C and the Bottom Ash Pond, and any other former ash ponds that were authorized to close by removal prior to the effective date of the CCR law, within the regulatory reach of Section 22.59 as "surface impoundments"?

Question Set No. 2 – Agency's Use of October 19, 2015 for Purpose of Closure Requirements

The Agency recognizes its proposal as has "developed a rule of general applicability for [CCR surface impoundments] at power generating facilities." Statement of Reasons at 1. Contained in proposed Part 845 is Section 845.170, which the Agency has described as a "comprehensive list of the Section of Part 845 that are applicable to inactive closed CCR surface impoundments . . . ." Pre-Filed Testimony of Lynn E. Dunaway at 1. Under proposed Section 845.120, two relevant definitions exist which discuss inactive CCR surface impoundments. First is an "Inactive CCR surface impoundment", which the Agency defines as "a CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains CCR on or after October 19, 2015." Second, proposed Section 845.120 defines "Inactive Closed CCR Surface Impoundment" to mean "an inactive CCR surface impoundment that completed closure before October 19, 2015 with an Agency-approved closure plan."

The new CCR provisions of the Act do not refer to the October 19, 2015 date in any manner, nor does it require strict adherence to the federal CCR law or require the Board's identical-in-substance rulemaking procedures. Instead, to the extent there is any closure triggering date in the Illinois CCR provisions, such date is May 1, 2019, as contained in Section 22.59(e) ("Owners or operators of CCR surface impoundments who have submitted a closure plan to the Agency before May 1, 2019, and who have completed closure prior to 24 months after the effective date of this amendatory Act of the 101st General Assembly shall not be required to obtain a construction permit for the surface impoundment closure under this Section"). 415 ILCS 5/22.59 (e).

1) How does the Agency define "closed" or "closure" as used throughout its rule proposal?

2) What is the significance of the Agency's use of the October 19, 2015 date?

3) If the Agency believes the October 19, 2015 date it to be federally required, would the Agency please provide the authority for such requirement to the Board in this proceeding for purposes of developing a complete record?

4) Further, would the Agency address the impact of the October 19, 2015 date on its proposed rules?
    a. Specifically, does the Agency consider a CCR surface impoundment which began closure after October 19, 2015 but completed closure before July 30, 2019 (effective date of CCR provisions) to be an Inactive CCR surface impoundment or an Inactive Closed CCR surface impoundment?
    b. Also, if the Agency considers a surface impoundment of the type described in the preceding sentence to be an Inactive CCR surface impoundment, what is the Agency's justification for not including Inactive CCR surface impoundments within the scope of proposed Section 845.170?
    c. How does the Agency interpret Section 22.59 (e) and regard its import in its rule proposal?

Question Set No. 3 – Hutsonville Pond D and Existing 35 Ill. Adm. Code Part 840

On January 20, 2011, in R09-21, pursuant to its authority under Section 27 and 28 of the Act, 415 ILCS 5/27 and 28, and pursuant to an extensive public hearing, the Illinois Pollution Control Board adopted a site-specific rule setting forth regulatory requirements governing the closure of Pond D at Ameren's Hutsonville station. See *In the Matter of: Ameren Ashpond Closure Rules (Hutsonville Power Station): Proposed 35 Ill. Adm. Code 840.101 – 840-152, R2009-021 (adopted Jan. 20, 2011)*. These regulatory requirements, now promulgated as Part 840 of the Board's rules, apply to Hutsonville Pond D and are believed to be the sole Illinois regulatory requirement adopted by the Board relative to the closure of any Illinois coal ash pond.

In accordance with Part 840 Ameren submitted a Groundwater Monitoring Plan, a Closure Plan, a Post-Closure Plan and all the documents necessary to obtain Agency approval and Agency approval was granted in each instance On January 30, 2013 Ameren notified the Agency that closure had been completed in accordance with Part 840. Ever since, Ameren has been monitoring and maintaining Pond D in accordance with the post-closure plan mandated by the Board in this rulemaking.

1) Does the Agency agree that any application of Part 845, as proposed, would place a duplicating program of regulation relative to Pond D dealing with the same subject matter as Part 840?

2) Does the Agency agree that the adoption of additional regulations applying to closure and post-closure care of Hutsonville Pond D is redundant and not necessary given the existing applicability of Part 840?

3) If the Agency's answer to question number two is in the negative, what is the Agency's justification for that answer?

4) If the Agency's answer to question number two is in the affirmative, would the Agency support a clarification by the Board that its more specific rule, instead of new Part 845, applies to Hutsonville? If not, what would be the Agency's basis or reason?

Question Set No. 4 – Old Ash Pond at Meredosia Power Station

In Section VI of its Statement of Reasons, the Agency identified Ameren's former Meredosia facility as having three CCR Surface Impoundments that would presumably be subject to Part 845. All three of those CCR Surface Impoundments have been closed by Ameren. Two of these impoundments were closed pursuant to a closure plan approved by the Agency. The third closed impoundment has been identified by Ameren and the Agency as the Old Ash Pond. Unlike the other two ponds, the Old Ash Pond is not identified in the inventory of CCR surface impoundments that were referenced in *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency,* 901 F.3d 414, 434 (D.C. Cir. 2018).

The Old Ash Pond ceased accepting CCR by the early 1970s and was closed by 1972. As such, it was closed before the federal RCRA statute was enacted on October 21, 1976 and before any Agency program existed relative to closure of CCR surface impoundments. It is now a mound of soil with a forest growing on it. To date, the Agency has never requested that Ameren take any action with regards to closure of the Old Ash Pond, even as Ameren proceeded to obtain closure of the other two ponds at the Meredosia facility. The area encompassed by the Old Ash Pond is located within the Groundwater Management Zone of the two other ponds at Meredosia that were closed with Agency approval. Under Part 845 as proposed, the Old Ash Pond would now be subject to the provisions of Part 845 and now would be required to proceed through closure almost fifty years after it ceased accepting CCR. Further, the Agency has assessed a $75,000 initial fee (and a $25,000 annual fee) as to the Old Ash Pond.

1) As to the Old Ash Pond at Meredosia and assuming the accuracy of the above-cited facts, if Ameren were to propose a revision to proposed Section 845.100 that provided that Part 845 does not apply to any CCR surface impoundment that ceased accepting CCR prior

to October 21, 1976 (the effective date of RCRA), would the Agency have a reason or basis for objecting to such revision?

2) If so, what would be the Agency's basis or reason?

Question Set No. 5 – Fees Assessed Pursuant to Section 22.59(j)

Pursuant to Section 22.59(j) of the Act, the Agency is empowered to collect an initial fee of either $50,000 or $75,000 from the owner or operator of a CCR surface impoundment, together with annual fees of either $25,000 or $15,000 on an ongoing basis. 415 ILCS 5/22.59(j). The Agency has previously asserted that those fees are being assessed and collected to defray the cost associated with administering the regulatory scheme proposed in proposed Part 845 for those "surface impoundments regulated by the proposed regulations". See Statement of Reasons, p. 34.

1) In setting the relevant fees pursuant to Section 22.59(j) did the Agency provide information to the General Assembly as to what those fees should be and what specific Agency oversight activities the fees would cover? If so, would the Agency provide such information to the Board for purposes of a complete record on the question of coverage and applicability?

2) In setting the relevant fees pursuant to Section 22.59(j) of the Act, did the Agency indicate that it expected the 73 surface impoundments it identifies on page 3 of its Statement of Reasons to be covered by the new rules? In identifying those, did the Agency give consideration to the new definition of "surface impoundment" at Section 3.143 of the Act, or did it apply its previous designation of ash pond? Did the Agency simply divide the expected costs of its new program by the number 73 or did it provide the legislature some other rationale in terms of appropriate fees? If other rationale, please explain.

3) If the fees forecast more revenues than are required to appropriately oversee this program, would the Agency be retaining those surplus funds or returning them to the owner or operators which have paid the assessments?

4) When does the Agency expect the annual fees to end for a specific surface impoundment (i.e., what key regulatory milestone would end the applicability of annual fees)? Would the Agency prorate the annual fee upon completion of such milestone?

5) If the Agency's answer to Question 3 or 4 is in the negative, would the Agency have a basis or reason to object to a revision of the proposed rules (a) to require the Agency to return the amount of annual fees which exceeds the Agency's cost of implementing the proposed rules or (b) which more clearly define which fee

assessment applies and when it is no longer required? If so to either (a) or (b), what would be that basis or reason?

6) Similarly, what key regulatory milestones would apply to end the obligation for financial assurance for any given surface impoundment subject to these rules? Would the Agency be amenable to a rule provision clearly establishing such milestones? If not, why not?

7) If Ameren were to propose a revision to Section 845.100 that provided that Part 845 does not apply to any CCR surface impoundment that ceased accepting CCR prior to October 21, 1976, would the Agency have a reason or basis for objecting to a revision which prohibited the Agency from collecting a total amount of annual fees which exceeds the Agency's cost of implementing the proposed rules?

8) In proposing these rules, or in assisting in the legislative development of the CCR provisions of the Act, did the Agency consider Section 5(f) of the Act – which provides authority for the Board to prescribe reasonable fees for permits required pursuant to this Act?

9) Does the Agency intend to track or otherwise document employee time and costs expended pursuant to the proposed rules using a site-specific mechanism which permits the Agency to demonstrate the time, effort, and/or cost associated with each individual CCR surface impoundment? If the Agency's answer to Question 9 is in the negative, please explain the Agency's basis or reason.

10) If Ameren were to propose a revision to the proposed rules which provided that the Agency shall prepare a report not less than annually which details costs incurred by the Agency during the prior calendar year ending on December 31 on a site-specific basis, would the Agency have a reason or basis for objecting to such a revision? If the Agency's answer to Question 10 is in the affirmative, please explain the Agency's basis or reason.

11) Is the Agency opposed to an amendment to the proposed rules which would require it to provide an accounting of the funds collected pursuant to 415 ILCS 5/22.59(j)? If so, please explain the Agency's basis or reason.

12) Other states which have adopted regulatory schemes for the oversight of closure activities of CCR surface impoundments have assessed fees in amounts which correlate to the amount of time the supervising body spends administering the relevant regulations. To

the best of the Agency's knowledge and belief, are the amounts assessed pursuant to 415 ILCS 5/22.59(j) similarly related?

Dated: June 23, 2020

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

By: /s/Claire A. Manning

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CERTIFICATE OF SERVICE

The undersigned certifies that she has caused to be served by email the Clerk and 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=16858, a true and correct copy of the foregoing **AMEREN QUESTIONS TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY**, on this 23rd day of June, 2020.

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

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