ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
1021 NORTH GRAND AVENUE EAST, P.O. BOX 19276, SPRINGFIELD, ILLINOIS 62794-9276 • (217) 782-3397
JB PRITZKER, GOVERNOR JOHN J. KIM, DIRECTOR

April 6, 2021

Office of the Joint Committee on Administrative Rules
700 Stratton Building
Springfield, IL 62706

RE: Illinois Environmental Protection Agency's Comments on Illinois Pollution Control Board's Second Notice Opinion and Order on Proposed Rules for Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845

To the Honorable Members of the Joint Committee on Administrative Rules (JCAR):

On February 4, 2021, the Illinois Pollution Control Board ("Board") issued its Second Notice Opinion and Order ("Board Order") on its proposed rules regulating coal combustion residual ("CCR") surface impoundments in Illinois, pursuant to Section 22.59 of the Illinois Environmental Protection Act (also known as the Coal Ash Pollution Prevention Act, Public Act 101-171). The Illinois Environmental Protection Agency ("Illinois EPA") submitted its comments on the Board's Order and proposed rules on March 4, 2021 for JCAR's consideration prior to final adoption of new 35 Ill. Adm. Code 845 ("Part 845"). See Attachment A.

On March 25, 2021, JCAR held a virtual meeting at its request to discuss public comments submitted by Ameren requesting revisions to the scope of, and definitions contained within, Part 845. See Attachment B. At JCAR's request for Illinois EPA's response to Ameren's comments, and to further assist JCAR's Second Notice review, Illinois EPA provides its response to Ameren's proposals below, which can also be found in the Board's R20-19 rulemaking record. See Attachment C.

Additionally, Illinois EPA has received requests for information outside of the Board's R20-19 rulemaking record. During the March 25, 2021 virtual meeting, JCAR requested that Illinois EPA provide certain supplemental information following the meeting that is not contained within the record. Illinois EPA has also received emails from JCAR staff seeking information outside of the Board's R20-19 rulemaking record. All of these inquiries require Illinois EPA to provide implementation ramifications, many site-specific, if hypothetical revisions were made to Part 845 as proposed by the Board at Second Notice. Illinois EPA believes that any material addition or revision to Part 845 must be supported by the rulemaking record as required by the Illinois Environmental Protection Act. 415 ILCS 5/28(a) (the Board may revise the proposed regulations after hearing in response to objections or suggestions made by JCAR where "the record before the Board is sufficient to support such a change without further hearing."). Notwithstanding, Illinois EPA endeavors to provide responses to questions received below.

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

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

2125 S. First Street, Champaign, IL 61820 (217) 278-5800
1101 Eastport Plaza Dr., Suite 100, Collinsville, IL 62234 (618) 346-5120
9511 Harrison Street, Des Plaines, IL 60016 (847) 294-4000
595 S. State Street, Elgin, IL 60123 (847) 608-3131
2309 W. Main Street, Suite 116, Marion, IL 62959 (618) 993-7200
412 SW Washington Street, Suite D, Peoria, IL 61602 (309) 671-3022
4302 N. Main Street, Rockford, IL 61103 (815) 987-7760

- ***Requested Addition to Section 845.100 (Scope and Purpose)***: "A former ash pond that was closed byremoval of CCR pursuant to a state-approved closure plan prior to the effective date of this Part is not a surface impoundment as defined in Section 3.143 of the Act, and is not subject to this Part."

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

- ***IEPA Response from Final Post Hearing Comments (p. 53-54):***

  The Agency believes the proposed revision is inappropriate and objects to its inclusion in Section 845.100. As discussed in the record at length regarding the definition of "inactive closed CCR surface impoundment," the Agency's position is that any CCR surface impoundment which has not closed in a manner consistent with the regulations adopted by USEPA in 40 CFR 257 Subpart D (Part 257), should not be considered closed.

  First, the Agency objects to the use of the term "former ash pond" as overly vague, and inconsistent with the rest of Part 845. Part 257, upon which Part 845 is largely modelled, and P.A 101-171 consistently refer to CCR surface impoundments. However, even if the revised language referred to a "former CCR surface impoundment," the revision is unacceptable. Like Part 257, Part 845.100(a) states:

  > *This Part establishes criteria for the purpose of determining which CCR surface impoundments do not pose a reasonable probability of adverse effects on health or the environment. CCR surface impoundments failing to satisfy any of the requirements of this Part are considered open dumps, which are prohibited.*

  Section 22.59(m) of the Act requires the proposed rules to apply to all existing CCR surface impoundments and any CCR surface impoundments constructed after the date of the amendatory Act. Accordingly, Part 845 establishes criteria for future construction of CCR surface impoundments, and when and in what manner, existing CCR surface impoundments (i.e., any surface impoundment constructed before the amendatory Act) must be closed. Mr. King on behalf of Ameren in his written testimony cites the definition of CCR surface impoundment found in Section 3.143 of the Act as one reason why the above "clarifying" language is proposed to Section 845.100. Hrg. Ex. 55, p. 19. The Agency's purpose in proposing Part 845 as it did was to include all surface impoundments "*designed* to hold an accumulation of CCR and liquids" (emphasis added). However, until those CCR surface impoundments have satisfied all of the Part 845 requirements, they cannot achieve the standard

stated in Section 845.100(a), and therefore, are not "former" CCR surface impoundments. Therefore, this proposed revision should not be accepted.

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

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

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

- ***IEPA Response from Final Post Hearing Comments (p. 50-53):***

  Illinois EPA strongly believes the definition of "inactive closed CCR surface impoundment" should remain as proposed. Illinois EPA acknowledges that Ameren has expended considerable resources to close inactive CCR surface impoundments at inactive generating facilities under State authority; however, Ameren fails to acknowledge federal authority under Part 257 and additional State authority and obligations pursuant to Section 22.59 of the Act.

  Section 22.59 of the Act requires that the rules the Agency propose, and the Board adopt, be at least as protective and comprehensive as Part 257. The WIIN Act allowed USEPA to develop a CCR permit program, or delegate such a program to the states. In order to receive delegation, Illinois EPA will have to gain USEPA approval of Illinois' CCR surface impoundment program by having a state program at least as stringent as the federal program.

  When drafting the rule, the Agency reasoned that for any CCR surface impoundment to be considered closed, the CCR surface impoundment would have to have an Agency approved closure plan in order to verify that the closure meets the minimum USEPA criteria. Further, Part 257 contains requirements not contained in any current State rules regulating surface impoundments, such as compliance with groundwater protection standards at the down gradient waste boundary. Given these conditions, the Agency believed it prudent to use the effective date of Part 257 (October 19, 2015) as the cut-off date for CCR surface impoundments that should be considered closed under State authority, and therefore, not subject to all of the requirements of Part 845, many of which originate in Part 257.

  The Agency purposely took a conservative approach when defining "inactive closed CCR surface impoundments" in Part 845. In the preamble of Part 257, USEPA stated

that its intent was not to regulate CCR surface impoundments in Part 257 that had already closed. Hrg. Ex. 5, p. 21343. The Part 257 Preamble also states that USEPA has concluded: "…that **inactive CCR surface impoundments require regulatory oversight**. **The sole exception is for 'inactive' CCR surface impoundments that have completed dewatering and capping operations (in accordance with the capping requirements finalized in this rule**)…(emphasis added). Hrg. Ex. 5, p. 21342. These seemingly contradictory statements in the preamble must be weighed against the requirements USEPA codified in Part 257. The current version of Part 257 acknowledges closure by removal, but doesn't consider the closure process to be complete until all CCR is removed and all areas affected by releases of CCR have been decontaminated, and the constituent concentrations in groundwater meet the groundwater protection standards. 40 CFR 257.102(c). Part 257 also recognizes closure with a final cover system as a viable option. In this instance, Part 257 requires a cover system that has a permeability less than any bottom liner or natural soils, but at a minimum must have permeability no greater than 1 x 10-5 cm/sec. 40 CFR 257.102(d)(3)(i)(A)-(D). However, when either closure method is used, the primary consideration is that the CCR surface impoundment pose no reasonable probability of adverse effects on health or the environment, consistent with Part 257.50(a) and Section 845.100(a). Given these facts and circumstances, the adoption of the definition of "inactive closed CCR surface impoundment" as proposed by the Board in Second Notice is appropriate.

- ***Board Order Findings (p. 17)***

  The Board agrees with IEPA regarding Ameren's proposed change to the definition of "inactive Closed CCR surface impoundment." This is a rule of general applicability. Maintaining October 15, 2015, the effective date of the federal rule, as the cutoff date for completing closure activities at inactive CCR surface impoundments is equitable to all participants. As pointed out by IEPA, Part 257 contains requirements that had not been contained in any state rules, including compliance with groundwater protection standards at downgradient waste boundaries. PC 120 at 51. Ensuring that all CCR surface impoundments fulfill the requirements of proposed Part 845 ensures protection of the environment and human health in the State and will help ensure approval by USEPA of Illinois' rules. To address site- specific issues, an affected entity may avail itself of relief mechanisms, such as an adjusted standard or a variance. The Board declines to make the proposed change to the definition of "inactive closed CCR surface impoundment."

JCAR Information Requests to Illinois EPA

On March 17, 2021, Illinois EPA received an email from JCAR staff requesting response to specific questions. See Attachment D. Illinois EPA provides responses to the questions posed in the March 17, 2021 email below.

1) **What specifically is lost by changing the applicable date for inactive closed CCRSI from 10/2015 to 4/2021?**

Because Part 845 is a rule of general applicability, simply changing the date will create 26 inactive closed CCRSIs in the State, more than one-third of all known CCRSIs, instead of the 4 inactive closed CCRSIs under Part 845 as proposed in First and Second Notice.

As Part 845 is currently written, inactive closed CCRSIs do NOT have to:

1. Follow the same public participation requirements under 845.240 and 260;
2. Demonstrate they meet floodplain criteria under 845.340;
3. Have inspections and annual consolidated reports under 845.540 and 845.550;
4. Meet the same GWPS or corrective action requirements under Subpart F;
5. Meet the same closure and post-closure care requirements under Subpart G; or
6. Create and maintain a publicly available website on which all documents required under Part 845 must be stored for public review under Subpart H.

a. What specifically will Ameren not have to do that it otherwise would have had to do—either under Part 845 as currently written or under 40 CFR 257?

With regard specifically to Part 845, please see the list above. Exempting certain CCRSIs from regulation under Part 845 will not exempt them from the requirements of Part 257.

Here Illinois EPA seeks to answer not just the question of what Ameren will not have to do that they would otherwise have to, but also what Ameren will have to do that they would otherwise not have to with the suggested additional of Sections 845.240, 260 and the rest of 780 and a 4/2021 applicability date as suggested in Question 2 below. Specific to Ameren:

Venice North and South Ponds, and Hutsonville Pond D (inactive closed CCRSI)- All of these ponds would be required to get operating permits that are subject to public review and comment. Each of them would have to revise their post-closure care plans to be consistent with 845.780, which uses different groundwater protection standards (GWPS), different mechanisms to initiate corrective action while in post-closure care and would have a minimum post closure care period. If additional corrective action is required, they would be subject to all of the hearing and public participation requirements of Sections 845.240 and 260.

Hutsonville Ponds B, C and Bottom Ash (inactive CCRSI)- Because CCR has been removed from these ponds, the requirements would be unchanged from the Second Notice Part 845.

Hutsonville Pond A and Meredosia Fly Ash, Bottom Ash and Old Ponds (inactive CCRSI)- Because these ponds have CCR in place, the suggested addition of Sections 845.240, 260 and the rest 780 and a 4/2021 applicability date, would reduce the number of requirements. They would not have to do a floodplain demonstration, they would have different groundwater monitoring, GWPS and corrective action procedures. They would not have annual inspections and consolidated reporting. There would be no requirement to create and maintain a publicly available website containing all facility documents under Part 845 for public review.

It is important to note that these Ameren facilities, like other similar facilities in the State, have on-going exceedances of applicable GWPS. Section 22.59 of the Act makes it clear that protection of human health and the environment, and public knowledge and participation to achieve those

ends, are key elements of Section 22.59. Ensuring these facilities comply with the GWPS and corrective action procedures contained in Part 257 and Part 845 is critical to ensuring the legislative intent and mandates of P.A. 101-171 are fulfilled.

b. What concrete harm will this do?

Changing the date to 4/2021 creates a situation where some CCRSIs regulated under Part 257, which uses 10/2015 as an effective date, will be regulated differently under Part 845. Illinois EPA is strongly concerned that such a change will prohibit USEPA from being able to approve the Illinois CCRSI program, since Part 845 will no longer be as stringent as the federal regulations. Illinois' failure to obtain federal approval of its CCRSI program will create a large and complex obstacle for those owners and operators who would then be subject to two separate programs regulating many of the same CCRSIs.

Along the same lines, changing the date to anything other than October 2015 makes Part 845 less stringent than Subpart D of Part 257 in contravention of the implementing statute, which requires the rules adopted by the Board be at least as protective and comprehensive as Part 257, 415 ILCS 5/22.59(g)(1), and that the provisions of Section 22.59 be liberally construed to carry out the purposes of Section 22.59 ("the purpose of this Section is to promote a healthful environment, including clean water, air, land, meaningful public involvement, and the responsible disposal and storage of coal combustion residuals, so as to protect public health and to prevent pollution of the environment of this State)."

Furthermore, the need for increased public participation, and especially public access to all documents and data, is stressed in Section 22.59 of the Act and was a repeated consideration during the rule development process. Changing the date to 4/2021 means that more than a one-third of all CCRSIs in the State would not be required to have data available for public review, harming the public's ability to be informed in contravention of the clear legislative mandate for meaningful public participation. See 415 ILCS 5/22.59(a) and (g)(6).

2) Is there a way to address this situation by changing Sec. 845.170 to make more requirements apply to inactive closed CCRSI (such as the rest of 845.780 or the public participation requirements in Secs. 845.240 and 845.260)?

Adding additional requirements to Section 845.170 does not resolve the issues created by changing the date of applicability from 10/2015 to 4/2021.

The 22 newly created inactive closed CCRSIs are already subject to the following as proposed in Part 845 at First and Second Notice:

1. Public participation requirements under 845.240 and 845.260;
2. Demonstrating they meet floodplain criteria under 845.340;
3. Conducting inspections and submitting annual consolidated reports under 845.540 and 845.550;
4. Meeting GWPS or corrective action requirements under Subpart F;
5. Closure and post-closure care requirements under Subpart G which includes Section 845.780; and

6. Creating and maintaining a publicly available website on which all documents required under Part 845 must be stored for public review under Subpart H.

However, with the change in scope and applicability, those 22 CCRSIs would now be exempted from:

7. Demonstrating they meet floodplain criteria under 845.340;
8. Conducting inspections and submitting annual consolidated reports under 845.540 and 845.550;
9. Meeting the GWPS or corrective action requirements under Subpart F;
10. Meeting the closure and post-closure care requirements under Subpart G, with the exception of Section 845.780; or
11. Creating and maintaining a publicly available website on which all documents required under Part 845 must be stored for public review under Subpart H.

Those 22 newly created inactive closed CCRSIs already have Agency-approved closure and post-closure plans that would remain open to public comment through the operating permit process, while simultaneously exempting those same CCRSIs from many of the substantive closure and post-closure requirements intended to fulfill the legislative purpose of restoring and protecting groundwaters. Public participation in a permitting process cannot replace enforceable regulatory closure and post-closure requirements. This would be a superfluous exercise and use of resources without any ability to substantively impact the resulting permit.

Again, however, the largest issue with this proposed "solution" is that it exempts CCRSIs from requirements imposed upon them by Part 257, which makes Part 845 less comprehensive and less protective than Part 257 and in turn severely jeopardizes federal approval of the state program.

3) Can you think of any precedents for this approach of retroactively imposing requirements (in rules that aren't explicitly Identical-In-Substance) to match federal effective dates?

First, the practice of matching federal effective dates where identical-in-substance rules are adopted by the State is relevant here, where the authorizing statute mandated that the Board adopt rules that are *at least* as protective *and comprehensive* as the federal rules. 415 ILCS 5/22.59(g)(1) (emphasis added).

Second, the term "retroactive" as it is being used to describe Part 845 is a misnomer. Part 845 is designed to consider the status of CCRSIs relative to other regulations and reasonably apply requirements under Part 845 to those CCRSIs in consideration of the legislative mandates in Section 22.59 of the Act and the requirements of Part 257. Part 845 does not require the owner or operator of a CCRSI to complete any task prior to the adoption of the statute or Part 845 to comply with Part 845 as proposed in First and Second Notice. Rather, Part 845 defines an inactive closed surface impoundment based on its condition as of a date certain. If an existing CCR surface impoundment does not meet the definition of an inactive CCR surface impoundment, it is subject to certain requirements moving forward from the effective date of the rule. Neither does Part 845 regulate activities that happened exclusively in the past. In all cases, there is ongoing groundwater

contamination – existing conditions that the statute sought to regulate and oversee in a manner that is at least as protective and comprehensive as the federal program.

If the definition of inactive closed CCRSI remains as proposed in First and Second Notice, Ameren's CCRSIs that do not qualify as inactive closed CCRSIs would not have to reclose but will have to meet applicable requirements such as groundwater monitoring requirements and corrective action procedures; If Part 845 remains as proposed at First and Second notice, Ameren Hutsonville Ponds B, C and Bottom Ash will complete "closure" the day Part 845 is adopted.

Finally, Section 22.59(m) of the Act states that Section 22.59 shall apply *without limitation to all existing* CCRSIs and CCRSIs constructed in the future. This is a clear legislative mandate, signed by the Governor, that any CCRSI known to the Agency when drafting Part 845, should be included and appropriately regulated. The Agency considered the requirements of the Illinois Environmental Protection Act in general and Section 22.59 of the Act specifically, in addition to Part 257, which was and is still incomplete relative to court ordered requirements, and proposed a rule to the Board that reasonably considers and equitably applies all of these requirements to owners and operators of CCRSI.

March 25, 2021 JCAR Stakeholder Meeting

During the March 25, 2021, members of JCAR asked Illinois EPA to provide response to specific questions, which are listed below along with the Agency's response.

1) **How many CCRSIs would be impacted if the October 2015 were revised to the 2019 effective date of the Coal Ash Pollution Prevention Act?**

If the date in the definition of "inactive closed CCRSI" was changed to July 30, 2019, the effective date of P.A. 101-171 (Section 22.59 of the Act), two additional known CCRSIs would meet the definition of an "inactive closed CCRSI" in Section 845.120. As discussed below, the suggested date change does not address Ameren Hutsonville Ponds B, C and Bottom Ash, because USEPA has not decided how "legacy" ponds will be defined or regulated. Adoption of Part 845 as proposed at First and Second Notice will result in those CCRSIs meeting the definition of "closed" but they will be subject to post-closure monitoring that is already on-going.

2) **Is Part 845 regulating "clean closed ponds" as CCR surface impoundments?**

"Clean closed ponds" as used by Ameren in its comments and as discussed during the JCAR virtual meeting is also a misnomer that fails to acknowledge the ongoing impact that CCR surface impoundments have beyond the physical closure process, even where closure includes removal of CCR. This question appears to refer to CCR surface impoundments that have been closed by removal of CCR prior to passage of P.A. 101-171.

Part 257 currently requires removal of CCR and compliance with groundwater protection standards ("GWPS") before closure by removal is considered complete. The Agency approved a closure plan prior to October 2015 for Ameren's Hutsonville Ponds A, B, C, and Bottom Ash and acknowledged that Ameren had "completed" the closure as approved. However, with the passage

of P.A. 101-171 and its requirement that state regulations be no less protective and comprehensive than Part 257, Illinois EPA had to consider the closure of Ameren Hutsonville Ponds B, C and Bottom Ash as not yet complete under Part 257 since groundwater contamination remains and compliance with GWPS has not been met. Illinois EPA believes Part 845 as written is as protective and comprehensive as Part 257 because removal of all CCR is required and GWPS must be achieved, even though that process under Part 845 is carried out as corrective action, not part of closure. Part 845 does go a step further and requires that a "closed" CCR surface impoundment must be recorded in the deed for that location, which is not in Part 257. However, Section 22.59(g) of the Act requires that Part 845 be as protective and comprehensive as Part 257, not identical.

Since USEPA has made no decisions regarding the regulation of "legacy" ponds (or inactive ponds at inactive facilities), Part 845's use of a two-step process may or may not conflict with Part 257, depending upon USEPA's final decisions. However, corrective action is underway at Hutsonville, and corrective action and groundwater monitoring must continue until GWPS are met, which is compliant with Part 257 regardless of any USEPA decisions on how to regulate such "legacy" ponds. It is the Agency's intent to have Part 845 serve in lieu of Part 257 as allowed by the WIIN Act. Upon approval by USEPA there would be no potential conflict. Should Illinois's program fail to gain federal approval, this is one example of the difficulty owners and operators will have navigating federal and state programs that regulate the same CCRSIs differently.

In conclusion, Illinois EPA believes that the final rules adopted by the Board must be supported by the rulemaking record in R20-19 to withstand appeal. The changes being considered by JCAR at Ameren's request are substantive, large in scope and unsupported by the record. Furthermore, such revision would severely jeopardize federal approval of Illinois' CCRSI program. Therefore, Illinois EPA strongly urges JCAR to reject Ameren's requests to revise Sections 845.100 and 845.120 during this Second Notice period.

Sincerely,

_/s/ Christine Zeivel_____

Christine Zeivel
Assistant Counsel
Illinois EPA

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY
1021 North Grand Avenue East, P.O. Box 19276, Springfield, Illinois 62794-9276 · (217) 782-3397
JB Pritzker, Governor
John J. Kim, Director

March 4, 2021

Office of the Joint Committee on Administrative Rules
700 Stratton Building
Springfield, IL 62706

RE: Illinois Environmental Protection Agency's Comments on Illinois Pollution Control Board's Second Notice Opinion and Order on Proposed Rules for Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845

To the Honorable Members of the Joint Committee on Administrative Rules (JCAR):

On February 4, 2021, the Illinois Pollution Control Board ("Board") issued its Second Notice Opinion and Order on its proposed rules regulating coal combustion residual surface impoundments in Illinois ("Board Order"), pursuant to Section 22.59 of the Illinois Environmental Protection Act (also known as the Coal Ash Pollution Prevention Act, Public Act 101-171). The Illinois Environmental Protection Agency hereby submits the following comments on the Board's Order and proposed rules for JCAR's consideration prior to final adoption of new 35 Ill. Adm. Code 845 ("Part 845").

First, there are two apparent inconsistencies in the Board's Second Notice Order. Regarding timing of the placement of materials into the operating record, the Environmental Groups proposed the following language revision to Section 845.800(d):

> d) Unless otherwise required below, the ~~The~~ owner or operator of a CCR surface impoundment must place the following in the facility's operating record within 1 day of their completion or finalization.

On page 102 of the Board Order, the Board agreed with the Environmental Groups that it was necessary to add a timing requirement for placing documents in the operating record. But because there was no basis for imposing the Environmental Groups' suggested placement deadline of one day after document "completion or finalization," the Board stated that it borrowed language from USEPA (40 C.F.R. § 257.105) and added the phrase "as it becomes available" to Section 845.800(d) as follows:

> d) Unless otherwise required below, the ~~The~~ owner or operator of a CCR surface impoundment must place the following information, as it becomes available, in the facility's operating record."

However, the underlined text of Section 845.800(d) in Addendum A to the Board Order reflects the language of the Environmental Groups' proposal and not what the Board said it intended.

The second inconsistency appears to be limited to the Board Order and is not reflected in the rule language of Addendum A. Nevertheless, Illinois EPA notes the inconsistency to ensure clarity for the Committee's review and benefit. Regarding the assessment of corrective action measures, page 81 of the Board Order states the following (with emphasis added):

> Section 845.660 specifies the provisions for the analysis of the effectiveness of potential corrective measures under Section 845.670. The participants raised issues concerning the initiation of the assessment and clarification of terminology. Midwest Generation asked that Section 845.670(a) be revised to reflect its proposal to require initiation of corrective action measures based on two consecutive quarters of monitoring showing exceedances above the GWPS. *The Board has made these changes to Section 845.860(a)(1) to incorporate Midwest Generation's revision. See discussion under Initiation of corrective action measures.*

There is no Section 845.860. There are no revisions to Section 845.670(a). There are revisions to 845.660(a)(1) but not any that require two consecutive quarters of monitoring showing exceedances above the GWPS. In fact, the Board Order points to its discussion under Initiation of Corrective Action Measures, but that discussion on page 76 indicates that the Board declined to make Midwest Generation's suggested changes. For these reasons, Illinois EPA believes that the Board intended what is in the rule language of Addendum A, which is to require initiation of corrective action measures or submission of an ASD based on one quarter of monitoring showing]exceedance above the groundwater protections standards.

Finally, the Board added a new subsection (i) in Section 845.210 on the creation, management and use of listservs, which are used by Illinois EPA to distribute required notices about CCR surface impoundments to interested persons. Section 845.210(i)(3) as proposed in the Board Order provides:

> 3) When this Part requires that the Agency email a notice to the listserv for a facility, the Agency must do so within the timeframe specified, concurrently with other required means of disseminating the notice, or otherwise in a timely manner. When this Part requires an owner or operator to request that the Agency email a notice to the listserv for the facility, the Agency must do so within one business day after receiving the request from the owner or operator.

Additionally, the Board added Section 845.650(e)(2) regarding alternative source demonstrations:

> 2) Within one business day after receiving the alternative source demonstration, the supporting report, and the qualified professional engineer's certification, the Agency must email notice—to its listserv for the facility—that it received those documents.

These revisions and timeframes were not discussed during the Board's rulemaking proceeding. Illinois EPA agrees with the Board that listservs will play a vital role in the distribution of

notices required under Part 845. Board Order, p. 20. However, Illinois EPA requests that JCAR extend the timeframe within which Illinois EPA must email notices via the listservs. Due to staffing considerations and other logistics, including ongoing Covid-19 complications, it is not possible to ensure compliance with a one business day requirement. Illinois EPA requests that JCAR revise this requirement to give Illinois EPA five business days from receipt of an ASD or request from an owner or operator to email a listserv notice.

Illinois EPA appreciates this opportunity to provide comment during this Second Notice period.

Sincerely,

Christine Zeivel
Assistant Counsel
Illinois EPA

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

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

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

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

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

   - ***Requested Addition to Section 845.100 (Scope and Purpose)***: "A former ash pond that was closed by removal of CCR pursuant to a state-approved closure plan prior to the effective date of this Part is not a surface impoundment as defined in Section 3.143 of the Act, and is not subject to this Part."

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

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

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

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

Attachment C

From: Eastvold, Jonathan C. <JonathanE@ilga.gov>
Sent: Monday, February 22, 2021 11:31 AM
To: Diers, Stefanie <Stefanie.Diers@Illinois.gov>; ahaas@atg.state.il.us; jhammons@elpc.org
Subject: [External] Ameren memo re: CCR rule

Dear Colleagues:

I received the attached memo from Ameren and am wondering how you would respond to their arguments.

Thanks in advance for your input.

Sincerely,

Jonathan C. Eastvold, Ph.D.
Rules Analyst III
Illinois General Assembly
Joint Committee on Administrative Rules

700 Stratton Building
Springfield, IL 62706
JonathanE@ilga.gov
(217) 524-9010

Attachment 2

From: Eastvold, Jonathan C.
To: AArmstrong@atg.state.il.us; MDunn@atg.state.il.us; ssylvester@atg.state.il.us; Diers, Stefanie; Zeivel, Christine; Ankney, Clayton; EXT McEllis, David
Subject: [External] More questions about 35 IAC 845
Date: Wednesday, March 17, 2021 2:48:48 PM

Thanks for your time and assistance throughout this rulemaking, which has been extended to JCAR's April meeting. I've got a few more questions at this point:

1) What specifically is lost by changing the applicable date for inactive closed CCRSI from 10/2015 to 4/2021?
    a. What specifically will Ameren not have to do that it otherwise would have had to do —either under Part 845 as currently written or under 40 CFR 257?
    b. What concrete harm will this do?
2) Is there a way to address this situation by changing Sec. 845.170 to make more requirements apply to inactive closed CCRSI (such as the rest of 845.780 or the public participation requirements in Secs. 845.240 and 845.260)?
3) Can you think of any precedents for this approach of retroactively imposing requirements (in rules that aren't explicitly Identical-In-Substance) to match federal effective dates?

Sincerely,

Jonathan C. Eastvold, Ph.D.
Rules Analyst III

Illinois General Assembly
Joint Committee on Administrative Rules
700 Stratton Building
Springfield IL 62706
217-524-9010