

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

IN THE MATTER OF:

PETITION OF ILLINOIS POWER
RESOURCES GENERATING, LLC FOR
AN ADJUSTED STANDARD FROM
35 ILL. ADMIN. CODE PART 845 OR, IN
THE ALTERNATIVE, A FINDING OF
INAPPLICABILITY

AS 2021-004
(Adjusted Standard)

NOTICE OF ELECTRONIC FILING

To: Illinois Pollution Control Board
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the attached Petitioner's Response to Illinois Environmental Protection Agency's Recommendation and a Certificate of Service, copies of which are herewith served upon you.

/s/ Sarah L. Lode

Sarah L. Lode

Dated: October 6, 2021

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 6th day of October, 2021:

I have electronically served a true and correct copy of the attached Petitioner's Response to Illinois Environmental Protection Agency's Recommendation by electronically filing it with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

Illinois Pollution Control Board
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My e-mail address is slode@schiffhardin.com. The number of pages in the e-mail transmission is 9. The e-mail transmission took place before 5:00 p.m.

/s/ Sarah L. Lode
Sarah L. Lode

Dated: October 6, 2021

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**PETITIONER'S RESPONSE IN SUPPORT OF ILLINOIS
ENVIRONMENTAL PROTECTION AGENCY'S RECOMMENDATION**

Petitioner, Illinois Power Resources Generating, LLC ("IPRG"), by its attorneys, Schiff Hardin LLP, submits this Response in Support of Illinois Environmental Protection Agency's ("IEPA" or the "Agency") Recommendation. This response is submitted pursuant to Section 104.416(d) of the Board's procedural rules. 35 Ill. Admin. Code § 104.461(d).

I. INTRODUCTION

On May 11, 2021, IPRG filed a Petition for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability ("Petition") for the Duck Creek Power Plant ("Duck Creek") Gypsum Management Facility ("GMF") Recycle Pond.¹ On September 22, 2021, following an extension of time, the Agency filed its Recommendation in Response to IPRG's Petition ("Recommendation"),² stipulating that the Duck Creek GMF Recycle Pond is not a CCR

¹ Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard from 35 Ill. Admin. Code Part 845, or In the Alternative, a Finding of Inapplicability, *In the Matter of: Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard from 35 Ill. Admin. Code Part 845, or In the Alternative, a Finding of Inapplicability*, AS 2021-004.

² Recommendation of the Illinois Environmental Protection Agency at 7, *In the Matter of: Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard from 35 Ill. Admin. Code Part 845, or In the Alternative, a Finding of Inapplicability*, AS 2021-004.

surface impoundment under 35 Ill. Admin. Code Part 845 and stating that it does not object to the Board issuing the finding of inapplicability requested by IPRG.

Given the Agency's position and for the reasons set forth in IPRG's Petition and the Agency's Recommendation, IPRG requests that the Illinois Pollution Control Board ("Board") grant Petitioner's requested relief for a finding of inapplicability and dismiss Petitioner's request for an adjusted standard as moot. Further, IPRG withdraws its request for a hearing.

II. PROCEDURAL BACKGROUND

On April 15, 2021, the Board adopted Part 845, regulating the disposal of coal combustion residuals ("CCR") in surface impoundments, which became effective on April 21, 2021. *See* Board Docket R 2020-019. On May 11, 2021, IPRG filed its Petition, arguing that 35 Ill. Admin. Code Part 845 ("Part 845") is inapplicable to its Duck Creek GMF Recycle Pond because the pond does not fall within the definition of a "CCR surface impoundment," as it has never directly or intentionally received CCR and contains minimal sediment, supported by evidence set forth in a bathymetric survey. Petition at 11–18; *see also* 35 Ill. Admin. Code § 845.120 (definition of "CCR surface impoundment"). In the alternative, IPRG argued that if the GMF Recycle Pond is considered by the Board to be a "CCR surface impoundment," an adjusted standard is warranted due to the inappropriate and excessive costs of compliance with Part 845 for a pond that poses no reasonable probability of adverse effects on human health and the environment. *Id.* at 19–29.

Following the filing, IPRG properly and timely published notice of its Petition in a newspaper of general circulation in Canton, Fulton County, Illinois. *See* Petitioner's Certificate of Publication, *In the Matter of: Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard from 35 Ill. Admin. Code Part 845, or In the Alternative, a Finding of Inapplicability*, AS 2021-004. On June 2, 2021, IPRG filed its Certificate of Publication with the

Board, *id.*, and on June 3, 2021, the Board accepted the Petition. Order of the Board at 1 (June 3, 2021), *In the Matter of: Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard from 35 Ill. Admin. Code Part 845, or In the Alternative, a Finding of Inapplicability*, AS 2021-004.

Under 35 Ill. Admin. Code § 104.461(a), the Agency originally had 30 days from the date the Petition was filed to file its Recommendation with the Board. On an uncontested motion, the Agency requested that the Board extend the deadline to file its Recommendation until September 25, 2021, which the Board granted on June 3, 2021. *Id.* at 1. On September 22, 2021, the Agency filed its Recommendation, agreeing that the GMF Recycle Pond *is not* a CCR surface impoundment within the meaning of Part 845 and stating that it does not object to the Board issuing the finding of inapplicability requested by IPRG, subject to the condition that the GMF Recycle Pond not be used to treat, store, or dispose of CCR in the future. *See* Recommendation. Petitioner now files this Response within 14 days of the Agency's Recommendation, as required by 35 Ill. Admin. Code § 104.461(d).

III. FACTUAL BACKGROUND

Duck Creek Power Plant and the GMF Recycle Pond

Duck Creek is a former coal-fired power plant located southeast of Canton, Illinois, which opened in 1976 and closed in 2019. Petition, Exs. 1, 2. In 2007, a GMF Pond and Recycle Pond were installed. Petition Ex. 3 at 2. The GMF Pond served as the wet impoundment basin for gypsum produced by the wet scrubber system at Duck Creek. Petition, Ex. 3 at 2. The GMF Recycle Pond, which was constructed adjacent to the GMF Pond, recycled water from the GMF Pond for use in the facility's wet scrubber system. Petition, Ex. 2. The GMF Recycle Pond is 8.5 acres in area and lined with a 60-mil HDPE geomembrane. Petition, Ex. 3 at 2.

An HPDE-lined earthen transfer channel connects the GMF Recycle Pond to the GMF Pond and allows for clarified process water to be decanted from the GMF Pond into the GMF Recycle Pond. Petition, Ex. 3 at 2–3. Water in the GMF Recycle Pond needed to be clear of sediment in order to be utilized in the wet scrubber system. Petition, Ex. 3 at 3. Throughout the lifetime of the GMF Recycle Pond, it never had to be dredged or cleaned out due to a buildup of sediment, which would have caused operational issues with the scrubber system. *Id.* Further, the GMF Recycle Pond, to the knowledge of Duck Creek personnel, never directly or indirectly received CCR or gypsum. Petition, Ex. 3 at 5.

Bathymetric Survey and Groundwater Monitoring

IPRG has been in discussions with IEPA since July 2020 regarding the proper characterization of the GMF Recycle Pond. These discussions began when IEPA issued a Violation Notice to IPRG alleging that IPRG failed to pay certain initial fees for Duck Creek, arguing that the GMF Recycle Pond is a “CCR surface impoundment” that has not completed closure under 415 Ill. Comp. Stat. 5/22.59 (“Illinois CCR Act”). Petition, Ex. 7. On September 14, 2020, IPRG sent a written response to the Agency, providing the Agency with relevant background on the GMF Recycle Pond that pointed to the strong likelihood that the GMF Recycle Pond contains no CCR, has never been designed to hold CCR, and that sediment of any kind in the GMF Recycle Pond would be of an insignificant volume. Petition, Ex. 8. IPRG proposed an investigation plan consisting of conducting a bathymetric survey to prove that the GMF Recycle Pond contains no meaningful amount of sediment, as well as agreeing to perform sediment sampling should the bathymetric study identify meaningful amounts of sediment. Petition, Ex. 8 at 2.

The bathymetric survey was conducted in November 2020 and found that the GMF Recycle Pond was “clear and still,” with minimal sediment buildup consisting of a “dusting” of sediment along the bottom and sides. Petition, Ex. 3 at 4. The survey noted a slight flattening at the base

of the slope opposite the discharge inlet that was estimated to be approximately 50 cubic yards of sediment. The survey found that the pond was 160,900 cubic yards in volume, with less than 500 cubic yards of potential sediment, accounting for approximately 0.3% of the GMF Recycle Pond's volume. Petition, Ex. 3 at 4. The equipment used to calculate this volume is accurate within 0.1% of depth. Petition Ex. 4 at 2. In analyzing the bathymetric survey, Geosyntec Consultants—experts IPRG contracted to study the GMF Recycle Pond—noted that the small volume of potential sediment in the Recycle Pond “could have been caused by atmospheric dust accumulation.” Petition, Ex. 3 at 4.

Following a review of the design, history, groundwater monitoring, and the bathymetric survey of the GMF Recycle Pond, Geosyntec Consultants concluded the following:

1. The Recycle Pond was not designed to hold an accumulation of CCR.
2. The Recycle Pond does not treat, store, nor is used for disposal of CCR.
3. The Recycle Pond is lined and there are no impacts above the maximum [Part 845 groundwater protection standards].
4. The Recycle Pond does not present a reasonable probability of an adverse effect on human health or the environment.

Petition, Ex. 3 at 5. IPRG provided a copy of the results of the bathymetric survey to IEPA on December 9, 2020 and, at the Agency's request, provided follow up information showing that the bathymetric survey was compared to the as-built construction drawing of the GMF Recycle Pond on March 9, 2021. Recommendation at 6; Petition, Exs. 4, 10.

In its Recommendation, IEPA agreed that this evidence confirms that the GMF Recycle Pond does not fall within Part 845's definition of “CCR surface impoundment.” *See* Recommendation at 7; *see also* 35 Ill. Admin. Code § 845.120 (defining “CCR surface impoundment” as “a natural topographic depression, man-made excavation, or diked area, which *is designed to hold an accumulation of CCR and liquids, and the surface impoundment treats, stores, or disposes of CCR*” (emphasis added)). IEPA reviewed both the bathymetric survey as

well as aerial photos of the GMF Recycle Pond. Recommendation at 6–7. Based on this review, IEPA came to the following conclusions: (1) “The bathymetric survey provides no indication of sediment accumulation or a delta-like alluvial structure in the basin. If CCR had been sluiced in, even incidentally, the Agency would expect to see some measurable accumulation of sediment and/or a delta-like alluvial structure in the GMF Recycle Pond,” (2) “[Based on aerial photos, t]he GMF Recycle Pond does not change in appearance throughout the review period. There are no deltas present, nor visible changes in the unit, in almost ten years. In contrast, other known CCR surface impoundments at the Duck Creek Station had various changes in appearance, including deltas and removals, throughout the same time period.” and (3) “[IEPA] agrees that Petitioner provided sufficient information demonstrating that the GMF Recycle Pond is not a CCR surface impoundment subject to Part 845’s requirements.” *Id.* at 6–7.

IV. FINDING OF INAPPLICABILITY

Previous Board decisions support its authority to grant a finding of inapplicability of its regulations to certain facilities, products, or conditions. *See, e.g.*, Opinion and Order of the Board, *In the Matter of: Petition of Apex Material Technologies, LLC for an Adjusted Standard from Portions of 35 Ill. Adm. Code 807.104 and 810.103, or, in the Alternative, a Finding of Inapplicability*, AS 2015-002 (June 18, 2015) (denying a request for a finding of inapplicability based on the facts before it, not that such a finding would be inappropriate or without Board authority); Opinion and Order of the Board, *In the Matter of Petition of Westwood Lands, Inc. for an Adjusted Standard from Portions of 35 Ill. Adm. Code 807.14 and 35 Ill. Adm. Code 807.104 and 35 Ill. Adm. Code 810.103 or, in the Alternative, a Finding of Inapplicability*, AS 2009-003 (Oct. 7, 2010) (granting request for a finding of inapplicability from solid waste regulations); Opinion and Order of the Board, *In the Matter of Petition of Jo’Lyn Corporation and Falcon Waste and Recycling Inc. for an Adjusted Standard from 35 Ill. Adm. Code 807.103 and 35 Ill. Adm.*

Code 810.103, or in the Alternative, a Finding of Inapplicability, AS 2004-002 (Apr. 7, 2004) (granting a request for a finding of inapplicability from solid waste regulations). The Board should use this authority to grant Petitioner's requested relief because IPRG has shown that Part 845 is inapplicable to the GMF Recycle Pond, the Agency has stipulated that the GMF Recycle Pond is not a CCR surface impoundment subject to Part 845, and the Agency does not object to the Board granting the requested finding of inapplicability.

V. REQUESTED RELIEF

Based on the foregoing facts, as well as the reasons contained in IPRG's Petition and IEPA's Recommendation, Petitioner respectfully requests that the Board enter an order finding that Part 845 is inapplicable to the Duck Creek GMF Recycle Pond because the GMF Recycle Pond is not a "CCR surface impoundment." *See* 35 Ill. Admin. Code § 845.120. IPRG does not object to the order including the Agency's requested condition that the GMF Recycle Pond not be used to treat, store, or dispose of CCR in the future. Additionally, IPRG respectfully requests that, should the Board grant IPRG's request for a finding of inapplicability, it dismiss IPRG's request for an adjusted standard as moot and accept IPRG's withdrawal of its request for hearing.

Respectfully Submitted,
ILLINOIS POWER RESOURCES
GENERATING, LLC.

Dated: October 6, 2021

By: /s/ Sarah L. Lode
One of its attorneys

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