

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	AS 2021-003
PETITION OF MIDWEST)	
GENERATION, LLC FOR AN)	(Adjusted Standard)
ADJUSTED STANDARD FROM)	
845.740(A) AND FINDING OF)	
INAPPLICABILITY OF PART 845)	

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on March 21, 2024, I electronically filed with the Clerk of the Illinois Pollution Control Board (“Board”) the **ENVIRONMENTAL GROUPS’ POST-HEARING COMMENTS URGING DENIAL OF MIDWEST GENERATION’S PROPOSED ADJUSTED STANDARD**, copies of which are served on you along with this notice.

Dated: March 21, 2024

Respectfully Submitted,

/s/ Jennifer Cassel
 IL Bar No. 6296047
 Earthjustice
 311 S. Wacker Dr., Suite 1400
 Chicago, IL 60606
 (312) 500-2198
 jcassel@earthjustice.org

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	AS 2021-003
PETITION OF MIDWEST)	
GENERATION, LLC FOR AN)	(Adjusted Standard)
ADJUSTED STANDARD FROM)	
845.740(A) AND FINDING OF)	
INAPPLICABILITY OF PART 845)	

**ENVIRONMENTAL GROUPS’ POST-HEARING COMMENTS URGING DENIAL OF
MIDWEST GENERATION’S PROPOSED ADJUSTED STANDARD**

Pursuant to 35 Ill. Adm. Code 101.628(c), 101.110(a), and 104.100, Clean Power Lake County, Earthjustice, Prairie Rivers Network, and Sierra Club (collectively, “Environmental Groups”) submit the following post-hearing comments urging the Board to deny the Third Amended Petition filed by Midwest Generation, LLC (“MWG”) on February 7, 2024 and to direct MWG to comply with Part 845 at all coal combustion residuals (“CCR” or “coal ash”) surface impoundments—including the so-called “Grassy Field” portion of the Old Pond—at the Waukegan Station.

Now in its third iteration, MWG seeks an adjusted standard that would authorize installation of an “engineered cap” over the “Grassy Field” while disregarding fundamental closure performance standards essential to make closure in place a safe and permissible option. The proposed adjusted standard would also exacerbate pollution by further delaying closure based on the false premise that the “Grassy Field” is not already subject to the federal CCR rule, but may be in the future.

The Board should deny this petition for multiple reasons. First, the issuance of any revisions or additions to the federal CCR rule (the “2015 CCR Rule”¹) is irrelevant. As Environmental Groups have explained in prior comments and reiterate here in light of additional evidence in this proceeding, the entire Old Pond—including the portion MWG calls the “Grassy Field”—is already subject to the 2015 CCR Rule.

Second, MWG’s attempts to reopen the Part 845 applicability determination based on purported risk analysis must fail. Illinois lawmakers decided years ago that the risks posed by CCR surface impoundments such as the Old Pond require safeguards that are “at least as protective and comprehensive” as the 2015 CCR Rule.² Accordingly, the Board’s regulations in Part 845 must be applied here.

Third, MWG has not, and cannot, satisfy the standards for the Board to grant an adjusted standard. The so-called “Grassy Field” portion of the Old Pond is decidedly not “substantially

¹ U.S. Environmental Protection Agency, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (Apr. 17, 2015) (“2015 CCR Rule”).

² Public Act 101-0171, eff. 7-30-19 (codified at 415 ILCS 5/22.59(g)(1)).

and significantly different” from the factors the Board relied upon in adopting Part 845; to the extent it differs at all, it is only because it poses *greater* risks than many similar impoundments. Nor can MWG show that its proposed adjusted standard “will not result in environmental or health effects substantially and significantly more adverse” than the effects the Board considered in adopting Part 845. As the Board found nearly five years ago, the “Grassy Field” is a source of ongoing pollution that exceeds Illinois’ groundwater standards, and allowing groundwater to remain in contact with it indefinitely—which MWG’s proposed adjusted standard would do—would lead to continuing pollution far in excess of what Part 845 standards permit. Moreover, as explained herein, the adjusted standard would be inconsistent with the 2015 CCR Rule.

Finally, environmental justice and the public interest demand rejection of MWG’s proposed adjusted standard. There is no ambiguity in the demands of Waukegan residents, who bear so many environmental and social burdens: MWG must not abandon its sludge on the lakefront, in close proximity to a public beach, on a water body that provides drinking water to millions of people. This Board has the authority and the obligation to direct MWG to comply with Part 845 and should do so without any further delay.

1. The Old Pond is already regulated by the 2015 Federal CCR Rule.

- a. The entire Old Pond, including the “Grassy Field,” is a CCR surface impoundment under the 2015 CCR Rule.**

Any new regulations that may be issued by the United States Environmental Protection Agency (“USEPA”) to revise or add to the 2015 CCR Rule are not relevant to this proceeding because the entire Old Pond, including the so-called “Grassy Field,” is already regulated as a CCR surface impoundment. Under the 2015 CCR Rule, a CCR surface impoundment “means 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.”³ This definition is essentially identical to the definition of CCR surface impoundment in the Coal Ash Pollution Protection Act (“CAPPA”)⁴ and Part 845.⁵

As longtime Illinois Environmental Protection Agency (“IEPA”) senior staff members Lynn Dunaway and Darin LeCrone observed, nothing in this definition specifies the amount of time that liquid must be “held” in an impoundment, nor what volume of liquid must “accumulate.”⁶ Abundant evidence shows that the dunes next to Waukegan station were used to receive CCR and sluice water, and that many feet of CCR remain buried in the “Grassy Field.”⁷ Mr. Dunaway and Mr. LeCrone testified that coal-ash-laden water sluiced to the valleys of dunes

³ 40 C.F.R. § 257.53 (emphasis added).

⁴ Public Act 101-0171, eff. 7-30-19.

⁵ 415 ILCS 5/3.143; 35 Ill. Adm. Code 845.120.

⁶ See Transcript of February 13, 2024 Hearing, at 272:1–273:8 (Mar. 5, 2024) (testimony of Mr. Dunaway); *id.* at 317:13–318:3 (testimony of Mr. LeCrone).

⁷ See P.C. #9, Environmental Groups’ Comments In Response to MWG’s Response to IEPA’s Recommendation, at 4–6 (Nov. 1, 2023).

at the Waukegan site would have accumulated for some time before it drained out.⁸ Dunes are not, as MWG would have the Board imagine, a “pasta colander.”⁹

Mr. Dunaway and Mr. LeCrone’s interpretation that the “Grassy Field” is “a natural topographic depression . . . designed to hold an accumulation of CCR and liquids . . . ” is reasonable, consistent with USEPA’s explanation of the type of CCR disposal sites that qualify as CCR surface impoundments,¹⁰ and consistent with CAPP’s directive that its provisions “shall be liberally construed to carry out the purposes of this Section.”¹¹ Accordingly, the “Grassy Field” is a CCR surface impoundment under the 2015 CCR Rule, CAPP, and Part 845.

b. The “Grassy Field” qualifies as an inactive CCR surface impoundment under the 2015 CCR Rule.

The “Grassy Field” also meets the definition of “inactive CCR surface impoundment” under the 2015 CCR Rule. Under that rule, an inactive CCR surface impoundment is a CCR surface impoundment “that no longer receives CCR on or after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015.”¹² As Environmental Groups have previously discussed, voluminous evidence shows that liquid—along with CCR—remains in the “Grassy Field.”¹³ The Board itself observed that groundwater overlaps with CCR in that area of the Waukegan site.¹⁴ Thus, as the plain language of the 2015 CCR Rule and USEPA’s explanations of the rule make clear,¹⁵ the “Grassy Field” is federally regulated as an “inactive CCR surface impoundment.”¹⁶

Contrary to MWG’s assertions during the hearing, nothing in the documents included in the docket for USEPA’s proposed rule concerning legacy impoundments and CCR fill (“the

⁸ See Transcript of February 13, 2024 Hearing, at 277:9–278:17 (Mar. 5, 2024) (testimony of Mr. Dunaway); *Id.* at 321:18–322:24 (testimony of Mr. LeCrone).

⁹ See, e.g., *id.* at 319:21–320:15, 321:18–322:24 (testimony of Mr. LeCrone).

¹⁰ See P.C. #9, Environmental Groups’ Comments In Response to MWG’s Response to IEPA’s Recommendation, at 4–8 (Nov. 1, 2023); *id.*, Attach. A, USEPA, Letter re: Duke Energy’s Gallagher Generating Station, at 1 (Jan. 2021); USEPA, Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,982, 31,992 (May 18, 2023) (“Proposed Legacy Rule”) (explaining that “[a] surface impoundment that, on or after October 19, 2015, has only decanted the surface water would normally still contain liquid if waste is saturated with water. *To the extent the unit still contains liquids, it would be covered by the existing definition of an inactive impoundment.*”) (emphasis added).

¹¹ 415 ILCS 5/22.59(a). The purpose of CAPP is “to promote a healthful environment, including clean water, air, and land, meaningful public involvement, and the responsible disposal and storage of coal combustion residuals, so as to protect public health and prevent pollution of the environment of this State.” *Id.*

¹² 40 C.F.R. § 257.53.

¹³ See P.C. #9, Environmental Groups’ Comments In Response to MWG’s Response to IEPA’s Recommendation, at 4–6 (Nov. 1, 2023).

¹⁴ See *id.*; *Sierra Club v. Midwest Generation, LLC*, Interim Opinion at Order, at 67, PCB 2013-15 (June 20, 2019); MWG’s Response to IEPA’s Recommendation, at 1. n.1 (July 28, 2023) (noting that the “Grassy Field” is the same area as the “Former Slag/Fly Ash Storage Area”).

¹⁵ See P.C. #9, Environmental Groups’ Comments In Response to MWG’s Response to IEPA’s Recommendation, at 4–8 (Nov. 1, 2023); *id.*, Attach. A, USEPA, Letter re: Duke Energy’s Gallagher Generating Station, at 1 (Jan. 2021); Proposed Legacy Rule at 31,992; 2015 CCR Rule at 21,357.

¹⁶ Under the 2015 CCR rule, an inactive CCR surface impoundment is “a CCR surface impoundment that no longer receives CCR on or after October 19, 2015 and still contains both CCR and liquids on or after October 19, 2015.” 40 C.F.R. § 257.53.

legacy rule”)¹⁷ indicates that the “Grassy Field” portion of the Old Pond is not already regulated under the 2015 CCR Rule. Specifically, at the hearing, MWG referenced a document titled “Summary of Potential Universe Comments for Legacy CCRMU NODA, October 2023,”¹⁸ suggesting that this document shows that the “Grassy Field” will be among the units regulated by USEPA under the proposed legacy rule. The document shows nothing of the sort. As Environmental Groups have previously explained, USEPA included a murky reference to the Waukegan site in its list of “potential” CCR Management Units,¹⁹ so Earthjustice submitted comments on that “potential universe” to explain what Environmental Groups have explained here: the “Grassy Field” is already regulated by the 2015 CCR Rule. The fact that USEPA noted Earthjustice’s comments concerning Waukegan in its summary of comments about the potential universe of CCRMU reveals nothing about whether any portion of the Old Pond is properly classified as such.

2. MWG’s attempts to re-litigate the rule based on “risk analysis” fail.

The risks posed by the Old Pond are not subject to debate despite MWG’s attempts to make them so at the February hearing. USEPA relied on its 2014 risk analysis in developing the 2015 CCR Rule, which—with additional protections ordered by the U.S. Circuit Court for the District of Columbia in its 2018 review of the rule—was upheld as providing the necessary protections to protect human health and the environment.²⁰

USEPA, in the D.C. Circuit challenge to the 2015 CCR Rule, expressed its concerns about coal ash contamination of groundwater and the need to protect drinking water resources like the Class I groundwater that the Old Pond is contaminating. “The EPA also expressed concern about the contamination of groundwater that is not currently used as a source of drinking water because ‘[s]ources of drinking water are finite, and future users’ interests must also be protected.’”²¹ Recognizing the leaks from an unlined pond would be very difficult, if not impossible, to pinpoint and quickly halt, the D.C. Circuit directed USEPA to strengthen the 2015 CCR Rule to require such impoundments to close, regardless of whether exceedances of groundwater protection standards were found at those pits.²² Subsequently, USEPA found there to be risks associated with both active CCR surface impoundments and legacy CCR ponds and fill areas:

[A]nother significant source of unquantified benefits [of proposed EPA regulations] comes from the protection and remediation of the groundwater contaminated by a legacy CCR [coal combustion residual] surface impoundment [coal ash pond] or CCRMU [coal combustion residual management unit] as at many sites this groundwater is a potential future source of drinking water or other uses. This is distinct from the benefits associated with reducing the risks from

¹⁷ Proposed Legacy Rule.

¹⁸ MWG’s Exhibits Introduced at Hearing on Feb. 13 and 14, 2024, Ex. 40 (Feb. 20, 2024).

¹⁹ See PC #9, Environmental Groups’ Comments In Response to MWG’s Response to IEPA’s Recommendation, at 3 (Nov. 1, 2023); USEPA, Potential CCR Management Universe, Docket ID No. EPA-HQ-OLEM-2020-0107-0155 (May 17, 2023).

²⁰ *Util. Solid Waste Activities Grp. v. Env’t Prot. Agency*, 901 F.3d 414, 449–50 (D.C. Cir. 2018).

²¹ *Id.* at 428 (citing 80 Fed. Reg. at 21,452).

²² *Id.* at 429–430.

contaminants migrating into drinking water wells or surface waters, reduced risks that rely on the presence of a receptor. As EPA explained in the preamble to the original 1979 regulations, sources of drinking water are finite, and future users' interests must also be protected.²³

With the backdrop of the 2015 CCR Rule and the D.C. Circuit decision, the Illinois legislature and governor determined that Illinois' regulatory scheme must be "at least as protective and comprehensive" as the federal rule; accordingly, Illinois has already weighed the risks and made a reasoned decision to regulate these sites.²⁴ MWG may not second-guess lawmakers' conclusions, nor may MWG rewrite the scope of Part 845—which was just upheld in full by an Illinois appellate court²⁵—in an Adjusted Standard proceeding.

Further, the Board has also concluded that contamination of groundwater, like that caused by the Old Pond, alone establishes environmental risk. There need not be receptors to establish environmental or health risk:

[T]he Board believes that among the most necessary facets of the State's groundwater protection program is the need to protect all drinkable water at a drinkable level. Similarly, the Board does not believe that current actual use should be the sole control of whether potable groundwater is afforded the protection necessary to maintain potability; we simply cannot allow the sully of a resource that future generations may need.²⁶

The Illinois Supreme Court went on to adopt the Board's determination that water pollution exists not only when actual harm has occurred or will occur, but rather whenever "harm *would* occur if the contaminated water were to be used."²⁷

Finally, the Board has already found that there are environmental and health risks posed by MWG's coal ash management and disposal practices:

[A] lack of current receptors at the four sites does not equate to an absence of environmental harm. The focus of [an] enforcement action [against MWG over coal ash contamination at four of its stations], the adopted regulations in Part 845, and the rulemaking sub-docket in R20-19A is the preservation of the water, land and air of the State for future use. The Board holds that simply because there are no current receptors, does not mean there exists no risk of current or future contamination from the facilities.²⁸

Granting an adjusted standard to MWG would exacerbate those environmental and health risks at Waukegan station because they would then be addressed only in lengthy and cumbersome

²³ Proposed Legacy Rule at 31,987.

²⁴ 415 ILCS 5/22.59(g)(1).

²⁵ *Midwest Generation, LLC v. Ill. Pollution Control Bd.*, Ill. App. 4th 210304 (Mar. 13, 2024) ("MWG v. IPCB").

²⁶ Op. and Order, slip op. at 11, R89-14(B) (Nov. 7, 1991) (emphasis in original); 35 Ill. Adm. Code 620 (Groundwater Quality Standards).

²⁷ *Cent. Ill. Pub. Serv. Co. v. Pollution Control Bd.*, 116 Ill.2d 397, 409 (Ill. 1987) (emphasis in original).

²⁸ Order, at 6, PCB 13-15 (Dec. 15, 2022).

enforcement proceedings or go unaddressed.

3. Illinois' rules appropriately cover a broader range of impoundments than the federal rule and apply even if the federal rule did not.

Even if the entire Old Pond were not already federally regulated, the “Grassy Field” portion of that pond is covered by the Board’s Part 845 rules. As discussed above, that area is a “CCR surface impoundment” under both the 2015 CCR Rule and Part 845, as explanations from USEPA and Mr. Dunaway’s and Mr. LeCrone’s testimony make clear.

The area is also an “inactive CCR surface impoundment” under Part 845. In relevant part, under Part 845, an “inactive 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.”²⁹ This differs from the 2015 CCR Rule in that the Board’s definition does not require the unit to still contain both CCR and liquids. The Board weighed voluminous evidence and decided to regulate a broader range of CCR surface impoundments—including those from which liquids had already drained out. In so doing, the Board explained that its definition “is consistent with the federal regulations and provides clarity on the unintended consequence of excluding CCR surface impoundments containing CCR that may have leaked or were drained before the cutoff date.”³⁰ There is no question that MWG has left CCR in place in the “Grassy Field” portion of the Old Pond.³¹ While MWG may not agree with Board’s judgement, Part 845’s definition of “inactive CCR surface impoundment” was just upheld,³² MWG may not contest it in this proceeding.

As explained herein, the evidence in this docket makes clear that there is liquid in the “Grassy Field”—but even if it did not have liquid, the Board determined it is necessary to regulate old inactive impoundments like the so-called “Grassy Field.”

4. MWG has failed to meet the requirements to receive an adjusted standard for the Old Pond.

The burden of proof in an adjusted standard proceeding is on the petitioner—here, MWG.³³ To qualify for an adjusted standard, MWG must prove that:

- factors relating to it are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to MWG;
- the existence of those factors justifies an adjusted standard;
- the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and

²⁹ 35 Ill. Adm. Code 845.120.

³⁰ Op. and Order, at 16, PCB R20-19 (Feb. 4, 2021).

³¹ See, e.g., MWG, Motion to Stay Proceedings, at 3 (July 28, 2023) (acknowledging that that “Grassy Field” is “a historic area of unconsolidated CCR fill”).

³² *MWG v. IPCB*, 2024 IL App (4th) 210304, at *6–*12.

³³ 35 Ill. Adm. Code 104.426.

- the adjusted standard is consistent with any applicable federal law.³⁴

As explained herein and throughout Environmental Groups' comments in this docket, MWG has not proven—and cannot prove—that it satisfies *any* of those standards.

- a. The Old Pond is not different from other regulated sites—if anything, it poses even more risks.

MWG argues: “Finding that the Grassy Field is not a CCR surface impoundment will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board.”³⁵ Yet, there are documented impacts at the Old Pond: ash is in contact with groundwater, and monitoring reveals groundwater contamination that MWG itself attributes to the Old Pond.

MWG conducted sampling at the Old Pond that included 40 soil borings and laboratory analysis of some samples.³⁶ This survey showed coal ash as deep as 17.5 feet below the surface, often in saturated conditions.³⁷ This contact between the waste and groundwater provides a pathway for waste constituents to be dissolved and to migrate out of (or away from) the unit—similar to infiltration from above.

USEPA has long highlighted its serious concerns with leaving waste, and in particular CCR, in contact with groundwater. In the 2015 CCR rule, USEPA included multiple provisions aimed at ensuring that no CCR impoundment (or landfill) is closed in a manner that could allow for continued saturation of CCR. For example, among other mandates, the closure performance standards for “[l]eaving CCR in [p]lace” require owners and operators to eliminate free liquids and to “[c]ontrol, minimize or eliminate, to the maximum extent feasible, post-closure infiltration of liquids into the waste.”³⁸

USEPA had opportunity to underscore its concern with leaving CCR in contact with groundwater in November 2022, when it denied a request for an extension of the “cease receipt of waste” deadline at the Gavin Power plant in Ohio. USEPA based that denial, in part, on its finding that:

Gavin has not demonstrated that it complied with the closure performance standards in 40 C.F.R. 257.102(d) when it closed the Fly Ash Reservoir, a separate CCR surface impoundment at the Gavin Plant, with at least a portion of the CCR in the closed unit in continued contact with groundwater, and without taking any measures to address the groundwater continuing to migrate into and

³⁴ 415 ILCS 5/27(a); *id.* 5/28.1(a); 35 Ill. Adm. Code 104.426(a), 104.428(a).

³⁵ MWG, Pet. at 26 (May 11, 2021).

³⁶ MWG, Exhibits Introduced at Hearing on Feb. 13 and 14, 2024, Ex. 43 (PDF p. 121) (soil boring logs and laboratory analytical results for samples) (Feb. 20, 2024); Transcript of February 13, 2024 Hearing, at 118:17–22 (Mar. 5, 2024) (testimony of Mr. Dorgan).

³⁷ *See* MWG, Ex. 43 at PDF p. 154 (boring log D3, showing “ash and slag” to a depth of 17.5 feet below the surface, accompanied by the descriptor “wet”) (Feb. 20, 2024).

³⁸ 35 Ill. Adm. Code 845.750(a)(1), (b)(1); *see also* 40 C.F.R. §§ 257.102(d)(1)(i), (d)(2)(i).

out of the impoundment.³⁹

Again in May 2023, USEPA reiterated and further explained the risks posed if CCR is left in contact with water. In the preamble of the proposed rule addressing inactive surface impoundments at inactive facilities (legacy CCR surface impoundments) and CCR management units at regulated CCR facilities,⁴⁰ USEPA explained in detail why disposal of coal ash below the water table increases risk relative to other coal ash units. First, coal ash saturated with water, even intermittently, is hydrologically “more like an operating CCR surface impoundment.”⁴¹ Furthermore, saturated conditions can cause the mobilization of arsenic and other pollutants at levels much higher than leach testing would predict.⁴² USEPA ultimately concluded that “it is likely that long-term disposal of CCR below the groundwater table, whether in a closed or partially dewatered impoundment, a closed or inactive landfill, or other method of management, can pose risks similar to or even greater than previously modeled for operating surface impoundments.”⁴³

Illinois’ Part 845 regulations include provisions that mirror the federal closure performance standards aimed at keeping CCR out of contact with water.⁴⁴ As the Board addresses the issue of whether the Old Pond should receive an adjusted standard allowing it relief from the Illinois coal ash rules, the basic hydrological principles that the rules serve to address are directly relevant: leaving ash in contact with groundwater allows for ongoing contamination to continue. As noted herein, that circumstance (CCR in contact with groundwater) is currently present in the “Grassy Field” portion of the Old Pond, and—as described further below—would continue to occur under MWG’s proposed adjusted standard.

Not surprisingly given the saturated CCR in the “Grassy Field” portion of the Old Pond, monitoring at MWG’s Waukegan Station already shows the Old Pond is causing impacts to

³⁹ Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; A Holistic Approach to Closure Part A: Final Decision on Request for Extension of Closure Date Submitted by Gavin Power, LLC, 87 Fed. Reg. 72,989, 72,990 (Nov. 28, 2022). The Board in the present case may take judicial notice of the USEPA’s Gavin decision. *ESG Watts v. Ill. Pollution Control Bd.*, 668 N.E.2d 1015, 1023 (4th Dist. 1996) (upholding the Board’s decision to allow the State to cite nineteen of petitioner’s previous administrative citations in its post-hearing brief without introducing the citations into the record, and reiterating the standard that parties are placed on official notice when facts are of a nature in which “judicial notice may be taken” and grounded in an “administrative order, determination, or judgment.”). The Board adopted a similar, expansive exception in *Illinois v. Panhandle Eastern Pipeline Co.*, at *2, PCB 99-191, 2000 WL 890186 (June 22, 2000) (finding certain information to be public information which a witness “need not testify about this type of information for it to be considered by the Board.”).

⁴⁰ Proposed Legacy Rule.

⁴¹ *Id.* at 32,011. *See also id.* (“[W]here any part of the unit is actually constructed below the water table, the conditions caused by the continuous saturation of the CCR by the groundwater flowing in and out of the unit allow the contaminants in the unit to continuously leach directly into the nearby ground and surface waters, even without any downward pressure from hydraulic head pushing leachate out of the unit.”).

⁴² *Id.* According to the USEPA, “[d]ata collected using LEAF methods, like all standardized leaching tests, tend to reflect oxidizing conditions due to contact between the sample and the atmosphere during sample collection and laboratory analysis.” *Id.* Saturated coal ash, on the other hand, is typically associated with depleted oxygen (i.e., reducing conditions). *Id.* This difference can dramatically affect real-world releases of contamination. For example, in the U.S. EPA database, arsenic concentrations in water intermingled with coal ash below the water table were 200 times higher than LEAF test results from the same ash (4,100 µg/L vs. 20 µg/L).

⁴³ *Id.* at 32,011–012.

⁴⁴ *See* 35 Ill. Adm. Code 845.750(a)-(b).

groundwater. As IEPA pointed out in its Recommendation on MWG’s petition, “[t]he Petitioner doesn’t deny that Grassy Field contains CCR, or that it is a readily identifiable source of CCR contaminants in groundwater.”⁴⁵ Monitoring Well 5 at Waukegan Station provides clear evidence of this. MW-05 was installed along the eastern side of the Grassy Field portion of the Old Pond and the boring for the well went through over 16 feet of “black coal cinders” mixed with other material.⁴⁶ As the Board observed in a different proceeding, “MWG employees testified that they knew this area as a former ash storage area.”⁴⁷ In that proceeding, the Board concluded that the Grassy Field portion of the Old Pond (referred to as the Former Slag and Fly Ash Storage Area) “is contributing to the exceedances in wells MW-1 through 7.”⁴⁸ MWG’s expert even concluded that the potential source of the impacts at MW-05 is the coal ash present in the area: “The grassy field is identified as a potential source for the contamination under MW-5”⁴⁹

Table 1, below, shows the impacts at MW-05 from just one year, 2021—the year MWG filed its adjusted standard petition.⁵⁰

Table 1

Well	Constituent	Date	Concentration (mg/L)	Class I Groundwater Quality Standard (mg/L)	Exceedance	Statewide 90th percentile background (mg/L)	Exceedance
MW-05	Arsenic	3/1/21	0.040	0.01	Yes		
MW-05	Arsenic	5/7/21	0.021	0.01	Yes		
MW-05	Arsenic	8/20/21	0.017	0.01	Yes		
MW-05	Arsenic	11/5/21	0.039	0.01	Yes		
MW-05	Boron	3/1/21	33.00	2.00	Yes	0.7	Yes
MW-05	Boron	5/7/21	33.00	2.00	Yes	0.7	Yes
MW-05	Boron	8/20/21	29.00	2.00	Yes	0.7	Yes
MW-05	Boron	11/5/21	25.00	2.00	Yes	0.7	Yes
MW-05	Sulfate	3/1/21	880	400	Yes	175	Yes
MW-05	Sulfate	5/7/21	850	400	Yes	175	Yes
MW-05	Sulfate	8/20/21	800	400	Yes	175	Yes
MW-05	Sulfate	11/5/21	700	400	Yes	175	Yes
MW-05	TDS	3/1/21	1800	1200	Yes		
MW-05	TDS	5/7/21	1700	1200	Yes		

⁴⁵ IEPA, Recommendation at ¶ 50 (Oct. 31, 2022) (“IEPA Recommendation”).

⁴⁶ Order at 67, PCB 13-15 (June 20, 2019).

⁴⁷ *Id.*

⁴⁸ *Id.* at 69.

⁴⁹ Transcript of February 13, 2024 Hearing, at 121:8–10 (Mar. 5, 2024) (testimony of Mr. Dorgan).

⁵⁰ IEPA Recommendation, Ex. 34, Table 2, p. 5 (PDF p. 200).

MW-05	TDS	8/20/21	1100	1200	No		
MW-05	TDS	11/5/21	1600	1200	Yes		

In sum, the Old Pond is decidedly not “significantly and substantively” different from the bulk of CCR surface impoundments in Illinois that state lawmakers decided must be regulated, nor is it different from the majority of impoundments regulated by Part 845. If anything, given the presence of CCR in contact with groundwater in the “Grassy Field” portion of the Old Pond and the ongoing, documented groundwater contamination from that area, in an environmental justice community with a nearby public beach, on the shores of the drinking water source of millions of people, the “Grassy Field” portion of the Old Pond poses even *greater* risks than other CCR surface impoundments. Moreover, notwithstanding the long, documented history of groundwater pollution from the “Grassy Field,” MWG has never—as IEPA rightly pointed out—taken any action to reduce the contamination coming from the Old Pond or to remediate the contamination present in the groundwater.⁵¹ MWG has not met its burden to qualify for any adjusted standard for the Waukegan Old Pond, much less one that would allow the coal ash in the “Grassy Field” to continue to leach pollutants into groundwater for the indefinite future.

- b. MWG’s proposed adjusted standard would result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability.

Under MWG’s proposed adjusted standard, by the latter of 12 months after the Board’s final order in this matter or April 2025, MWG would “discuss installing an engineered cap over the [“Grassy Field”] at the Waukegan Station, or taking other appropriate action as deemed necessary” This adjusted standard would allow greater pollution than the Board—and the Illinois legislature—deemed acceptable.

To begin with, the adjusted standard would further delay closure of the polluting impoundment, allowing more contamination to enter groundwater. The Board’s Part 845 rules went into effect in May 2021. Under Part 845, the closure construction permit application for Waukegan Station—which MWG acknowledges is in an area of environmental justice concern and thus a “Category 3” site for purposes of the submission deadlines for closure construction permit applications⁵²—was required to be submitted in February 2022.⁵³ If the Board finds, as it should, that the entire Old Pond is and must be regulated under Part 845, it may require MWG to submit a closure construction application for the “Grassy Field” with minimal delay—a directive that would be fully appropriate since the deadline that should have applied to all impoundments at the Waukegan Station passed over two years ago. Under the proposed adjusted standard, in contrast, no closure method would even be proposed until mid to late 2025; possibly later.⁵⁴

⁵¹ IEPA Recommendation at ¶ 51 (“There are exceedances of Section 620.410(a) standards down gradient of Grassy Field (e.g. Boron, Sulfate and TDS), therefore corrective action would be required. To date, the Agency is not aware of any actions voluntarily initiated by MWG to mitigate the release of contaminants from Grassy Field.”).

⁵² See MWG, CCR Residual Surface Impoundment Permit Application, http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/WAU_APE_IPIV.pdf at PDF p. 32 (Jan. 28, 2022).

⁵³ 35 Ill. Adm. Code 845.700(g)(1)(C), (h)(1).

⁵⁴ Environmental Organizations note that, as currently scheduled, final response briefs in this proceeding will not even be submitted, much less considered by the Board, until the end of June of this year. See Hr’g Officer Order (Mar. 13, 2024).

The adjusted standard also would result in substantially and significantly more pollution than would complying with Part 845 because MWG proposes “install[ing] an engineered cap” over the “Grassy Field,” with no mention of satisfying mandates to eliminate free liquids in the impoundment or proposing measures to preclude future impoundment or to control, minimize or eliminate, “to the maximum extent feasible,” infiltration of liquids into the impoundment or releases of CCR or leachate from it. All of those mandates are cornerstone requirements of the 2015 CCR Rule⁵⁵ and Part 845,⁵⁶ as all function to ensure that CCR is not left indefinitely leaching pollutants into groundwater.⁵⁷ Accordingly, the proposed adjusted standard would result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting Part 845.

The Board’s question number 8 to MWG also is relevant here, as the Board should know that MWG’s Alternate Source Demonstrations (“ASDs”) fail to establish that the “Grassy Field” is not a source of pollution. In that question, the Board asks MWG, “a. Has the Grassy Field or the Old Pond been ruled out as possibilities as sources of the contamination? b. If not, would a new ASD be useful in determining whether the Grassy Field or the former Old Pond are the source of contamination?” Before the Board relies on any of the results of any MWG’s ASDs, the Board should be aware of concerns with past MWG ASDs.

First, as stated above, IEPA noted that “[t]he Petitioner doesn’t deny that Grassy Field contains CCR, or that it is a readily identifiable source of CCR contaminants in groundwater. The Petitioner only contests that Grassy Field is a CCR surface impoundment.”⁵⁸

Second, MWG’s ASDs have failed to comply with the 2015 CCR Rule’s requirements. MWG used ASDs as grounds to cease assessment monitoring of Appendix IV constituents and return to detection monitoring.⁵⁹ As USEPA has already identified,⁶⁰ the ASDs fail to comply with the 2015 CCR Rule because they “are not sufficiently supported by site-specific facts and analytical data.”⁶¹ USEPA proposed to conclude that MWG’s 2018 and 2019 ASDs for Waukegan misconstrued the results from the LEAF testing, incorrectly used these results to conclude the ponds are not the source of the SSIs, and failed to specifically identify an alternate source.⁶² USEPA stated that MWG did not properly take either pH or the liquid-to-solid ration “into account as it incorrectly compares concentrations from the downgradient wells to LEAF

⁵⁵ See 40 C.F.R. §§ 257.102(d)(1)(i)-(ii); *id.* § 257.102(d)(2)(i).

⁵⁶ 35 Ill. Adm. Code 845.750(a)(1)-(2); *Id.* 845.750(b)(1).

⁵⁷ See PC #9, Environmental Groups’ Comments In Response to MWG’s Response to IEPA’s Recommendation, at 5–8 (Nov. 1, 2023); USEPA, Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302, 21,357 (Apr. 17, 2015); USEPA, Alabama: Denial of State Coal Combustion Residuals Permit Program, 88 Fed. Reg. 55,220, 55,237 (Aug. 14, 2023) (stating that “allowing groundwater to continue flowing through [CCR] indefinitely will not protect human health and the environment”).

⁵⁸ IEPA Recommendation at ¶ 50.

⁵⁹ *Id.* at ¶ 93. USEPA’s Proposed Decision also found MWG’s ASDs for Waukegan to be deficient and Commenters agree with this finding. USEPA, Memo. soliciting public comment, at 39–45, Docket ID. No. EPA-HQ-2023-0209-0001 (July 4, 2023) (“EPA Proposed Decision”).

⁶⁰ *Id.* at 39–45.

⁶¹ *Id.* at 39.

⁶² *Id.* at 42, 45.

test results.”⁶³ USEPA went on to identify six more specific reasons why the ASDs were inadequate.⁶⁴ In short, USEPA concluded that the ASDs should not have been relied upon to relieve MWG from Appendix IV assessment monitoring and initiating an assessment of corrective measures.⁶⁵ Accordingly, the Board should be exceedingly cautious about relying on any of MWG’s ASDs at the Waukegan Station, or any of MWG’s statements as to what is or is not a source of elevated constituents detected in groundwater monitoring.

Despite their serious flaws, MWG relied on these ASDs to return to detection monitoring and has not monitored total arsenic and lithium under its monitoring program pursuant to the 2015 CCR Rule at Waukegan since November 2017. MWG has, however, continued to monitor those constituents pursuant to a compliance commitment agreement with IEPA, although that method uses measures dissolved rather than total constituents. Groundwater monitoring results reported by MWG under that compliance commitment agreement show dissolved constituents arsenic, boron, sulfate and TDS exceed the state Part 845 GWPS downgradient of the East and West Pond.⁶⁶ For example, dissolved arsenic was reported at 0.043 on April 21, 2020.⁶⁷ Because “[m]easurement of total recoverable metals captures both the particulate [filtered] fraction and dissolved fraction of metals in natural waters,”⁶⁸ the fact that solely the dissolved portion far surpasses the .010 MCL for arsenic indicates that a measurement of total arsenic would likewise exceed the Part 257 standard. At a minimum, these results are troubling, considering the insufficient ASDs.⁶⁹

In sum, MWG’s so-called “Grassy Field” is already leaking dangerous concentrations of pollutants into groundwater and will continue to do so unless MWG fully complies with Part 845 at the site. MWG’s proposal to disregard Part 845’s mandates and simply “cap” the area would result in environmental—and potentially health—effects substantially and significantly more adverse than those that would result if MWG complied with Part 845. The adjusted standard should be denied.

c. The adjusted standard is not consistent with applicable federal law.

Finally, MWG’s proposed adjusted standard should be denied because, as explained herein and elsewhere, the entire Old Pond is already subject to the 2015 CCR Rule. The proposed adjusted standard would not comply with the 2015 CCR Rule because, as noted above, it wholly fails to satisfy multiple fundamental closure requirements designed to keep CCR from leaching indefinitely into groundwater. Unless MWG fully complies with all closure performance standards for closure in place, no closure via “engineered cap” satisfies the 2015 CCR Rule. Therefore, the proposed adjusted standard is not consistent with applicable federal

⁶³ *Id.* at 42.

⁶⁴ *Id.* at 43–46. EPA did not repeat all its findings from the 2018 ASD when assessing the 2019 ASD. Instead, EPA stated “EPA found similar problems for the 2019 ASD as MWG used the same LEAF test results but for calcium and TDS SSIs. Specifically, MWG failed to identify an alternate source for calcium and TDS. For the same reasons outlined above, EPA is proposing to find the 2019 ASD is insufficient . . .” *Id.* at 46.

⁶⁵ 40 C.F.R. § 257.95(g).

⁶⁶ See IEPA Recommendation at ¶ 93.

⁶⁷ See *id.* at Ex. 34, Table 2, at 1 (PDF p. 196).

⁶⁸ 40 C.F.R. 257.93(i).

⁶⁹ See IEPA Recommendation at ¶ 93; *id.* at Ex. 34.

law.

Because MWG has not met, and cannot meet, its significant burden to obtain an adjusted standard, its proposed adjusted standard must be denied.

5. Environmental justice and the public interest demand immediate compliance with the rules.

a. Principles of environmental justice demand immediate compliance with Part 845.

The Old Pond, and Waukegan Station generally, are in an area of environmental justice concern. Chris Pressnall is the Environmental Justice Coordinator for IEPA and administers the IEPA's Environmental Justice ("EJ") Program.⁷⁰ Mr. Pressnall's testimony in the Part 845 rulemaking provided an explanation of Environmental Justice.

Environmental Justice is based on the principle that all people should be protected from environmental pollution and have the right to a clean and healthy environment. Environmental justice is the protection of the health of the people of Illinois and its environment, equity in the administration of the State's environmental programs, and the provision of adequate opportunities for meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.⁷¹

Mr. Pressnall also described what the IEPA's EJ Program does. "[T]he Illinois Environmental Protection Agency's Environmental Justice Program . . . includes screening of regulated sources of pollution to determine if the source is located in an area of environmental justice concern."⁷²

The Waukegan Station is in a designated area of environmental justice concern.⁷³ Mr. Pressnall's testimony on prioritization of coal ash impoundments in overburdened communities explains why coal ash areas that are sources of groundwater contamination pose an environmental justice concern:

Prioritization [of] coal ash impoundments located in areas of environmental justice concern is appropriate given the potential impact of coal ash impoundments on overburdened communities. USEPA defines "overburdened communities" as "minority, low-income, tribal, or indigenous populations or geographic locations in the United States that potentially experience

⁷⁰ IEPA, Notice of Filing and Pre-Filed Testimony, Pre-filed Test. of Chris Pressnall, at 1, R2020-019 (June 1, 2020) ("Pressnall Testimony"). The Board may take judicial notice of Mr. Pressnall's testimony in the R2020-019 rulemaking. *ESG Watts v. Ill. Pollution Control Bd.*, 668 N.E.2d 1015, 1023 (4th Dist. 1996). Mr. Pressnall's testimony—in the public docket for rules that were adopted by the board—is of a nature in which "judicial notice may be taken" and grounded in an "administrative order, determination, or judgment." *Id.* The Board adopted a similar, expansive exception in *Illinois v. Panhandle Eastern Pipeline Co.*, PCB 99-191, 2000 WL 890186, at *2 (June 22, 2000)

⁷¹ Pressnall Testimony at 1–2.

⁷² *Id.* at 1.

⁷³ IEPA, Notice of Filing and Pre-Filed Answers, at 181–82, R2020-019 (Aug. 3, 2020).

disproportionate environmental harms and risks. This disproportionality can be as a result of greater vulnerability to environmental hazards, lack of opportunity for public participation, or other factors. Increased vulnerability may be attributable to an accumulation of negative or lack of positive environmental, health, economic, or social conditions within these populations or places. The term describes situations where multiple factors, including both environmental and socio-economic stressors, may act cumulatively to affect health and the environment and contribute to persistent environmental health disparities.”⁷⁴

The groundwater contamination the Old Pond is causing, combined with the Waukegan Station’s designation as in an area of environmental justice concern, would make granting MWG’s request for an adjusted standard for the Old Pond particularly improper.

b. The public interest demands immediate compliance with Part 845.

At the Waukegan Station, the sources of coal ash contamination have also raised concerns for elected officials and members of the public, further underscoring that an adjusted standard would be unacceptable. Dozens of members of the Waukegan community, coming from a range of sectors and city government, offered unanimous public comments opposed to MWG’s proposed adjusted standard. These extensive comments are recorded in the February 13, 2024 hearing transcript; two will be highlighted here.

First, comments from Dani Abboud, Senior Program Director at the Brushwood Center, further underscore the environmental justice concerns emphasized in CAPP.

[The] Brushwood Center released a report, the Health Equity and Nature Report which showcased that northwestern Lake County including Waukegan is the most overburdened by both environmental and health inequities in our region.

Not only are Black and brown communities like Waukegan facing higher environmental burdens, but they are also facing terrifying health disparities, including the decades-long difference in life expectancy . . . And this decades-long life expectancy difference is in comparison to wealthier, whiter communities only a few miles away who noticeably do not have coal ash ponds in their neighborhood.⁷⁵

Comments from Mayor of Waukegan, Ann Taylor, echo these environmental justice concerns and highlight MWG’s apparent disregard for its profoundly negative impact on the community:

Despite extensive public input, strongly advocating for the complete removal of all coal ash from the site during the public closure hearings, Midwest Generation has maintained its initial decision to leave unlined coal ash at this location.

The company aims to do the bare legal minimum rather than prioritizing what’s right or best for the residents of Waukegan . . . Waukeganites . . . deserve not to

⁷⁴ Pressnall Testimony at 1.

⁷⁵ Transcript of February 13, 2024 Hearing, at 155:19–156:10 (Mar. 5, 2024) (testimony of Mr. Dorgan).

have to worry about what happens to unaddressed coal ash and how it will impact their children and grandchildren in the years to come.⁷⁶

These are just two of the dozens of public comments from members of the Waukegan community who are concerned about coal ash remaining in place at the Waukegan Station and opposed to MWG's proposed adjusted standard for the so-called "Grassy Field." The Waukegan community has lived too long with coal ash leaching contamination into the groundwater at Waukegan station and the Board should act promptly to deny the adjusted standard and require MWG to comply fully with Part 845.

Conclusion

Waukegan's Mayor, a former mayor, a city economic development official, the city clerk, and a broad spectrum of current and former Waukegan residents have made crystal clear that MWG's CCR pollution—among too many other pollution burdens—has plagued them for far too long. MWG's ceaseless attempts to circumvent compliance with safeguards that protect these residents, Lake Michigan, and Illinois' environment more broadly must end. We ask the Board to act as quickly as possible to deny MWG's requested adjusted standard and direct MWG to comply with the protective requirements of Part 845 at all of its impoundments at the Waukegan site, including the "Grassy Field" portion of the Old Pond.

Respectfully Submitted,

/s/ Jennifer Cassel
IL Bar No. 6296047
Earthjustice
311 S. Wacker Dr., Suite 1400
Chicago, IL 60606
(312) 500-2198
jcassel@earthjustice.org

Lauren Piette
IL Bar No. 6330290
Earthjustice
311 S. Wacker Dr., Suite 1400
Chicago, IL 60606
(312) 500-2193
lpiette@earthjustice.org

Mychal Ozaeta
ARDC No. 6331185
Earthjustice
707 Wilshire Blvd., Suite 4300
Los Angeles, CA 90017
(213) 766-1069

⁷⁶ *Id.* at 148:17–150:12 (testimony of Mr. Dorgan).

mozaeta@earthjustice.org

On behalf of Earthjustice

Dulce Ortiz
Clean Power Lake County

Faith E. Bugel
Attorney for Sierra Club
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Andrew Rehn
Prairie Rivers Network
1605 South State St, Suite 1
Champaign, IL 61820
(217) 344-2371 x 8208
arehn@prairierivers.org

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	AS 2021-003
PETITION OF MIDWEST)	
GENERATION, LLC FOR AN)	(Adjusted Standard)
ADJUSTED STANDARD FROM)	
845.740(A) AND FINDING OF)	
INAPPLICABILITY OF PART 845)	

CERTIFICATE OF SERVICE

The undersigned, Jennifer Cassel, an attorney, certifies that I have served by email the Clerk and by email the individuals with email addresses named on the Service List provided on the Board's website, *available at* <https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=17032>, a true and correct copy of the **ENVIRONMENTAL GROUPS' POST-HEARING COMMENTS URGING DENIAL OF MIDWEST GENERATION'S PROPOSED ADJUSTED STANDARD**, before 5 p.m. Central Time on March 21, 2024. The number of pages in the email transmission is 19 pages.

Dated: March 21, 2024

Respectfully Submitted,

/s/ Jennifer Cassel
 IL Bar No. 6296047
 Earthjustice
 311 S. Wacker Dr., Suite 1400
 Chicago, IL 60606
 (312) 500-2198
 jcassel@earthjustice.org

SERVICE LIST

Don Brown
Clerk of the Board
Don.brown@illinois.gov
Brad Halloran
Hearing Officer
Brad.Halloran@illinois.gov
Illinois Pollution Control Board
60 E. Van Buren St., Suite 630
Chicago, Illinois 60605

Charles Gunnarson
General Counsel
Charles.Gunnarson@Illinois.gov
Stefanie N. Diers
Deputy General Counsel
Stefanie.diers@illinois.gov
Sara Terranova
Assistant Counsel
sara.terranova@illinois.gov
Rebecca Strauss
Assistant Counsel
Rebecca.Strauss@illinois.gov
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794

Susan M. Franzetti
sf@nijmanfranzetti.com
Kristen Laughridge Gale
kg@nijmanfranzetti.com
Genevieve J. Essig
ge@nijmanfranzetti.com
Nijman Franzetti LLP
10 South LaSalle Street
Suite 3400
Chicago, IL 60603