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COMMENTS TO ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

STANDARDS FOR THE DISPOSAL OF COAL COMBUSTION RESIDUALS IN SURFACE IMPOUNDMENTS:

PROPOSED 35 ILL. ADM. CODE Part 845

R20-19 (Rulemaking – Land)

By

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In its First Supplemental Response to its Pre-Filed Questions, the Agency identifies 73 "water treatment units" as "CCR surface impoundments". Nine of the 73 units are owned and operated by Southern Illinois Power Cooperative ("SIPC"). Of the units owned by SIPC, only one is a CCR surface impoundment as defined by the Act 415 ILCS 5/3 Section 3.143 and the Federal Coal Combustion Residuals Rule, 40 CFR Part 257, ("CCR Rule"). SIPC identified, according to the CCR Rule, that Emery Pond is a CCR surface impoundment. The other eight ponds do not meet the definition of a CCR surface impoundment by either the "CCR Rule" or under the CCR fee provisions of the Act ("Illinois CCR statute"), Sections 3.143 and 22.59. These ponds are identified by the names of Pond 1, Pond 2, Pond 3, Pond 4, Pond A-1, Pond B-3, South Fly Ash Pond (built but never used as a fly ash pond), and Pond 6.

Section 3.143 of the Act, as added by the CCR Law, defines CCR surface impoundment to be "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.

The units described in the First Supplemental Response to its Pre-Filed Questions never received regulated CCR, were not designed to hold an accumulation of CCR with water and indirectly received only *de minimis* amounts of CCR, if any, were completely cleaned of CCR prior to the effective date of the Federal CCR Rule and the Illinois CCR statute, and/or are exempt beneficial uses.

The Agency stated in the First Supplemental Response to its Pre-Filed Questions that ponds not subject to the CCR Rule are also not subject to Part 845. *In the Matter of: Standards for the Combustion of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R20-19, Pre-Filed Answers of the Illinois Environmental Protection Agency, p. 17 ("*CCRs in Surface Impoundments*"). Since Emery Pond is the only pond subject to the CCR Rule then it is the only SIPC pond subject to Part 845. IEPA's listing of all SIPC ponds ignores the clear terms of the federal CCR surface impoundment definition and the Illinois legislature's choice to use that definition.

As the Act and the proposed rules copy and incorporate language of the key federal definitions, including "CCR surface impoundment," the state definitions effectively incorporate federal guidance on what constitutes regulated CCR and regulated CCR surface impoundments, including that ponds that receive *de minimis* amounts of CCR, especially only indirectly from other ponds, wind deposition or stormwater, are not regulated units. This is because such units do not, per USEPA's extensive assessments, present any risk that warrants regulation.

In response to questions in the ongoing state CCR rulemaking, IEPA states it does not agree that Part 845 does not regulate surface impoundments that contain *de minimis* amounts of CCR, claiming that U.S. EPA left the concept vague in Part 257 by not defining *de minimis*. *CCRs in Surface Impoundments*, R20-19, Pre-Filed Answers of the Illinois Environmental Protection Agency (Aug. 5, 2020), p. 40. While U.S. EPA did not define the term *de minimis*, it clarified the

concept in the rule Preamble by explaining that units that received only small amounts of CCR or never received a direct discharge of CCR are not covered by the rule. Specifically, U.S. EPA states in the Preamble that "[U.S.] EPA reviewed the risk assessment and the damage cases to determine the characteristics of the surface impoundments that are the source of the risks the rule seeks to address. Specifically, these are units that contain a large amount of CCR managed with water, under a hydraulic head that promotes the rapid leaching of contaminants . . . [U.S.] EPA agrees with commenters that units containing only truly '*de minimis*' levels of CCR are unlikely to present the significant risks this rule is intended to address." 80 Fed. Reg. 21301, 21357 (Apr. 17, 2015). Further, at the time that USEPA clarified in the Preamble this view of units excluded from Part 257, it also added in the final federal rule the phrase "treats, stores, or disposes" of CCR to the definition of CCR surface impoundment, implementing its view of excluded units through the rule's language. 40 Fed. Reg. at 21357. Again, IEPA has stated in the R20-19 rulemaking proceeding that units not covered by Part 257 are not covered by the proposed Part 845 rule.

IEPA has conceded in the state rulemaking that it has conducted no risk assessment or other study to support its proposed Part 845 rules. R20-19, IEPA Statement of Reasons for Part 845 Rulemaking, p. 44. Thus, even if IEPA were otherwise authorized to deviate from and go beyond the Act's definition of CCR surface impoundment, which copied that in the federal rule, it would have no basis for doing so under statutory rulemaking authorities that require some support for proposed regulatory requirements. Here, there is none for rules that go beyond federal requirements. Moreover, units that do not meet the definition of a CCR surface impoundment remain subject to other regulation. The Act prohibits the open dumping of solid wastes, and the State has adopted groundwater quality standards to protect against impacts to groundwater.

Pursuant to the Act's definition of CCR surface impoundments, units that have been cleaned of CCR prior to the adoption of the Illinois CCR statute, or at least prior to effective date of the federal CCR rule that provided the definition incorporated verbatim into the Act, are not CCR surface impoundments because they are not designed to hold an accumulation of CCR and do not treat, store or dispose of CCR. The regulatory definitions of "new," "existing" and "inactive" CCR surface impoundments in Part 257 and proposed Part 845 lend further support for the conclusion that the Act does not reach units from which CCR was removed before October 2015 and that do not receive regulated CCR thereafter. Such ponds cannot be "new" ponds, nor can they be "existing" CCR surface impoundments under the federal or proposed state rules because they did not receive regulated CCR before and after October, 2015. Further, the proposed state rules provide that an "'[i]nactive CCR surface impoundment' means ***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***. Inactive CCR surface impoundments may be located at an active facility or inactive facility." Proposed 35 Ill. Adm. Code 845.120. To be a surface impoundment under this proposed "inactive" definition, a unit must contain

regulated CCR on or after October 19, 2015. If CCR was removed from a unit before then, the unit cannot be a regulated CCR surface impoundment.

IEPA erroneously claims in the table of 73 alleged CCR surface impoundments that each of the eight SIPC units is a CCR surface impoundment under the Act, and thus Part 257, because they are CCR surface impoundments that have not completed closure. This is wrong because the units must first be "CCR surface impoundments" before they can be CCR surface impoundments that have not completed closure, and they are not for the various reasons described in these comments, including because they contain only excluded beneficial use materials, they were not designed to accumulate CCR and water or they contain no or only *de minimis* amounts of CCR. Further, IEPA misconstrues the closure required to avoid applicability under the Act and rules. To support its view of what constitutes closure, IEPA misinterprets the USWAG decision in responses to questions presented in the *CCR in Surface Impoundments* rulemaking by erroneously conflating the concepts of rule applicability and completion of closure.[1] It appears this misinterpretation is contributing to IEPA's identification of alleged CCR surface impoundments from which CCR was removed prior to the effective date of the federal rules.

IEPA relies on the USWAG decision when stating it does not agree that a pond closed by removal prior to the effective date of the CCR rule is not a CCR surface impoundment. *CCRs in Surface Impoundments*, R20-19, Pre-Filed Answers of the Illinois Environmental Protection Agency (Aug. 3, 2020), p. 138. Relying on the USWAG decision, IEPA states "it is the Agency's position that any surface impoundment that had not completed removal of CCR from the CCR surface impoundment prior to October 19, 2015, the effective date of Part 257, is subject to the requirements of Part 257 . . . [a]s currently written, Part 257 does not deem closure by removal complete until the CCR and any liner have been removed and decontamination of any area affected by releases from the CCR surface impoundment has been completed pursuant to Part 257.100(b)(5)." *Id*. at, pp. 138-39.

The USWAG decision, however, set forth a fact pattern about legacy ponds described as containing "a toxic 'slurry' of Coal Residuals mixed with water." USWAG decision, p. 28. It is these legacy ponds that the court in USWAG decided must be regulated under the CCR Rule even though they were located at inactive power plant sites. In stark contrast, units that have had all CCR removed from them prior to the effective date of the federal rule are not "legacy ponds," and if water was removed as well they are not ponds at all. They did not treat, store, or dispose of CCR as of the effective date of the federal rule, this characteristic being essential to meeting the definition of a regulated CCR surface impoundment. Whether or not a unit has "completed closure" within the meaning of the federal rule is a question that only arises after it is first determined that the rule applies. For legacy ponds, which still contained "the toxic slurry" of CCR and water, the rule does apply. For units from which CCR and/or water was removed prior to the

[1] *Utility Solid Waste Activities Group, et al. v. United States Environmental Protection Agency and Waterkeeper Alliance, et al.*, United States Court of Appeals for the District of Columbia Circuit, Case No. 15-1219 (Aug. 21, 2018) ("USWAG decision").

effective date of the federal rule, the federal CCR rule does not apply because the unit is not a regulated CCR surface impoundment. In other words, closure by removal and corrective action requirements, including the requirement to decontaminate after closure by removal under Section 257.100(b)(5), do not apply to units that are not regulated CCR surface impoundments. Quite simply, the USWAG decision did not change the fact that a pond from which CCR was removed prior to the effective date of the CCR rule is not a CCR surface impoundment. The same holds true for Part 845's definition of "inactive" CCR surface impoundment, under which a unit can be regulated as an "inactive" CCR surface impoundment only if it "still contains" CCR as of October, 2015. There is nothing in that definition equating "sill contains" CCR with the notion of "closure by removal" under the rules. Thus, the definition of "closure" under the rules, which applies only when the rules apply to a unit, has no place in deciding whether a unit is subject to the rules. And it would be anomalous to construe the Act to apply to units that are not covered by the federal CCR Rules or proposed Part 845. This would be an arbitrary and capricious interpretation of the Act.

In essence, IEPA seems to be erroneously interpreting the federal rules to mean that a unit still can be an "inactive CCR surface impoundment" even though CCR was removed before October, 2015 if the CCR removal did not fully comply with the closure by removal requirements of the federal rule. However, this reading of the federal rules incorporates closure requirements applicable only to units subject to the rules to determine if a unit is subject to the rule in the first place. This reasoning is circular and ignores the fact that the federal definition does not tie the prior CCR removal that exempts a unit from the "inactive CCR surface impoundment" definition to any "closure by removal" requirements that apply to units only after they are first determined to be subject to the rules. Only regulated CCR units are subject to closure by removal requirements. 40 CFR 257.102(c) ("An owner or operator may elect to close a CCR unit by removing and decontaminating all areas affected . . . ."). Further, under IEPA's interpretation, to exempt a unit from Part 257 coverage an owner or operator would have needed to comply with Part 257 closure by removal requirements before they were adopted, and potentially even before they were proposed. It is not possible for a source to know and comply with requirements that do not yet exist. IEPA's interpretation is illogical and fundamentally flawed.

The eight units still in dispute at Marion Station do not constitute CCR surface impoundments under the Act, including because they do not satisfy the definition of CCR surface impoundment under federal law as incorporated into the Act. SIPC asks the board to reject the characterization of the eight SIPC ponds as CCR surface impoundments.