

ILLINOIS POLLUTION CONTROL BOARD

February 17, 2022

IN THE MATTER OF: )  
                            )  
PETITION OF ILLINOIS POWER     )  
RESOURCES GENERATING, LLC FOR AN )  
ADJUSTED STANDARD FROM 35 ILL.     )     AS 21-4  
ADM. CODE PART 845, OR IN THE     )     (Adjusted Standard)  
ALTERNATIVE, A FINDING OF     )  
INAPPLICABILITY     )

OPINION AND ORDER OF THE BOARD (by M. Gibson):

Illinois Power Resource Generation, LLC (Illinois Power) filed a petition (Pet.) for an adjusted standard 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. Illinois Power requests a finding of inapplicability of 35 Ill. Adm. Code 845 for its Gypsum Management Facility (GMF) Recycle Pond at the Duck Creek facility. Pet. at 11-19. In the alternative, Illinois Power requests an adjusted standard exempting the GMF Recycle Pond from the requirements of 35 Ill. Adm. Code 845. Pet. at 20-29.

The Illinois Environmental Protection Agency (IEPA) filed a recommendation agreeing that Part 845 is inapplicable to the GMF Recycle Pond. After reviewing the record and the arguments by the parties, the Board finds that the GMF Recycle Pond is not subject to the Part 845 rules, on the condition that the GMF Recycle Pond not be used in the future for the treatment or storage of coal combustion residuals (CCR).

The Board will briefly describe the procedural background, and then move on to the regulatory background. The Board will then iterate the factual background before proceeding to the requested relief and recommendation. The Board will conclude by discussing its decision and stating the conclusion.

**PROCEDURAL BACKGROUND**

On May 11, 2021, Illinois Power filed its petition for an adjusted standard. Notice of the requested adjusted standard was timely published in the *Daily Ledger* on May 25, 2021.

On September 22, 2021, IEPA timely filed its recommendation (Rec.) indicating its agreement that the Part 845 rules were inapplicable to the GMF Recycle Pond.

On October 6, 2021, Illinois Power filed a response (Resp.) to the recommendation.

**REGULATORY BACKGROUND**

The Board adopted new Part 845 creating Illinois' first Statewide standards for the disposal in surface impoundments of coal combustion residuals (CCR), commonly called "coal ash," which is generated by coal-fired power plants. The Board adopted the rules 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. For example, Part 845 regulates the location, design, construction, operation, closure, and post-closure care of CCR surface impoundments, as well as the remediation of releases from those impoundments. Part 845 also requires that impoundment owners or operators supply financial assurance to ensure payment of closure, post-closure care, and remediation costs. In addition, Part 845 provides for meaningful public participation in the permitting process, along with requirements to prioritize CCR surface impoundment closures in areas of environmental justice concern.

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). CCR surface impoundments are defined by the Act as:

"CCR surface impoundment" or "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 surface impoundment treats, stores, or disposes of CCR. 415 ILCS 5/3.143 (2020).

The rules define existing CCR surface impoundment as:

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**

The Board first describes the facility and the GMF Recycle Pond at issue in this proceeding. The Board then sets forth the steps taken to address the issue of whether or not the GMF Recycle Pond is a CCR impoundment.

### **Recycle Pond**

The GMF Recycle Pond is located within the Duck Creek Power Station (Duck Creek) near Canton, Tazewell County. Pet. at 1. Duck Creek is a former coal-fired plant that operated from 1976 to 2019. *Id.* at 2. The GMF Pond is 2.5 miles north of Duck Creek and served as the

wet impoundment basin for gypsum produced by the wet scrubber system at Duck Creek. *Id.* at 3. The GMF Recycle Pond was installed adjacent to the main GMF pond in 2007 to handle the waste from a new wet scrubber system. The GMF Recycle Pond was used to recycle water from the GMF Pond for subsequent use in the wet scrubber system. *Id.* at 2.

The GMF Recycle Pond was specifically designed to receive clarified process water from the GMF Pond through a HPDE-lined earthen transfer channel. Pet. at 3; Pet. Exh. 3 at 2. The process water was decanted from the GMF Pond into the GMF Recycle Pond. *Id.* After further clarification in the GMF Recycle Pond, the clarified water was returned back to the plant via pipeline for use in the wet scrubber system during plant operations. *Id.* During plant shut-down, water from the GMF Recycle Pond was recirculated to the top of the gypsum stack in the GMF pond. *Id.*

Illinois Power contracted with Geosyntec consultants (Geosyntec) to determine if the GMF Recycle Pond: 1) is designed to hold CCR; 2) assess the amount of sediment in the GMF Recycle Pond; and, 3) assess whether the GMF Recycle Pond presents a probability of an adverse effect on human health or the environment. Pet. Exh. 3 at 1. Geosyntec provided Illinois Power with a *de minimis* certification letter. Pet. Exh. 3. In that letter, Geosyntec notes that the water in the GMF Recycle Pond was necessarily clear of sediment (CCR or otherwise) to be utilized in the wet scrubber system. Pet. at 3; Pet. Exh. 3 at 2. Further, Illinois Power explains that the GMF Recycle Pond was never dredged or cleaned throughout its lifetime to remove any buildup of sediment. Illinois Power adds that such a buildup would have caused operational issues with the scrubber system. Pet. at 4; Pet. Exh. 3 at 2.

### **IEPA Violation Notice**

On July 28, 2020, IEPA issued a violation notice to Illinois Power alleging that Illinois Power failed to pay the initial fees required under Section 22.59(j)(1) of Act (415 ILCS 5.22.59(j)(1) (2020)). Pet. Exh. 7. Section 22.59(j) of the Act required owners of CCR surface impoundments to post a performance bond or security to cover potential closure and remediation of the CCR surface impoundments. On September 14, 2020, Illinois Power responded to IEPA, explaining that the recycle pond was not designed to hold an accumulation of CCR and liquids, and that the GMF Recycle Pond did not treat, store, or dispose of CCR. Pet. at 9; Pet. Exh. 8. Illinois Power further indicated that there was a strong likelihood that the GMF Recycle Pond contains no CCR, and if it did by chance contain CCR, the amount would be *de minimis*. *Id.* Illinois Power proposed that a bathymetric survey of the GMF Recycle Pond be conducted to demonstrate that the GMF Recycle Pond did not contain a meaningful amount of CCR. Pet. at 10; Pet. Exh. 8.

### **Bathymetric Survey**

In November of 2020, a bathymetric survey was conducted by IngenAE. Pet. Exh. 3 at 4; Pet. Exh. 4. IngenAE surveyed the existing conditions of the area within the containment banks of the GMF Recycle Pond, including the containment banks themselves, to develop an existing conditions surface and perform a volume calculation between the existing conditions surface and

the bottom of gypsum within the pond. Pet. Exh. 4 at 1. The results of the survey were evaluated by Geosyntec.

Geosyntec's evaluation indicates "no significant sediment accumulation around the discharge channel inlet where the most sedimentation would have occurred if the unit was designed to receive CCR from the GMF Stack Pond." Pet. Exh. 4, *citing* Pet. Exh. 3, Figures 1 and 2. Further, a site inspection conducted December 1, 2020 indicated no significant accumulation of sediment present in the GMF Recycle Pond. *Id.* Based on the bathymetric survey results and site inspection, Geosyntec estimates less than 500 cubic yards of sediment could have been deposited in the GMF Recycle Pond due to atmospheric dust accumulation. *Id.* Geosyntec notes that the volume of possible accumulation of sediment represents approximately 0.3% of the total volume of the GMF Recycle Pond. *Id. citing* Pet. Exh. 3, Figure 3.

### **Groundwater Monitoring.**

Geosyntec also notes that the GMF Recycle Pond is part of an on-going groundwater monitoring program for the GMF Pond that includes monitoring wells located upgradient and downgradient of both ponds. Pet. Exh. 3 at 4. Geosyntec notes that sampling the monitoring wells downgradient of the GMF Recycle Pond began in January 2019 and the latest samples were collected in August 2020. *Id.* The groundwater sampling results of the various monitored parameters were compared against the proposed Part 845 groundwater protection standards to evaluate any groundwater impacts. *Id.* Geosyntec notes that the results for over the past year show that except for one pH exceedance, the maximum concentrations of all other parameters were below the GWPS. *Id.*

### **REQUESTED RELIEF**

Illinois Power requests that the Board make a finding of inapplicability of Part 845 requirements to the GMF Recycle Pond because the pond does not fall under the regulatory definition of CCR surface impoundment. Alternatively, Illinois Power requests that the Board grant an adjusted standard exempting the GMF Recycle Pond from Part 845 requirements. Pet. at 11.

### **RECOMMENDATION**

IEPA states that it has no objections to the Board granting the requested relief by making a finding of inapplicability because the GMF Recycle Pond is not a CCR surface impoundment under Part 845. Rec. at 1. However, IEPA recommends that the Board condition the requested relief by requiring that the GMF Recycle Pond not be used to treat, store, or dispose of CCR in the future. *Id.* While the GMF Recycle Pond was identified as a CCR surface impoundment based on historic records in December 2019, IEPA later allowed Illinois Power to demonstrate that the GMF Recycle Pond does not contain CCR. *Id.* at 5. This allowance, IEPA notes, triggered Illinois Power's investigation plan to determine the content of the GMF Recycle Pond, including the performance of the bathymetric survey, to demonstrate that the pond is not a CCR surface impoundment. *Id.* at 6.

IEPA notes that the bathymetric survey results are based on a comparison with the as-built construction drawing of the GMF Recycle Pond to show any sediment accumulation. In this regard, the bathymetric survey does not indicate sediment accumulation or presence of a delta-like alluvial structure, which would indicate presence of CCR accumulation. Rec. at 6. Additionally, IEPA states that a review of historic aerial photos of the GMF Recycle Pond taken between 2009 and 2017 shows no visible changes, including any presence of deltas in that period. *Id.* at 7 citing Rec. Exh. D. In contrast, IEPA notes that “other known CCR surface impoundments at the Duck Creek Station had various changes in appearance, including deltas and removals, throughout the same time period.” *Id.* at 7. Therefore, IEPA agrees with Illinois Power that the GMF Recycle Pond is not a CCR surface impoundment and is not subject to Part 845. Rec. at 7. Because Illinois Power provided sufficient information to demonstrate that the GMF Recycle Pond is not a CCR surface impoundment, IEPA states the request for an adjusted standard is no longer necessary and it did not evaluate the adjusted standard information. *Id.*

## **DISCUSSION**

The Board will first discuss its authority to make a finding of inapplicability, and then discuss the issue of inapplicability. The Board then explains its reasons for not reviewing the factors necessary to evaluate an adjusted standard.

### **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, AS09-3, 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).

In Jo’Lyn, the Board found that the petitioner’s processes of grinding granulate bituminous shingle material (GBSM) into dust control and paving applications did not constitute a waste, and the solid waste rules did not apply. Jo’Lyn, slip op. at 14. Likewise, in Westwood, the Board found that steelmaking slag fines Westwood processes to produce coarse and fine metallic fractions in bulk, nugget, and briquette form to be used for steel manufacturing are not a waste under specified conditions. Westwood, slip op. at 16. In Apex, the Board found that the solid waste rules were applicable as the petitioner failed to demonstrate that the process was outside the solid waste regulations. Apex, slip op. at 52.

In each case the Board examined the record to determine if the Board’s Solid Waste regulations applied to the materials or processes at issue. The Board will follow the same analysis here to determine if Part 845 applies to the GMF Recycle Pond.

### **Part 845 Applicability to the Recycle Pond**

The Board adopted Part 845 to address the issues facing the State from CCR impoundments in the State. The definition of Surface Impoundment in Part 845 and in the enabling statute specifically defines a CCR surface impoundment as an area designed to hold an accumulation of CCR and liquids, and the surface impoundment treats, stores, or disposes of CCR. 415 ILCS 5/3.143 (2020); 35 Ill. Adm. Code 845.100(b). The evidence before the Board demonstrates that the GMF Recycle Pond was not designed for, nor has it received, any CCR residue. By definition, the GMF Recycle Pond is not a CCR surface impoundment. Therefore, the Board finds that Part 845 does not apply to the GMF Recycle Pond. The Board is cognizant of IEPA's concern that the pond not be used in the future for CCR and will condition this finding by requiring that the GMF Recycle Pond never be used for the treatment, storage, or disposal of CCR.

### **Requested Adjusted Standard**

The IEPA did not offer a recommendation on Illinois Power's request for an adjusted standard, as IEPA agrees with Illinois Power an adjusted standard is not necessary. The Board will not examine the factors necessary for a petitioner to receive an adjusted standard in this proceeding. The Board agrees with Illinois Power and IEPA that because the rules do not apply to the GMF Recycle Pond, an adjusted standard is not necessary.

### **CONCLUSION**

After reviewing the record and the arguments by the parties, the Board finds it has the authority to make a finding of inapplicability of the rules, as requested by Illinois Power. Based on this record, the Board finds that the GMF Recycle Pond is not subject to the Part 845 rules. The Board's finding is conditioned upon the GMF Recycle Pond never being used for the treatment, storage, or disposal of coal combustion residuals.

### **ORDER**

The provisions of 35 Ill. Adm. Code 845 do not apply to Illinois Power Resource Generation, LLC Gypsum Management Facility Recycle Pond located at the Duck Creek Power Station near Canton, Tazewell County. The GMF Recycle Pond 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) (2018); *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.

<b>Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court</b>	
<b>Parties</b>	<b>Board</b>
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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on February 17, 2022, by a vote of 5-0.

Don A. Brown  
 Don A. Brown, Clerk  
 Illinois Pollution Control Board