

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	AS 2021-003
Petition of Midwest Generation)	
for an Adjusted Standard from 845.740(a))	
and a Finding of Inapplicability of Part 845)	(Adjusted Standard)
(Waukegan Station))	

To: See attached service list.

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Illinois Environmental Protection Agency's POST-HEARING BRIEF, a copy of which is herewith served upon you.

Dated: May 14, 2024

Respectfully submitted,
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PROTECTION AGENCY,

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THIS FILING IS SUBMITTED ELECTRONICALLY

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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) AS 2021-003
Petition of Midwest Generation)
for an Adjusted Standard from 845.740(a))
and a Finding of Inapplicability of Part 845) (Adjusted Standard)
(Waukegan Station))

ILLINOIS EPA’S POST-HEARING BRIEF

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ("Illinois EPA" or "Agency") by and through its counsel and submits its Post-Hearing Brief in the above captioned case. Illinois EPA states as follows:

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 (“Part 845”). R-20-19, Final Order (April 15, 2021). The Part 845 rules became effective on April 21, 2021. 45 Ill. Reg. 5884 (May 7, 2021).
3. While independent of the federal rule, Part 845 complies with the statutory mandate in 415 ILCS 5/22.59(g)(1) and is based on Part 257 and written with “at least the same protection and comprehensiveness” as Part 257. R20-19, Order (February 4, 2021), at 11.

4. On May 11, 2021, Petitioner filed a “Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station” (“Petition” or “Pet.”), concerning two areas that Petitioner designates as: (1) the East Pond, and (2) the Grassy Field. *See* Petition at 1.
5. On September 17, 2021, Petitioner 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 designates 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, the Agency filed its Recommendation.
7. On July 28, 2023, Petitioner filed its Response to the Agency Recommendation (“MWG Response”).
8. On the same day, Petitioner filed a “Motion to Stay Proceedings and Memorandum in Support of Its Motion to Stay Proceedings” (“Motion to Stay”).
9. On the same day, Petitioner also filed a “Second Amended Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station” to withdraw its request for an adjusted standard to allow Petitioner to decontaminate and retain the existing liner of the West Pond at its Waukegan Station.
10. On September 6, 2023, the Agency filed a Response to Petitioner’s Motion to Stay.
11. On October 5, 2023, the Board denied MWG’s Motion to Stay, finding that the Board is able to consider an adjusted standard during the same time period a federal rulemaking is occurring.
12. On February 13, 2024, and February 14, 2024, a hearing was held in Waukegan on the issue of the applicability of Part 845 to the Grassy Field.

13. On March 13, 2024, the Board ordered that simultaneous opening post-hearing briefs were to be filed by May 14, 2024, and simultaneous response briefs were to be filed by June 27, 2024.

DEFINITIONS

14. A “CCR surface impoundment” is defined as a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the surface impoundment treats, stores, or disposes of CCR. 415 ILCS 5/3.143, 35 Ill. Adm. Code 845.120, and 40 CFR 257.2.

15. An “Inactive CCR surface impoundment” is defined as a CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains CCR on or after October 15, 2015.” Inactive CCR surface impoundments may be located at an active facility or an inactive facility. 35 Ill. Adm. Code 845.120.

ARGUMENTS

Petitioner has the burden of proof in an adjusted standard case. 415 ILCS 5/28.1(c). Therefore, Illinois EPA does not have to provide a single piece of evidence or testimony and the Board could still deny Petitioner’s request for an adjusted standard. All that is required of Illinois EPA is the recommendation, which was filed on October 31, 2022.

In this case, Petitioner has failed to meet its burden of proof under Section 28.1(c) of the Environmental Protection Act (“Act”). Since 35 Ill. Adm. Code § 302.122(b) does not provide a specific level of justification required by a petitioner to obtain an adjusted standard, the level of the justification requires Petitioner to present adequate proof of the following under Section 28.1(c) of the Act:

- (1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;

- (2) the existence of those factors justifies an adjusted standard;
- (3) 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
- (4) the adjusted standard is consistent with any applicable federal law.

If any one of the four elements have not been adequately proven, the Board must deny the adjusted standard. In this case, the Petition fails at the first of these four elements. Petitioner has failed to provide adequate proof that the Grassy Field is not a CCR surface impoundment, thus it has failed to provide adequate proof that factors relating to this matter are at all different from the factors relied upon by the Board in adopting Part 845. Considering that the factors described to in the first element do not exist, the second element cannot be met. So, Petitioner fails on at least two of the four required elements. Therefore, Petitioner's request for an adjusted standard request on the issue of applicability of Part 845 to the Grassy Field must be denied.

It is possible that the Board may find that the adjusted standard framework is no longer appropriate for this matter, as the "finding of inapplicability" portion of the original Petition is separate from the issue regarding the East Pond's liner, which is more clearly an adjusted standard issue. In the current matter, the issue is not whether the Grassy Field should be regulated differently under Part 845; rather, it is whether the Grassy Field should be regulated under Part 845 at all. If the Board finds that an adjusted standard analysis is inappropriate for determining the outcome of the matter, then the sole question at issue here is whether the Grassy Field is a CCR surface impoundment, which will in turn determine whether Part 845 is applicable to it.

THE GRASSY FIELD IS A CCR SURFACE IMPOUNDMENT

Petitioner is correct in its historical recounting that "well before the Illinois EPA proposed the Illinois CCR Rule, there was a flat area of grass located to the west of the West Pond called

the ‘Grassy Field’.” *See* Petition at 10. However, well before the Grassy Field was graded and seeded (*See* Agency Exhibit 33) a CCR surface impoundment- which the Agency has historically referred to as Old Pond- existed and operated in this area. *See* Agency Exhibit 2 to the Recommendation; Petitioner’s Exhibit 19 to the Petition. This now inactive CCR surface impoundment comprises the areas of the Grassy Field, East Pond, and West Pond. *See* Agency Exhibit 5. This now inactive CCR surface impoundment has also been referred to in various permit documents as the “Slag-ash Field” or “Settling Basin,” or “ash Pond”. *See* Agency Exhibits 32, 33, 35, 36, 38, and 39 to the Recommendation.¹

Though the Agency has used the term “Old Pond” to refer to this area in other pleadings related to the current matter, Petitioner takes issue with this name and argues that the area is not accurately categorized as a “pond”. February 13, 2024 Hearing, Testimony of Sharene Shealey, p. 40. To avoid confusion, the Agency will refer to this area as the “Original Slag Field,” adopting the same language Mr. Tom Dehlin used to describe the area at the February 14 hearing. February 14, 2024 Hearing, Testimony of Tom Dehlin, p. 32. Whether we call this CCR surface impoundment a pond is immaterial; it need not be a pond in order to be a CCR surface impoundment.

Based on measurements from aerial photos, the Original Slag Field originated as a 30-acre sand dune field off the Lake Michigan shoreline. *See* Agency Exhibit 1 to the Agency Recommendation; Petitioner’s Exhibit 18 to the Petition. Over time, liquid and CCR were

¹ Agency Ex.35 at 10 “ash Pond”; Exhibit 36 at 28 “slag-ash field”; Agency Ex. 32 at 3 “slag-field and settling basin”, Id. at 5 “settling basin (slag field) ; Id. at 10/ “slag field and settling basin”, ID. at 17 “slag field (settling basin)”, Agency Exhibit 38 at 4 “slag field and settling basin” , Id. at 8 “Ash Settling Pond” , Id. at 104 “settling basin” ; Exhibit 33 at 23 “the existing ash pond will be modified to pond will be modified to provide for easier and redundant operations. The existing single pond will be split into two separate ponds ... each about 10 acres” Exhibit 39 at 11 “Ash Pond”).

deposited within the entirety of the Original Slag Field. *Id.* Eventually, the Original Slag Field was modified and divided into three, approximate 10-acre areas. *See* Agency Exhibit 4 to the Agency Recommendation; Petitioner's Exhibit 21 to the Petition. The western third of the Original Slag Field became the Grassy Field, which was ultimately graded and seeded with no further modification or construction. *See* Agency Exhibit 41 to the Recommendation at 4; Agency Exhibit 45 to the Recommendation at 13. The eastern two-thirds of the Original Slag Field became what is now known as the East Pond and West Pond, two operational CCR surface impoundments. *See* Agency Exhibit 45 to the Recommendation at 13; Agency Exhibit 33 to the Recommendation at 23.

Petitioner asserts that the Grassy Field does not meet the definition of a CCR surface impoundment and is therefore “seeking an adjusted standard finding that the CCR rules are inapplicable to the Grassy Field.” *See* Petition at 2. However, as outlined above, because the Grassy Field sits within the footprint of the Original Slag Field, it must first be established whether the Original Slag Field is a CCR surface impoundment under Part 845. If the Original Slag Field is a CCR surface impoundment, then the Grassy Field is also a CCR surface impoundment.

Part 845 is based on Part 257 and provides at least the same protection and comprehensiveness as Part 257. Therefore, one must look to the preamble of Part 257 to examine the definition of a CCR surface impoundment and its intended applicability. R20-19, Order (February 4, 2021), at 11. “The final definition [of a CCR surface impoundment] makes extremely clear the impoundments that are covered by the rule, so an owner or operator will be able to easily discern whether a particular unit is a CCR surface impoundment.” 80 Fed. Reg. 21357 (April 17, 2015). The United States Environmental Protection Agency (U.S. EPA) provided: 1) examples of CCR surface impoundments, 2) stated how CCRSIs are used, and 3) provided an applicable

scenario of how the definition could be met. *Id.* “Examples of CCR surface impoundments are holding, storage, settling and aeration pits, ponds, and lagoons.” 80 FR 21357 (April 17, 2015).

A settling pond is a type of waste treatment system designed to either convey or retain, concentrate, settle, reduce, or remove pollutants, either actively or passively, from wastewater prior to discharge (or eliminating any such discharge). 40 CFR 120.2(3)(xv). Historical documentation characterizes the Original Slag Field as a settling pond. See Agency Exhibit 32 at 5 and 17, Agency Exhibit 36 to the Recommendation at 28; Agency Exhibit to the Recommendation 38 at 4.

By 1946, the Original Slag Field utilized the natural topographic depression within the dune field to settle CCR from sluice water prior to discharge. *See* Agency Exhibit 2. The water from the sluiced wastewater was treated by settling out the solid CCR prior to discharge. *See* Agency Exhibit 2 to the Recommendation; Petitioner’s Exhibit # 19 to the Petition. As the CCR sluice water flowed into the depressions, the naturally sandy conditions allowed the water to slow down and ultimately infiltrate into the ground. Fast moving water, such as in the sluice lines, can carry a larger sediment load, in the instance of the Original Slag Field the sediment was CCR. When the water entered the Original Slag Field, it slowed down and lost energy, causing the CCR to settle out of the water as it flowed across the dunes and into the dune swales, thus treating the CCR sluice water and leaving CCR behind. The CCR was stored in the bottom of the natural depressions. *See* Agency Exhibit 2 to the Recommendation; Petitioner’s Exhibit 19 to the Petition.

By 1974, the design within the Original Slag Field was modified. The Original Slag Field utilized designed, man-made excavations and dikes (berms) within the dune field to settle CCR from sluice water prior to discharge. *See* Agency Exhibit 4 to the Recommendation; Agency Exhibit 32 to the Recommendation at 5 and 17; Petitioner’s Exhibit 21 to the Petition. Agency

Exhibit 4 to the Recommendation depicts what appears to be a low berm on the eastern edge of the Original Slag Field. These berms would have controlled the flow of sluice water to allow settling before discharge of water and further CCR storage. The berms being used to control sluice water are more evident in the 1974 photo. *See* Agency Exhibit 4 to the Recommendation; Petitioner's Exhibit 21 to the Petition. Moving from west to east, a berm is visible about one third of the way across the Original Slag Field and there is what appears to be a pool of water east of that berm. *Id.* This is an accumulation of water with CCR storage occurring all around it. *Id.* Berms also appear to exist on the southern and eastern portions of the Original Slag Field in the 1974 photo. *Id.* Another apparent berm is located about two thirds of the way across the Original Slag Field, with what appears to be a ditch just to its west. *Id.* The ditch correlates with the location of one of the culverts indicated in permit 1974EB0346. *See* Agency Exhibit 32 to the Recommendation at 17. The water accumulated in the basin would flow out of the basin, through the culvert that penetrated the berm. The CCR was left behind for continued treatment and storage. *See* Agency Exhibit 4 to the Recommendation; Petitioner's Exhibit 21 to the Petition.

U.S. EPA stated how CCR surface impoundments are used. 80 FR 21357 (April 17, 2015). "CCR surface impoundments are used to receive CCR that have been sluiced (flushed or mixed with water to facilitate movement)..." *Id.* The Original Slag Field received CCR that had been sluiced. *See* Agency Exhibit 32 to the Recommendation at 5.

By 1946, the Original Slag Field was receiving CCR that had been sluiced to the dune field. *See* Agency Exhibit 2 to the Recommendation; Petitioner's Exhibit 19 to the Petition. As evidenced by photographs, the presence of what appears to be a delta from liquid deposition, which allows liquids to flow into depressions between dune peaks, indicates that the sluice water containing CCR and liquids was sent to the Original Slag Field. *See* Agency Exhibit 2 to the

Recommendation; Petitioner's Exhibit 19 to the Petition. Petitioner argues that the presence of this delta demonstrates that liquid was meant to run off rather than accumulate. February 14, 2024 Hearing, Testimony of Tom Dehlin, p. 93. However, liquid would not have run off via the delta were there not first an accumulation of liquid in the Original Slag Field. There needs to be an accumulation in order for liquid to flow. The presence of a delta suggests that it took some amount of time for liquid to flow out of the Original Slag Field into the adjacent sand dunes, during which time an accumulation would be contained within the Original Slag Field. February 14, 2024 Hearing, Testimony of Tom Dehlin, p. 93.

By 1974, the Original Slag Field continued to receive CCR that had been sluiced to the dune field. *See* Agency Exhibit 4 to the Recommendation; Petitioner's Exhibit 21 to the Petition. The 1974 NPDES permit application shows that the Original Slag Field received sluiced CCR. *See* Agency Exhibit 36 to the Recommendation at 28. The 1974 NPDES application states the “[a]sh and slag-coal combustion products are sluiced to the slag-ash field situated just north [sic]² of the plant. *Id.* at 28.

U.S. EPA provided an applicable scenario of how the definition of a CCR surface impoundment could be met:

...a constructed primary settling pond that received sluiced CCR directly from the electric utility would meet the definition of a CCR surface impoundment because it meets all three criteria of the definition: It is a man-made excavation and it is designed to hold an accumulation of CCR (*i.e.*, directly sluiced CCR). It also engages in the treatment of CCR through its settling operation. The CCR may be subsequently dredged for disposal or beneficial use, or it may be permanently disposed of within the unit. 80 Fed Reg at 21357 (April 17, 2015).

This scenario is applicable because the Original Slag Field was a settling pond receiving sluiced CCR from ComEd. The Original Slag Field met the definition of a CCR surface

² The slag-ash field is located south of the plant.

impoundment because it utilized the natural topographic depression design within the dune field to hold an accumulation of CCR (directly sluiced CCR from ComEd). It also engaged in the treatment of CCR through its settling operation as a settling pond. *See* Agency Exhibit 2 to the Recommendation; Petitioner's Exhibit 19 to the Petition. By 1961 and 1974, the Original Slag Field designed man-made excavations and dikes (berms) within the dune field to settle CCR from sluice water directly received from the Waukegan Station prior to discharge. *See* Agency Exhibit 3 to the Recommendation; Agency Exhibit 4 to the Recommendation; Agency Exhibit 32 to the Recommendation; Petitioner's Exhibit 20 to the Petition; Petitioner's Exhibit 21 to the Petition.

As U.S. EPA stated it should be³, it is extremely clear that The Original Slag Field (and therefore Grassy Field) meets the definition of a CCR surface impoundment. However, Petitioner argues that Grassy Field is not a depression or excavation, it is not designed to hold CCR and liquids, and it was never designed to accumulate CCR and liquid. No CCR or CCR slurry water is directed or has ever been directed to the Grassy Field.” *See* Petition at 2. According to Petitioner, the same historic aerial photos and permit applications as the Agency uses instead “show that the Grassy Field was never designed to accumulate CCR and liquids and was not operated to do so.” *See* Petition at 10.

This argument is incorrect. The Original Slag Field was divided into its present configuration of three parts in 1977. *See* Agency Exhibit 5 to the Recommendation. ComEd was issued a permit stating ComEd would construct and operate two water pollution control facilities to replace the single settling basin (the Original Slag Field) that existed previously. *See* Agency Exhibit 33 to the Recommendation at 23. The permit established that East Pond would occupy the

³ “The final definition [of a CCRSI] makes extremely clear the impoundments that are covered by the rule, so an owner or operator will be able to easily discern whether a particular unit is a CCR surface impoundment.” 80 Fed. Reg. 74 at 21357 (April 17, 2015).

eastern one-third of the Original Slag Field, West Pond would occupy the middle one-third, and the western one-third of the Original Slag Field, the Grassy Field, would be graded and seeded. *See* Agency Exhibit 45 to the Recommendation at 13. Grassy Field appeared to have stopped receiving CCR by 1980. *See* Agency Exhibit 5 to the Recommendation. Grassy Field has maintained a vegetive covering with only minor modifications. *See* Agency Exhibits 13-26 to the Recommendation; Petitioner's Exhibits ## to the Petition.

Although the Grassy Field was graded and seeded and has maintained a vegetive covered, it remains a CCR surface impoundment. Grassy Field sits within the footprint of a CCR surface impoundment, the Original Slag Field. The Original Slag Field was a depression or excavation, it was designed to hold an accumulation of CCR and liquids, and it stores or disposes of CCR. Since the Original Slag Field was a CCR surface impoundment designed to hold an accumulation of CCR and liquids, and the surface impoundment stores or disposes CCR, Grassy Field, which is part of the Original Slag Field, is also designed to hold an accumulation of CCR and liquids and is a surface impoundment that stores or disposes of CCR.

This notion is supported in the 2018 USWAG decision *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 438-42 (2018). There, the D.C. Court of Appeals addressed a similar joining of the present tense "is" and the past tense "disposed of." *Id.* While the "is" retains its active present tense, the "disposal" takes the form of a past participle ("disposed"). In this way, the disposal itself can exist (it "is"), even if the act of disposal took place at some prior time. 901 F.3d 414, 438-42.

Similarly, "designed" is the past tense of "design," while "is" allows the design to exist even if the initial design was in the past. Therefore, since the Original Slag Field was designed to hold an accumulation of CCR and liquids, Grassy Field is also designed to hold an accumulation of CCR and liquids. Even if more recent modifications to the area, like the grading and seeding of

the Grassy Field, have taken place since the previous design was put into place, the Grassy Field still exists within footprint of the Original Slag Field, a CCR surface impoundment that was designed to hold an accumulation of CCR and liquids.

Further, a CCR surface impoundment need not “hold” liquids during its entire active life to meet the definition of CCR surface impoundment found at Section 845.120 Act or 40 C.F.R. 257.53. The definition states in part “...is designed to hold an accumulation of CCR and liquids...”. Therefore, the intended function of a manmade excavation or natural topographic depression, either with or without the use of embankments, is relevant. The word “hold” is a verb defined as “to enclose and keep in a container or within bounds” or “prevent from leaving or getting away.” Synonyms include “keep” or “retain.” The act of keeping or retaining can be a temporary condition. The extent to which liquids are held within an impoundment is dependent upon several factors, including its design, use, and the permeability of the bottom of the impoundment and groundwater elevation. The Original Slag Field was never lined and is located on beach sand, allowing the infiltration of liquids from the impoundment.

At hearing, Petitioner pointed toward the infiltration as a way to argue that liquids did not accumulate, and that the accumulation was never held. At issue here is the definition of “accumulation.” Per even the definition that Petitioner provided at hearing, to accumulate is “to gather.” February 13, 2024 Hearing, Testimony of Darin LeCrone, p. 304. Petitioner argues that infiltration rather than accumulation occurred when CCR was sluiced to the Original Slag Field. In reality, what occurred was infiltration *in addition to* accumulation. While it is true that accumulation and infiltration are two separate processes, liquid that has accumulated can still infiltrate. Here, infiltration of sluiced liquid into the sand dunes occurred, but accumulation would have happened before that. There must be an accumulation of liquid in order for the liquid to flow.

As Mr. Darin LeCrone explained at hearing, there is no set timeframe by which that accumulation must occur. During the time that CCR was sluiced to the Original Slag Field and before the water infiltrated outward from the Original Slag Field, the Original Slag Field would have held an accumulation of CCR and liquid. February 13, 2024 Hearing, Testimony of Darin LeCrone, p. 317.

At hearing, Petitioner used a pasta analogy to simplify the process by which sluiced liquid would infiltrate into the sand. February 13, 2024 Hearing, Testimony of Lynn Dunaway, p. 280; February 13, 2024 Hearing, Testimony of Darin LeCrone, p. 320. On its face, this analogy is an oversimplification of this process. Sand dunes are not pasta colanders, and the ways that liquids pass through the two things are not the same. On some level, though, this analogy could describe the process through which sluiced liquid permeates sand dunes: as Mr. Lynn Dunaway and Mr. LeCrone testified, before water filters through a colander, that colander still does, albeit briefly, hold an accumulation of water and pasta. February 13, 2024 Hearing, Testimony of Lynn Dunaway, p. 280; February 13, 2024 Hearing, Testimony of Darin LeCrone, p. 320. One can expect the time it takes for sluiced liquid to infiltrate sand to be longer than the time it takes for water to pass through a pasta colander. The time period in which the holding takes place may not be lengthy, but it is certainly not nonexistent, and some particles of liquid may infiltrate faster than others; the liquid does not simply disappear. Liquid does not disperse immediately after coming into contact with sand, just as pasta does not immediately cease to be wet once it is poured into a colander.

Petitioner drew attention to the use of the word “sluice” in the Agency’s description of the history of the Original Slag Field, arguing that it was not relevant to describe the sluicing that took place because the definition of a CCR surface impoundment does not contain the word “sluice”

and the method by which CCR arrives in an impoundment is not indicative of whether it is a CCR surface impoundment. February 14, 2024 Hearing, Testimony of Tom Dehlin, p. 91. While it is true that the definition does not contain the word “sluice” and there is more than one way by which CCR can arrive at a CCR surface impoundment, it is still material that CCR was sluiced to the Original Slag Field. The fact that CCR was sluiced to the Original Slag Field suggests that the Original Slag Field was meant to accumulate CCR and liquids, as an accumulation of CCR and liquids was quite literally sent there, and the liquid within that accumulation could not have infiltrated outward into the sand dunes without an accumulation of CCR and liquid being held within the dune swales in the Original Slag Field first. *See* February 13, 2024 Hearing, Testimony of Lynn Dunaway, p. 280; February 13, 2024 Hearing, Testimony of Darin LeCrone, p. 320.

Understanding that CCR was sluiced there is also important to our characterization of the Original Slag Field as a CCR surface impoundment because it is how we know that CCR *is* there. Part of the definition of a CCR surface impoundment is that the impoundment “treats, stores, or disposes of CCR.” 415 ILCS 5/3.143, 35 Ill. Adm. Code 845.120, and 40 CFR 257.2. If CCR was sluiced to the Original Slag Field and that CCR has never been removed, then the Grassy Field presently stores CCR.

THE GRASSY FIELD IS AN INACTIVE CCR SURFACE IMPOUNDMENT

The Grassy Field is a CCR surface impoundment that stopped receiving CCR by 1980 when East and West Ponds were constructed on top of the eastern two thirds of Old Pond. *See* Agency Exhibit 45 at 13 and Agency Exhibit 5. Therefore, the CCR impoundment is an inactive surface impoundment because it is 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 and is located at an active facility. 35 Ill. Admin. Code 845.120.

Furthermore, no mention, documentation, permit, permit application, or other evidence has been presented to the Agency showing that the CCR materials were removed or covered in a manner that would prevent infiltration. (Petitioner has suggested placing an engineered cap to prevent infiltration from precipitation, but that has not occurred, nor would it alone be an Agency approved closure plan of a CCR surface impoundment.) February 13, 2024 Hearing, Testimony of Douglas Dorgan, p. 133. Therefore, the Original Slag Field has not closed under an Agency approved closure plan and has also not completed post-closure care. Because the Original Slag Field has not closed under an Agency approved closure plan and has not completed post-closure care, the Grassy Field (because it sits within the footprint of the Original Slag Field) has not closed under an Agency approved closure plan and has not completed post-closure care. Therefore, the Grassy Field is an inactive CCR surface impoundment and must be regulated under Part 845.

**THE GRASSY FIELD IS A CCR SURFACE IMPOUNDMENT RATHER THAN
A CCR MANAGEMENT UNIT**

Petitioner argues that the Grassy Field should not be regulated as a CCR surface impoundment because the Grassy Field is instead a CCR management unit (“CCRMU”) under a new federal rule. The final rule establishing the existence of CCRMUs was published in the Federal Register on May 8, 2024. Under the new rule, a CCRMU is defined as “any area of land on which any non-containerized accumulations of CCR are received, placed, or otherwise managed, that is not a CCR unit.” 89 FR 39044 (May 8, 2024).

Under this definition, the Grassy Field is still a CCR surface impoundment rather than a CCRMU. As discussed previously, Part 845 is based the federal Part 257, and the definition of “CCR surface impoundment” is identical between these two rules. As the Agency has

demonstrated, the Grassy Field meets the definition of a CCR surface impoundment, and it would continue to meet that definition even after the adoption of the proposed federal rule. Part of the definition of a CCRMU is that a CCRMU is “not a CCR unit.” 89 FR 39044 (May 8, 2024). Under the existing federal rule, CCR units encompass “CCR landfills and CCR surface impoundments, as well as any lateral expansion of a CCR landfill or CCR surface impoundment.” 40 CFR 257.53. Because a CCR surface impoundment is a type of CCR unit, any CCR surface impoundment, inactive or otherwise, will not fall under the definition of a CCRMU. Thus, the Grassy Field continues to be a CCR surface impoundment and still needs to be regulated as such.

Petitioner provides a list issued by the U.S. EPA as part of a “Summary of Potential Universe Comments for Legacy CCRMU NODA.” Petitioner’s Exhibit 40 to MWG Response. This is a list of potential CCRMUs, not of confirmed CCRMUs. This list includes four entries for the Waukegan site, all of which are designated as potential CCRMUs. It is unclear which, if any, of these entries is meant to represent the Grassy Field. Similarly, the final rule names Waukegan as the site of a CCRMU, but it does not specifically name the area where the CCRMU exists; it is likewise unclear based on the language of the rule that this is meant to refer to the Grassy Field. 89 FR 39041 (May 8, 2024).

PETITIONER’S RISK ANALYSIS ARGUMENTS ARE IRRELEVANT

Petitioner dedicated a significant amount of time at hearing to a risk analysis assessment of the Grassy Field. This risk analysis is irrelevant to whether the Grassy Field is a CCR surface impoundment. While one element of the adjusted standard determination is whether “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”, the

analysis required to consider the adjusted standard does not even reach that element. The previous two elements are not met.

For the first element to be met, Petitioner would need to provide adequate proof that the Grassy Field is a CCR surface impoundment, as the “general regulation”- Part 845- was adopted and meant to apply to all CCR surface impoundments. Petitioner does not have “factors that are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation.” As discussed above, the Grassy Field is a CCR surface impoundment, and Petitioner has not met its burden of proof to demonstrate otherwise; the factors at issue in the first element do not exist. Because those factors do not exist, they cannot justify an adjusted standard, as is required in the second element.

Even if the Board found the third element to be met, the adjusted standard analysis would still fail, as all four elements must be met, and the first and second elements are not met. Further, as the Environmental Groups provide in their post-hearing comments, there are many environmental risks associated with the Grassy Field, despite Petitioner’s analysis. AS 2021-003, Environmental Groups’ Post-Hearing Comments Urging Denial of Midwest Generation’s Proposed Adjusted Standard (March 21, 2024), pp. 5-13. The third element likely is not met either.

However, as discussed earlier, this adjusted standard analysis may be inappropriate to the question of inapplicability posed in the current matter, in which case the second, third, and fourth elements would not be relevant at all. Regardless of the framework used, the ultimate question is whether the Grassy Field is a CCR surface impoundment, which in turn determines whether Part 845 is applicable to it. In the adjusted standard framework, this question is at the root of the first element. Outside of that framework, this question is the only thing at issue.

Petitioner's extended risk analysis at hearing reads as an attempt to relitigate Part 845 and detract from the issue at hand. If the Grassy Field is a CCR surface impoundment, then the risk analysis does not matter; Part 845 applies, and the Agency must treat the Grassy Field as it does any other CCR surface impoundment. Petitioner cannot argue that its CCR surface impoundment should not be treated as a CCR surface impoundment by arguing that the risks associated with it are lesser than they theoretically could be. Like the definition of CCR surface impoundment does not include the word "sluice" or state any specific process by which a CCR surface impoundment becomes one, the definition also does not provide for any sort of risk analysis that would exclude a CCR surface impoundment from the definition.

WHEREFORE, for the reasons stated above, Illinois EPA respectfully reiterates its recommendation that the Board DENY Petitioner's request for a Board finding of inapplicability of Part 845.

Dated: May 14, 2024

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Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent,

BY: /s/Rebecca Strauss
Rebecca Strauss

THIS FILING IS SUBMITTED ELECTRONICALLY

CERTIFICATE OF SERVICE

I, the undersigned, on affirmation certify the following:

That I have electronically served the attached **NOTICE OF ELECTRONIC FILING** and **ILLINOIS EPA'S POST-HEARING BRIEF** upon those listed on the Service List before 4:30 p.m. on May 14, 2024.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Rebecca.Strauss
Rebecca Strauss
Assistant Counsel
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DATED: 5/14/2024

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