

ILLINOIS POLLUTION CONTROL BOARD
May 18, 2023

IN THE MATTER OF:)
)
PETITION OF MIDWEST GENERATION,)
LLC FOR AN ADJUSTED STANDARD)
FROM 35 ILL. ADM. CODE 845.740(a) AND) AS 21-1
FINDING OF INAPPLICABILITY OF 35) (Adjusted Standard - Land)
ILL. ADM. CODE 845)

ORDER OF THE BOARD (by B. F. Currie):

Midwest Generation, LLC (Midwest, MWG or Petitioner) filed a petition (Pet.) pursuant to Section 28.1 of the Environmental Protection Act (Act) and Part 104 of the Board’s procedural rules. *See* 415 ILCS 5/28.1 (2020); 35 Ill. Adm. Code 104 Subpart D. Midwest petitions the Board for an adjusted standard from Part 845 - Standards for the Disposal of Coal Combustion Residuals (CCR) in Surface Impoundments. 35 Ill. Adm. Code 845. Specifically, Midwest seeks adjusted standards for three ponds, known as Pond 1, Pond 2 and Pond 3, at its Joliet 29 Station in Joliet, Will County. For Pond 2, Midwest petitions for an adjusted standard to retain its existing liner. The Board will address the petition for Pond 2 at a later date. For Ponds 1 and 3, Midwest petitions the Board for a finding of inapplicability of Part 845.

The Illinois Environmental Protection Agency (IEPA or Agency) first filed a recommendation as to the applicability of Part 845 to Pond 1 and 3. IEPA did not object to Midwest’s request for a finding of inapplicability of Part 845 to Ponds 1 and 3. IEPA stipulated that Ponds 1 and 3 were not CCR surface impoundments under Part 845 if they are not used in the future to treat, store, or dispose of CCR. In a separate recommendation, as to Pond 2, IEPA recommended that the Board deny Midwest’s request for an adjusted standard from Part 845.740(a). Alternately, IEPA said that if the Board were to grant the adjusted standard for Pond 2, IEPA recommended that the adjusted standard be conditionally granted for one year, during which time Midwest would be required to perform additional testing. After reviewing the record, testimony, and arguments by the parties, the Board finds that Ponds 1 and 3 are not subject to the provisions of Part 845, as long as the ponds are not used to treat, store, or dispose of CCR in the future. The Board will issue an order regarding Pond 2 at a later date.

In this order, the Board first provides a brief procedural background and a regulatory background. Next, the Board summarizes the petition and recommendations, after which the Board analyzes and provides the reasons for granting the requested relief.

PROCEDURAL BACKGROUND

On May 11, 2021, Midwest filed a petition requesting an adjusted standard and findings of inapplicability as to Ponds 1, 2, and 3 at Joliet 29. On May 17, 2021, notice of the adjusted standard petition was timely published in the *Joliet Herald-News*.

On May 18, 2021, IEPA filed a motion for an extension of time to file its recommendation. On June 3, 2021, the Board accepted Midwest's petition and granted IEPA's request for extension of time.

On August 22, 2021, IEPA filed its recommendation as to Pond 1 and Pond 3 (First Recommendation). Additionally on August 22, 2021, IEPA filed a motion requesting an additional extension of time to file its recommendation as to Pond 2. Midwest did not object to the motion. That motion was granted by the hearing officer. IEPA filed three subsequent motions for extension of time, all unopposed, and all subsequently granted by the hearing officer. On February 4, 2022, IEPA filed its recommendation as to Pond 2 (Second Recommendation).

On March 24, 2022, Midwest filed a response to IEPA's recommendations (Midwest Resp.). On May 20, 2022, a notice of hearing was issued and was subsequently published in the *Joliet Herald-News* on May 24, 2022.

On May 25, 2022, Midwest filed a motion to withdraw its request for hearing as to Ponds 1 and 3, leaving Pond 2 as the focus of the hearing. IEPA did not oppose the motion and the Board subsequently granted the motion. On June 23, the Board filed written questions to Midwest and IEPA in advance of the hearing.

A hearing was held on June 28, and 29, 2022, at the Will County Office Building in Joliet. On July 8, 2022, IEPA filed written answers to the Board's pre-filed questions (IEPA Ans.). On July 22, 2022, Midwest filed written answers to the Board's pre-filed questions (Midwest Ans.).

On September 13, 2022, Midwest filed its post-hearing brief (Midwest Br.). Also on September 13, 2022, IEPA filed its post-hearing brief (IEPA Br.). On October 7, 2022, Midwest filed its response to IEPA's post-hearing brief (Midwest Hr. Resp.).

On January 18, 2023, the Board filed follow-up questions directed at both IEPA and Midwest. On February 2, 2023, both IEPA and Midwest filed written answers (IEPA follow-up Ans., Midwest follow-up Ans.).

On May 4, 2023, the Board issued an order finding that additional testing of Pond 2 was required before making a determination on the substance of the adjusted standard petition for Pond 2. The Board set a four-month deadline for completion of the testing and filing of the results.

REGULATORY BACKGROUND

On April 15, 2021, the Board adopted new regulations regarding the storage and handling of coal combustion residuals (CCR) commonly called "coal ash." *See In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Apr. 15, 2021).* This new Part 845 created Illinois' first Statewide standards for the disposal of CCR in surface impoundments. CCR is generated by coal-fired power plants. The new regulations were adopted pursuant to the Coal Ash Pollution

Prevention Act, which the General Assembly passed and Governor JB Pritzker signed into law in 2019 as Public Act 101-171. 415 ILCS 5/22.59 (2020). The rules of general applicability provide for the protection of public health and the environment in Illinois by establishing a comprehensive State permitting program to govern all aspects of CCR surface impoundments.

Part 845 applies, “to owners and operators of new and existing CCR surface impoundments, including any lateral expansions of CCR surface impoundments that dispose of or otherwise engage in solid waste management of CCR generated from the combustion of coal at electric utilities and independent power producers.” 35 Ill. Adm. Code 845.100(b).

The Act defines “coal combustion residual”, or CCR, as follows, “‘Coal combustion residual’ or ‘CCR’ means fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal and for the purpose of generating electricity by electric utilities and independent power producers.” 415 ILCS 5/3.142 (2020).

Further, the Act defines “CCR surface impoundment” as follows, “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 (2020).

The Board’s regulations define “existing CCR surface impoundment” as follows:

A CCR surface impoundment in which CCR is placed both before and after October 19, 2015, or for which construction started before October 19, 2015 and in which CCR is placed on or after October 19, 2015. A CCR surface impoundment has started construction if the owner or operator has obtained the federal, State, and local approvals or permits necessary to begin physical construction and a continuous on-site, physical construction program had begun before October 19, 2015. 35 Ill. Adm. Code 845.120.

FACTUAL BACKGROUND

Midwest’s Joliet 29 Station is located at 1800 Channahon Road in Joliet, Will County and is adjacent to the Des Plaines River. Joliet 29 is located in an industrial area and operated as a coal-fired power plant from approximately 1965 until March 18, 2016. Pet. at 1, 14, First Recommendation at 35. Midwest became the operator of Joliet 29 in 1999. In 2016, Midwest converted Joliet 29 from a coal-fired power plant to a natural gas electrical generation facility. Pet. at 1. After the conversion, the facility no longer burned coal and ceased to produce coal ash. Pet. at 1.

The three ponds at issue, Ponds 1, 2, and 3, were constructed in 1978 and are located east of the Joliet 29 Station. Pond 1 is approximately 3.9 acres and Pond 3 is approximately 2.7 acres in size. Pet. at 15, 16. When constructed in 1978, each pond was built with a poz-o-pac liner. Poz-o-pac is the trade name for a patented cementitious product and the poz-o-pac at Joliet 29 is made up of three percent hydrated lime, 20 percent fly ash and 77 percent boiler slag aggregate. Second Recommendation at 10.

REQUESTED RELIEF

On May 4, 2023, the Board issued an order requesting additional testing for Pond 2. The Board will issue a determination on the petition for an adjusted standard for Pond 2 once Midwest has filed the results of the additional testing. The subject of this Board order is only the petition for a finding of inapplicability of Part 845 to Ponds 1 and 3.

Midwest seeks a finding that Part 845 of the Board rules is inapplicable to Ponds 1 and 3, as both ponds are process water basins that do not accumulate CCR. Pet. at 1. Midwest claims, “[i]n December 2019, Illinois EPA determined, without consultation with MWG, that both ponds were CCR surface impoundments and issued an invoice for the initial fee pursuant to Section 22.59(j) of the Illinois Environmental Protection Act.” Pet. at 2. Rather, Midwest argues that Pond 1 was emptied and decontaminated of CCR in 2015, prior to the enactment of the new Part 845 rules. Pet. at 2. Pond 3, Midwest argues, has never collected CCR as part of Joliet 29’s operations. Pet. at 2. Pond 3 has been used as a process water basin since it was constructed. *Id.*

RECOMMENDATION

In December 2019, Illinois EPA identified Pond 1 and Pond 3 as CCR surface impoundments based on historic records on file. First Recommendation at 6. However, IEPA now agrees with Midwest that sufficient information has been provided that demonstrates Pond 1 and Pond 3 are not CCR surface impoundments and therefore not subject to Part 845’s requirements. First Recommendation at 9. IEPA says that Midwest has provided sufficient information that Pond 1 and Pond 3 are not CCR surface impoundments, and says that Midwest’s request for an adjusted standard is moot as to Ponds 1 and 3. *Id.* “Illinois EPA stipulates that Pond 1 and Pond 3 are not CCR surface impoundments subject to Part 845 and therefore does not object to the Board granting Petitioner relief, subject to the condition that neither Pond 1 nor Pond 3 be used to treat, store, or dispose of CCR in the future.” *Id.* at 10.

DISCUSSION

The Board will first discuss its authority to make a finding of inapplicability, and then discuss the issue of inapplicability.

Board Authority

The Board previously adopted orders in adjusted standard proceedings that examined the applicability of the Board’s Solid Waste rules. See *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 15-2, slip op. at 51-52 (June 18, 2015); *Westwood Lands, Inc. for and Adjusted Standard from Portions of 35 Ill. Adm. Code 807.104 and 35 Ill. Adm. Code 810.103 or, in the Alternative, a Finding of Inapplicability*, AS 09-3, slip- op at 16 (Oct. 7, 2010); *Jo’Lyn Corporation and Falcon Waste and Recycling for an Adjusted Standard from 35 Ill. Adm. Code Part 807 or, in the Alternative, a Finding of Inapplicability*, AS 04-2, slip op. at 13-14 (Apr. 7, 2005); *Midwest Generation LLC’s Petition for an Adjusted Standard and Finding of Inapplicability for the Powerton Station*, AS 21-2, slip op. at 5-6 (Feb. 17, 2022).

In Midwest, the Board found that a service water basin was used for process water and did not accumulate CCR, so by definition, it was not a CCR surface impoundment. Midwest, slip op. at 6. The Board therefore found that Part 845 of the Board's rules did not apply to the operation of the service water basin. *Id.*

In these cases, the Board examined the record to determine if the Board's regulations applied to the materials or processes at issue. The Board will follow the same analysis here to determine if Part 845 applies to Ponds 1 and 3.

Part 845 Applicability

Both Part 845 and the Act define CCR surface impoundments as areas designed to hold an accumulation of CCR and liquids, and the surface impoundments treat, store, or dispose of CCR. 415 ILCS 5/3.143 (2020); 35 Ill. Adm. Code 845.100(b). The evidence before the Board demonstrates that Pond 1 was emptied of CCR and decontaminated in 2015, meaning it was not an "existing CCR surface impoundment" as defined by Part 845. *See* 35 Ill. Adm. Code 845.120. Additionally, the evidence demonstrates that Pond 3 has never been a surface impoundment as it was used as a process water basin since its construction and has never held CCR.

Therefore, by definition, Ponds 1 and 3 are not CCR surface impoundments. Consequently, the Board finds that Part 845 does not apply to Ponds 1 and 3. The Board notes IEPA's request that both ponds not be used in the future for CCR and will condition this finding by requiring Ponds 1 and 3 never be used for the treatment, storage, or disposal of CCR.

CONCLUSION

After reviewing the record and arguments by the parties, the Board finds that Ponds 1 and 3 are not subject to the provisions of Part 845, as long as the ponds are not used in the future for the treatment, storage, or disposal of CCR.

ORDER

Part 845 of the Illinois Pollution Control Board Regulations does not apply to Ponds 1 and 3, located at Midwest Generation's Joliet 29 Station, 1800 1800 Channahon Road in Joliet, Will County, Illinois, 60436. Ponds 1 and 3 must never be used for the treatment, storage, or disposal of coal combustion residuals.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2020); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final

orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Midwest Generation, LLC Attn: Susan Franzetti, Kristen Gale Nijman Franzetti LLP 10 South LaSalle Street, Suite 3600 Chicago, IL 60603 sf@nijmanfranzetti.com kg@nijmanfranzetti.com	Illinois Pollution Control Board Attn: Don A. Brown, Clerk 60 E. Van Buren, Suite 630 Chicago, Illinois 60605
Illinois Environmental Protection Agency Division of Legal Counsel Attn: Stefanie Diers, Sara Terranova 1021 North Grand Avenue East P.O. Box 19276 Springfield, IL 62794-9276 Stefanie.diers@illinois.gov Sara.terranova@illinois.gov	

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on May 18, 2023, by a vote of 3-0.



Don A. Brown, Clerk
 Illinois Pollution Control Board