

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>PETITION OF MIDWEST GEN, LLC</b>	)	
<b>FOR AN ADJUSTED STANDARD FROM</b>	)	<b>AS 2021-003</b>
<b>35 ILL. ADM. CODE 845.740(a) FOR THE</b>	)	
<b>WAUKEGAN STATION</b>	)	

**NOTICE**

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PLEASE TAKE NOTICE that I have today served the Illinois EPA's Response to Petitioner's Motion to Stay Proceedings.

Respectfully submitted,

Date: September 6, 2023

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PROTECTION AGENCY,

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**ILLINOIS ENVIRONMENTAL PROTECTION AGENCY’S RESPONSE  
TO MIDWEST GENERATION, LLC’S MOTION TO STAY  
PROCEEDINGS**

The Illinois Environmental Protection Agency (“Illinois EPA or Agency”), by one of its attorneys, provides this Response to Midwest Generation, LLC’s (“MWG” or “Petitioner”) Motion to Stay Proceedings and requests that the Illinois Pollution Control Board (“Board”) DENY Petitioner’s motion. In support, Illinois EPA states as follows:

**I. Background**

- 1) Pursuant to 415 ILCS 5/22.59(g)(1), the Board was directed to adopt rules for coal combustion residuals (“CCR”) surface impoundments “at least as protective and comprehensive” as Subpart D of 40 CFR 257 (“Part 257”) and to use Part 257 “as a baseline.” 415 ILCS 5/22.59(g)(1) and *In the Matter of: Standards for Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19* (“R20-19”), Order (February 4, 2021), at 11.
- 2) On April 15, 2021, the Board adopted new regulations providing standards for disposal of CCR in surface impoundments at 35 Ill. Adm. Code 845. R20-19, Final Order (April 15, 2021). The Part 845 rules became effective on April 21, 2021. 45 Ill. Reg. 5884 (May 7, 2021).
- 3) Part 845 complies with the statutory mandate in 415 ILCS 5/22.59(g)(1) using Part 257 as a baseline and written to provide at least the same protection and comprehensiveness as Part 257. R20-19, Order (February 4, 2021), at 11. However, Part 845 remains independent of the federal rule.

- 4) On May 11, 2021, MWG filed a “Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station” (“Petition” or “Pet.”), concerning two areas that Petitioner designated as: (1) the East Pond, and (2) the Grassy Field. *See* Petition at 1.
- 5) On September 17, 2021, MWG filed an “Amended Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station” (“Amended Petition” or “Amd. Pet.”) concerning two areas that Petitioner designated as: (1) the West Pond (instead of the East Pond as originally proposed); and (2) the Grassy Field. *See* Amended Petition at 1.
- 6) On October 31, 2022, Illinois EPA filed with the Board a Recommendation to deny Petitioner’s request for an adjusted standard from Part 845 and deny Petitioner’s request for a finding of inapplicability of Part 845. AS 2021-03, Agency Recommendation (October 31, 2022). Through a fact-based analysis, the Agency applied the criteria of a CCR surface impoundment and demonstrated that both the West Pond and Grassy Field meet the requirements of a CCR surface impoundment and are therefore subject to Part 845.
- 7) On May 18, 2023, in accordance with a consent decree (Consent Decree. *Statewide Organizing for Community Empowerment v US EPA.*, No. 22-cv2526 (D.D.C., May 3, 2023) (“Consent Decree”), the United States Environmental Protection Agency (“U.S. EPA”) proposed language and solicited comments to revise 40 CFR Part 257. 88 Fed Reg 31982 and 32033 (May 18, 2023).
- 8) On July 28, 2023, Petitioner filed a Motion to Stay Proceedings, a Response to the Agency’s Recommendation, and Second Amended Petition for an Adjusted Standard from 35 Ill. Adm. Code 845.740(a) and Finding of Inapplicability of Part 845 withdrawing its request for an adjusted standard allowing the reuse of the West Pond’s existing liner but leaving its request to the Grassy Field.
- 9) On August 10, 2023, the Board granted the Agency’s request for an extension of time to file its response to Petitioner’s motion to stay the proceedings, allowing the Agency to file on September 6, 2023.

**II. Illinois EPA's Opposition to the Requested Stay**

10) Illinois EPA opposes MWG's request to stay the proceedings because 1) of the uncertainties surrounding the U.S. EPA proposal; 2) Part 845 remains applicable independently of Part 257; and 3) Petitioner failed to show no environmental harm.

11) There are various uncertainties surrounding U.S. EPA's proposal. To start, both the date of final action and the content of the final rule are unknown. Petitioner is overstating the certainty that U.S. EPA will take final action regarding the proposed language by May 6, 2024. Petitioner failed to recognize that the May 3, 2023, Consent Decree also contains a provision allowing deadlines to be extended. *See* Consent Decree at 3. Paragraph 6 of the Consent Decree states, "The deadlines established by this consent decree... may be extended... by the Court upon motion by EPA for good cause shown...". *Id.*

12) Depending on the number of comments received during the comment period and the potential issues those comments raise, U.S. EPA may have good cause to extend the deadline to take final action beyond May 6, 2024. In fact, U.S. EPA received over 15,000 comments in an advanced notice period in 2020 regarding this very issue. *See* 88 Fed Reg at 31988. That large number of comments from environmental groups, states, one tribe, individual utilities and industry trade associations is a significant indicator of the wide-spread interest and potential on-going controversy. What's more, it took U.S. EPA three years to review those 15,000 comments and propose a rule. *Id.* Given this level of interest to date, it is entirely reasonable to assume a similar voluminous number of comments could be received again, and the amount of time necessary for U.S. EPA to review and modify the proposed rule could provide good cause to extend the deadlines for final action could extend well beyond May 6, 2024.

13) All proposed federal rules must be published in the in the Federal Register to notify the public and give them an opportunity to submit comments. *See* 5 USC 553(b). The proposed rule and public comments received on it form the basis for the final rule. *Id.* It is common and to be expected that the final

rule will not mirror a proposed rule. Because a final rule often differs from the proposed rule, the notice for the final rule will include a section outlining those major differences.<sup>1</sup>

14) Petitioner is attempting to analyze the impact of proposed language before it has gone through the required rulemaking process. *Id.* Petitioner cannot know the extent of the comments U.S. EPA will receive regarding the proposed language and how those comments might alter the language in any final rule.

15) Second, Illinois EPA opposes MWGs requested stay because Part 845 remains applicable independently of Part 257 and the proposed modifications. Part 845 is governed by the State law, making it imperative for the Board's decision to strictly adhere to the mandates outlined in Section 22.59 of the Illinois Environmental Protection Act (415 ILCS 5/22.59) and Part 845. Since Petitioner's request for an adjusted standard is from the Part 845 requirements, the proposed modifications to Part 257 have no bearing on the issue before the Board.

16) Finally, Petitioner failed to show there is no environmental harm and in fact, demonstrates that the Grassy Field actually poses a threat of further environmental harm. Petitioner states that there are no potable wells down gradient of the station. *See* Motion to Stay Memorandum at 6. The Agency has no information indicating the existence of potable wells down gradient of the Waukegan Station. However, assuming the absence of down gradient potable wells is valid, the only threat eliminated is to human health by consuming the groundwater. The absence of groundwater consumption has no bearing on environmental harm or the need to protect the groundwater resources. *See* 415 ILCS 55/1(b).

17) The Petitioner states that there are Environmental Land Use Controls ("ELUC") to prevent potable use at the station. *See* Motion to Stay at 6. The ELUC is authorized under 35 Ill. Adm. Code 742.1010 and is used to prevent completing certain routes of human exposure to a contaminant. Therefore, the presence

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<sup>1</sup> See, for example, Section VII of the 2015 CCR rule. 80 Fed Reg 21302 at 21428. This section provides a summary of the major differences between the 2010 proposed CCR rule and the 2015 final CCR rule.

of an ELUC means that environmental harm has already occurred or may occur (e.g. potential for migration of contaminated groundwater), and the property owner has taken appropriate steps to ensure that human health will not also be jeopardized.

18) The presence of an ELUC on one parcel of land does not preclude the possible contamination of another parcel of land. The Board has already found that Grassy Field and other fill areas are the likely cause of contamination at monitoring wells MW-5, MW-7, MW-8 and MW-9. *See Agency's Recommendation at 19.*

19) Petitioner's Ex. 35, Table B 4-2 states that the average concentration of Boron, Sulfate, and TDS at monitoring wells MW-5 and MW-7, are 31.9 mg/L, 819 mg/L, 1,950 mg/L and 40.7 mg/L, 639 mg/L and 1,630 mg/L, respectively. These concentrations exceed Class I Groundwater Quality Standards and groundwater protection standards. *See 35 Ill. Adm Code 620.410 and 35 Ill. Adm Code 845.600(a)(1).* Both monitoring wells MW-5 and MW-7 are down gradient of Grassy Field. *See Pet. Ex 37 at 2129/2952.* Monitoring well MW-7 is near the southern property line of the Waukegan Station (*See Pet. Ex. 37 2141/2952 pdf*), indicating that contaminants are most likely moving off-site at concentrations greater than applicable groundwater protection standards.<sup>2</sup>

20) The Petitioner also states that their expert, (Weaver), determined that no ash constituents were reaching Lake Michigan, the nearest water body. *See Motion Pg. 6.* Weaver's assessment of contaminated groundwater migrating towards Lake Michigan used groundwater quality results only from monitoring well MW-1, MW-2, MW-3, MW-4, which are directly down gradient of East Pond. *See Pet. Ex. 37, Figure 8, 2141/2952 pdf.* As displayed in Table B 4-2, the concentrations of Boron in MW-7 are approximately

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<sup>2</sup> The average concentrations listed in Petitioner's Ex. 35, Table B 4-2 at 2050/2952 pdf are for dissolved constituents, which may provide a useful indication of concentrations present, but are typically lower than total metals concentrations, Pet. Ex. 38 at 2941/2952 pdf. Unfiltered samples must be used when conducting human health and ecological calculations. *See U.S. EPA Groundwater Guidance, EQASOP-GW4 Revised September 2017, Pg 19.* The Petitioner's exhibits demonstrate it is likely that harmful environmental conditions are spreading from their property to off-site locations.

20 times higher than Boron concentration in monitoring wells MW-1, MW-2, MW-3 and MW-4. *See* Pet. Ex. 37, 2050/2952 pdf. Weaver provided no evaluation of the potential for migration of CCR constituents to Lake Michigan based on the concentrations found at MW-7, which is down gradient of Grassy Field, Pet. Ex 37 at 2129/2952.

21) Therefore, the Petitioner has provided no support that the Grassy Field is not a threat to water quality and that there is no environmental harm.

22) What Petitioner *has* provided, however, is that the Grassy Field actually poses a threat of further environmental harm. *See* Pet. Ex. 37. Weaver included information from the KRPG 2020 Investigation. *See* Pet. Ex. 37. KRPG drilled 40 borings in Grassy Field. *See* Pet. Ex. 37, Figure 8, 2141/2952 pdf. Only three of the borings A1, A9, and C7 were analyzed for leachable metals. *See* Pet. Ex. 37, Table 4, 2147/2952 pdf. Using the Leaching Environmental Assessment Framework Analysis, all the borings sampled for metals had two or more leachable metals at concentrations above the groundwater protection standards of 35 Ill. Adm Code 845.600(a)(1). *See* Pet. Ex. 37, Table 4, 2147/2952 pdf.

23) Therefore, the Petitioner's own exhibits demonstrate that environmental harm is likely to continue due to the presence of leachable metals in the CCR contained in Grassy Field.

24) The Agency has filed its Recommendation and the Board should now move forward determining if the Grassy Field meets the requirements of a CCR surface impoundment and is therefore subject to Part 845.

25) Based on the reasons stated above, the Agency files this Response requesting MWG's Motion to Stay should be denied.

WHEREFORE, through this Response, Illinois EPA respectfully requests that the Board deny Petitioner's Motion to Stay and move forward with this Adjusted Standard proceeding.

Respectfully submitted,

Date: September 6, 2023

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ILLINOIS ENVIRONMENTAL  
PROTECTION AGENCY,

Respondent,

BY: /s/Sara Terranova  
Sara Terranova

**THIS FILING IS SUBMITTED ELECTRONICALLY**

**CERTIFICATE OF SERVICE**

I, the undersigned, on affirmation state the following:

That I have served the attached ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S RESPONSE TO MIDWEST GENERATION, LLC'S MOTION TO STAY PROCEEDINGS by e-mail upon Susan M. Franzetti, [sf@nijmanfranzetti.com](mailto:sf@nijmanfranzetti.com); Kristen Laughridge Gale, [kg@nijmanfranzetti.com](mailto:kg@nijmanfranzetti.com); and Genevieve J. Essig, [ge@nijmanfranzetti.com](mailto:ge@nijmanfranzetti.com).

That my e-mail address is: [sara.terranova@illinois.gov](mailto:sara.terranova@illinois.gov)

That the e-mail transmission took place before 4:30 p.m. on the date of September 6, 2023.

/s/Sara Terranova

