BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS POWER GENERATING COMPANY,	)	
Petitioner,	)	
v.	)	
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,	)	PCB 2024-043 (Petition for review – Alternative Source Determination)
Respondent.	)	

NOTICE OF FILING

To: See Attached Service List (Via Electronic Filing)

PLEASE TAKE NOTICE that the undersigned filed today with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following AGENCY'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO SUPPLEMENT RECORD, a copy of which is attached hereto and hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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Dated: July 15, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 15, 2024, she caused to be served by electronic mail, a true and correct copy of the following instruments entitled Notice of Filing and Agency's Response in Opposition to Petitioner's Motion to Supplement Record to:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this Certificate of Service are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

s/ Mallory Meade
Mallory Meade
Assistant Attorney General
Environmental Bureau

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AGENCY'S RESPONSE IN OPPOSITION TO PETITIONER'S MOTION TO SUPPLEMENT RECORD

NOW COMES Respondent Illinois Environmental Protection Agency ("IEPA" or "the Agency") by and through its attorney, Kwame Raoul, Attorney General of the State of Illinois, pursuant to 35 Ill. Adm. Code Section 101.500, and hereby responds in objection to Petitioner's Motion to Supplement Record on Appeal. Petitioner's argument that the Record in this case should be nearly tripled in size to over 9,000 pages and include the entire "universe" of potentially available information is wholly unsupported by rule, precedent, or logic. Petitioner puts forth no evidence or argument that any of those pages had anything to do with the Agency's decision now before the Board, or were required to be in the Agency Record for any reason. Moreover, Petitioner has had ample opportunities to submit documents to the Agency which would now be in the Record if it had done so. The Board's Regulations required Petitioner to include the factual or evidentiary basis for its conclusions supporting an alternative source determination in Petitioner's initial submittal to the Agency, which is already in the Agency Record.

The Agency does not object to supplementing the Agency Record with Petitioner's Appendices 1, 26, 27, and 28. The Agency also recognizes that Petitioner may, in due course,

request that the Board take additional information into consideration. In all other respects, however, the Board should reject Petitioner's motion, for the following reasons.

I. Introduction

A. Case background

This proceeding relates to the Newton Primary Ash Pond (PAP), an impoundment that holds coal combustion residuals (CCRs) from the Newton Power Station in Jasper County, Illinois. On August 7, 2023, in monitoring well APW15 at the Newton PAP, Petitioner detected an exceedance of the Illinois groundwater protection standard for chloride. In accordance with 35 Ill. Adm. Code 845.650(e), Petitioner submitted an alternative source demonstration ("the ASD") to the Illinois Environmental Protection Agency on October 6, 2023, contending that the source of the chloride was bedrock. (R. at R001606-1639.) Following the required public comment period, on November 7, 2023, the Agency issued a decision stating that it did not concur with the ASD, identifying three gaps in Petitioner's data as grounds for its nonconcurrence. (R. at R001965.) Petitioner filed this appeal on December 15, 2023.

The Board's Regulations allow for appeal of a nonconcurrence, but to protect the public health and environment of Illinois, they do not provide for an automatic stay of the corrective action requirements. *See* 35 Ill. Adm. Code 845.650(e)(7). Based on the right to an appeal, the Agency did not object to a temporary stay of the contested requirements. However, the Agency has continued to object to further delay of a final resolution of the appeal.[1]

[1] Over the Agency's objection, a 60-day discovery period was ordered in this case on April 15, 2024. Petitioner deposed two Agency employees on May 28, 2024. The discovery period was further extended over the Agency's objection on June 17, 2024.

Petitioner filed the instant Motion to Supplement the Record ("Motion") on July 1, 2024. Petitioner claims its Motion is based in part on information learned from discovery. (Motion at ¶12.) But as discussed below, this claim, along with every other argument Petitioner makes in its Motion, is without merit.

B. The Agency Record includes documents the Agency relied on or was required to rely on, in addition to the other documents required by Section 105.212 of the Board's Regulations, 35 Ill. Adm. Code 105.212.

1. Applicable rule

Section 105.212(b) of the Board's Regulations, 35 Ill. Adm. Code 105.212(b), provides as follows:

> b) The Agency record must include:
>
> 1) Any permit application or other request that resulted in the Agency's final decision;
>
> 2) Correspondence with the petitioner and any documents or materials submitted by the petitioner to the Agency related to the permit application;
>
> 3) The permit denial letter that conforms to the requirements of Section 39(a) of the Act or the issued permit or other Agency final decision;
>
> 4) The Agency public hearing record of any Agency public hearing that may have been held before the Agency, including any transcripts and exhibits;
>
> and
>
> 5) Any other information the Agency relied upon in making its final decision.

Section 101.202 of the Board's Regulations, 35 Ill. Adm. Code 101.202, provides the following definition:

> "Agency record" means a record of final Agency decision, as kept by the Agency, of those documents required by the State agency record meeting the applicable requirements of 35 Ill. Adm. Code 105.

Although Section 105.212 is not an exhaustive list of what the Agency Record *may* include, Section 101.202 makes plain the Board's intent to limit it to the record "as kept by the Agency." The Board has for example ruled that the Record may include documents that an Agency employee consulted even though the Agency itself did not rely on them for the decision. *See, e.g., Ameren Energy Resources Generating Co. v. IEPA*, PCB 14-41 (Mar. 20, 2014), slip op. at 9 (denying a petitioner's motion to strike an internal memorandum). Importantly, however, and as discussed in section II.B.2 (page 9) below, none of the Board precedents that Petitioner cites show any intention to widen the Record to include documents the Agency never consulted or received at all.

2. The rulemaking history of Section 105.212 shows the Board's intent to limit the scope of the Agency Record to documents kept by the Agency.

The Board adopted the current language of Section 105.212 and the definition of "Agency record" in Section 101.202 through the rulemaking proceeding R19-1, during which:

> The Board asked why IEPA believes that definitions of "Agency record" and "OSFM record" are necessary. IEPA responded that existing definitions do not distinguish processes before the Board from processes before other agencies such as IEPA and the OSFM. As an example, IEPA stated that Part 101 does not now distinguish a "record" before IEPA when it makes a permit decision and a "record" kept by the Board when it reviews an IEPA decision.

Board Opinion and Order (Mar. 5, 2020), *In the Matter of: Proposed New 35 Ill. Adm. Code 204, Prevention of Significant Deterioration, Amendments To 35 Ill. Adm. Code Parts 101, 105, 203, 211, and 215,* R19-1, slip op. at 45 (internal citations omitted). Persuaded by the Agency's rationale, the Board adopted the present language of the rule. *Id.*

As a result of this 2020 clarification, the Board's Regulations now distinguish between the record "as kept by the Agency" in accordance with the applicable requirements of Part 105, and the record as kept by the Board, of its own proceedings and deliberations. The ambiguity that

formerly clouded discussion of the record has thus been lifted, and the Agency Record is now only required to contain those documents necessary to meet "the applicable requirements of 35 Ill. Adm. Code 105," which in this case are specifically the requirements of Section 105.212(b).

This was not the first time the Board rejected the idea of a broad construction of "the Record" to include materials not before the Agency. When the Board adopted the current five-element structure of Section 105.212(b) in 2000, it rejected an industry proposal to allow petitioners to supplement the record with their own materials, because "Petitioner remains free to introduce materials consistent with applicable permit appeal case law[.]" Opinion of the Board (Mar. 16, 2000), *In the Matter of: Revision of the Board's Procedural Rules: 35 Ill. Adm. Code 101-130*, R00-20, slip op. at 29. Petitioner's repeated suggestion that fairness requires the Agency Record to include not just documents the Agency relied on, but also documents Petitioner relied on (*see, e.g.*, Motion at ¶¶ 13, 16, 29), is therefore not only baseless but has long since been rejected by the Board.

A party can certainly request that the Board make particular information of record, for example by submitting it as an exhibit to a substantive motion accompanied by an offer of proof (as occurred in *Joliet Sand & Gravel Co. v. IEPA*, PCB 86-159 (Feb. 5, 1987)). But the "Agency record" properly consists solely of that information certified *by the Agency* as belonging in it. To supplement the Agency Record, a petitioner therefore necessarily needs to show that a proposed supplemental document is one that the Agency was actually required to include in the Record. As set forth in greater detail below, Petitioner has made no such showing here, and therefore Petitioner's Motion must be denied.

II. Petitioner's Motion Must be Denied

A. Petitioner already had three bites at the apple.

Throughout its Motion, Petitioner argues that the documents in its Appendices belong in the Agency Record because the Agency "should have considered" or "should have relied" on them. (Motion at ¶¶ 9, 12, 14, 17, 18, 20, 21.) But if Petitioner believed that the Agency should have considered any of the documents in the Appendices, Petitioner has had at least *three* separate opportunities to make them of record. Petitioner could have included them as exhibits to the ASD itself, but did not. Petitioner could have included them as exhibits to its public comment, or other correspondence with the Agency, but did not, and seeking to use the public comment period to belatedly submit documents supporting the ASD would have been problematic for other reasons that will be discussed in Section III.B.3 below (page 21). Petitioner could have included them among the exhibits to its Petition for Review, but did not. Had Petitioner done any of these things, the documents would now be before the Board and this motion would be unnecessary.[2] It is difficult to understand how Petitioner can now argue that the Agency "should have relied" on documents that Petitioner never thought necessary to put before it.

Notably, in past cases where the Board has granted motions to supplement the Record, those documents have typically already been attached to a substantive motion or to the petition itself. *See, e.g., KCBX Terminals Co. v. IEPA*, PCB 14-110 (Apr. 17, 2014), slip op. at 13 (granting motion to supplement record with certain petition exhibits). In such a case it is apparent why the supplementing party thinks the additional documents are relevant. By comparison, here Petitioner

[2] The Agency recognizes that by including the Petition and exhibits in the Agency Record (R. at R001967-R002214), the Agency Record is already overinclusive because the Petition itself was not before the Agency at the time of the Agency's decision.

asks the Board for a blank check: swell the record by more than 5,800 pages without any particularized account of how and why these documents would be relevant to support any particular point.

B. Petitioner's expansive view of the Record is unsupported by rule, precedent, or logic.

1. The Board's Regulations do not support Petitioner's position.

As detailed in section III below (page 16), Petitioner's appendices 2-25 fall into two broad categories: documents cited in a document Petitioner submitted to the Agency in connection with the ASD (Appendices 2-22), and documents that were not even mentioned in any document Petitioner submitted (Appendices 23-25). Petitioner presents no evidence that the Agency relied on, or was required to rely on, any of these documents, or that any Agency staff even glanced at them in connection with the ASD nonconcurrence decision. They therefore do not fall into to any of the mandatory categories in Section 105.212(b), and also are not by any stretch within the record "as kept by the Agency" as Section 101.202 requires. Petitioner's arguments for including these appendices are therefore without any support in the Board's Regulations.

2. Petitioner's authorities do not support its position.

Petitioner cites a total of eight Board precedents in support of its arguments to supplement the Record. (Motion at ¶¶ 1, 11.) Notably, almost all the precedent on which Petitioner relies dates from before the Board adopted the present language of Section 105.212(b) in 2020. In the only case Petitioner cites from after the current language was adopted, the Hearing Officer allowed the Record to be supplemented only with a document on which the Agency had actually relied. *BFI Waste Systems of North America, LLC v. IEPA*, PCB 24-29 (May 16, 2024), slip op. at 4-5.

Moreover, five of Petitioner's eight cited precedents are from the 1980s (when Procedural Rule 502 applied) and the 1990s (when former Section 105.102 applied), and thus date from a time

when the rules governing appeals provided for only three mandatory categories in the record: the application, the denial, and any correspondence between the Agency and the applicant relating to the application.[3]

In this context, to ensure an adequate basis for its review, the Board adopted a general doctrine that "the Agency must provide the Board with a complete record that includes all documents on which the Agency relied or reasonably should have relied." *See Ameren*, PCB 14-41 (Mar. 20, 2014), slip op. at 9 (collecting cases from 1987 to 2004). When it adopted the present five-paragraph rule in R00-20, the Board codified the first half of that doctrine at 35 Ill. Adm. Code 105.212(b)(5). Petitioner relies heavily on the "should have," arguing that the Agency "should have relied" on various documents that Petitioner never placed before it. But none of the authorities cited by Petitioner support its expansive interpretation of this phrase. Rather, as detailed below, Petitioner's cited cases show that the Board has granted a request to supplement the record on the basis that the Agency "should have relied" on a document only when the Agency was *required* to rely on it.

[3] *See, e.g.*, Order of the Board, *Land and Lakes Company v. IEPA and White Fence Farm, Inc.*, PCB 81-48 (May 13, 1982), slip op. at 2 (citing former Procedural Rule 502(a)(4) to this effect); *White & Brewer* (Mar. 20, 1997), slip op. at 4 (citing the former text of Section 105.102 to this effect).

Only three of Petitioner's authorities – *White & Brewer, KCBX,* and *BFI* – involve the grant of a motion to supplement over the Agency's objection.[4]

In *White & Brewer*, the Board granted a petitioner's motion to supplement the record with draft instructions and regulations because those materials had been attached to correspondence from the Agency that was in the record and "attachments to that correspondence should be included in the record." PCB 96-250 (Nov. 21, 1996), slip op. at 3.[5] In contrast, Petitioner points to no attachments to correspondence that have been omitted here.

In *KCBX*, a RCRA permit appeal, the Board allowed the supplementation of the record with documents that should have been reviewed, based on Agency employee testimony regarding the applicable Agency procedures, because they were filed under the same permit number and the applicable procedures called for the Agency's reviewers to review all materials filed under the same permit number. Order of the Board (Apr. 17, 2014), *KCBX Terminals Company v. IEPA*, PCB

[4] To summarize the other five cases that Petitioner cites: in *Land and Lakes*, the Board allowed discovery as to a particular file because part of it was in the record and therefore likely relevant (slip op. at 1); in *Fritz Ents. v. IEPA*, PCB 86-76 (Opinion of the Board, Sept. 11, 1986), the Board denied a motion to strike certain testimony and exhibits related to the Agency's testing methodology from a post-hearing brief; in *Joliet Sand & Gravel Co. v. IEPA*, PCB 86-159 (Opinion and Order of the Board, Feb. 5, 1987), the Board admitted certain exhibits presented for a Board hearing relating to prior permit applications, because the applicable rule provided for the incorporation of data from such applications (slip op. at 6); and in *Ameren Energy Resources Generating Co. v. IEPA*, PCB 14-41 (Order of the Board, Mar. 20, 2014), the Board denied a petitioner's motion to strike an internal Agency memorandum that some Agency staff had consulted (slip op. at 9). Petitioner cites *Waste Management, Inc. v. IEPA*, PCB 84-45 (Oct. 1, 1984), but the Agency is unable to locate the cited pages 61 and 68; an earlier Board Order of Aug. 10, 1984, however, did grant the Agency's motion to supplement the record with lab data that had been overlooked but in the Agency's view "may have been relevant." Thus, none of these opinions are germane to Petitioner's argument: *Fritz* and *Joliet Sand & Gravel* did not involve the Agency Record at all, *Land and Lakes* related to the Record only in connection to the scope of discovery, and *Waste Management* and *Ameren* involved documents that the Agency certified as belonging in the Record.

[5] The Board's opinion in *White & Brewer* describes these materials as having been "referenced" in the Agency's letter but also as "attachments" to the letter. Order of the Board (Nov. 21, 1996), PCB 96-250, slip op. at 3. It appears from this that the materials were both referred to in the letter and actually enclosed with it. Nothing in the opinion, or any other opinion that Petitioner cites, suggests an intention to require the record to include every document *cited* in a record document, as Petitioner urges.

14-110, slip op. at 17, 19. Here, in contrast, Petitioner has not identified any such procedural requirements.

In *BFI*, the Hearing Officer denied the petitioner's motion to supplement, except as to a summary of other permitting decisions that an Agency reviewer acknowledged relying on. *BFI Waste Systems of North America v. IEPA*, PCB 24-29 (May 16, 2024), slip op. at 4-5. No such acknowledgement is present here.

3. Petitioner's view of the Record's scope is impossibly broad.

Ambitiously, Petitioner argues that the Record should include the entire "universe of information available to Respondent." Motion at ¶1. Consistent with this view, Petitioner's arguments for inclusion frequently rest on such slender reeds as that a document was available to the Agency—or even that it wasn't available, but the Agency could have asked Petitioner for it. *See, e.g.*, Motion at ¶¶ 17, 19. These arguments suggest that Petitioner thinks the Record should include not just everything the Agency "should" have relied on, but everything the Agency *could* have relied on. Every document the Agency could potentially access, plus every document the Agency could potentially ask some third party for, would now belong in the Record. It is hard to see how such an indiscriminately inclusive record would be of any help to the Board at all.

C. Petitioner mentions the Board's ability to take official notice but provides no reason for the Board to exercise that power.

Petitioner devotes a section of its Motion to arguing that the Board "may" take administrative notice of Petitioner's Appendices. (Motion at ¶¶ 27-29.) This would be uncontroversial as a general statement, but it is unclear how Petitioner intends it to apply here.

Section 101.630(a) of the Board's Regulations, 35 Ill. Adm. Code 101.630(a), provides as follows:

a) Official notice may be taken of:

1) Matters of which the circuit courts of this State may take judicial notice; and

2) Generally recognized technical or scientific facts within the Board's specialized knowledge.

Petitioner's Motion does not contain any argument that any of the documents Petitioner seeks to add to the Agency Record fit into either of these categories. Petitioner has not claimed that any of these documents, or in particular any part of them not already in the Record, is either a "generally recognized technical or scientific fact" or a matter of which "the circuit courts of this State may take judicial notice."

If Petitioner has specific arguments to make before the Board for which particular facts in Petitioner's Appendices would be relevant (hopefully including an explanation of why those facts were never important enough for Petitioner to attach the relevant document to the ASD, to any correspondence with the Agency about the ASD, or even to the Petition, but are important now), Petitioner is certainly able to argue that either Section 101.630(a)(1) or (2) applies to a particular fact, and can request the Board to take notice of the relevant fact at that time. The Agency reserves its right to object at that time, as provided by Section 101.630(b). For the time being there appears to be nothing for the Agency to do but observe that Petitioner has not made any argument for administrative or official notice yet.

Petitioner also argues that "Petitioner and the Board may properly rely on any and each of Appendices 1-28" for the purpose of challenging information relied on by the Agency. (Motion at ¶28.) The authority Petitioner cites here, *Weeke Oil Co. v. IEPA*, PCB 10-1 (May 20, 2010), involved the Board's decision to admit an OSFM removal log as evidence in a UST appeal, because the removal log would allow the petitioner to challenge the Agency's basis for concluding that no new release had occurred on the site. Slip op. at 1-2. *Weeke Oil* does not contain any mention of

official or administrative notice. Moreover, *Weeke Oil* involved site-specific evidence that spoke directly to the question before the Board (whether a new release had occurred). None of Petitioner's appendices fit that description, and only Appendices 1 and 3 provide any site-specific information at all.

In any event, Petitioner's argument has a more fundamental problem: the "information relied on by the Agency" for the nonconcurrence decision is precisely the information that Petitioner provided, or more importantly did not provide, in the ASD. (*See* R. at R001965, Agency nonconcurrence letter identifying three crucial gaps in Petitioner's data, without which it was impossible for the Agency to concur that an alternative source was responsible for the chloride exceedance.) Petitioner can scarcely use information *outside the Agency Record* to argue that it provided the necessary information to the Agency, since if it had done so, that information would be in the Record already. Thus, once again, Petitioner has not given the Board any reason to take notice of any part of its Appendices.

D. Petitioner claims bias but can show no prejudice.

Petitioner's Motion overflows with claims that the Agency Record is "biased," "slanted," or "cherry-picked," and that the resulting Record is "prejudicial" to Petitioner. (*See, e.g.*, Motion at ¶¶ 14, 16, 21.) Yet the vast majority of the Record consists of submittals by Petitioner to the Agency and correspondence between Petitioner and the Agency, which are required to be in the Record. *See* 35 Ill. Adm. Code 105.212(b)(1), (2). Petitioner does not appear to object to any of the remaining categories (public comments received, internal Agency correspondence, or reference materials actually consulted by Agency personnel), and does not argue that any of them have a prejudicial effect. Even if the Record is somehow "biased" by containing the materials the rule requires and not containing materials it doesn't, Petitioner has not shown that such a "bias" is

prejudicial to it. The Board reviews the Agency's nonconcurrence with Petitioner's ASD submittal exclusively based on the record before the Agency at the time of the decision. 35 Ill. Adm. Code 105.214(a). Any materials that were before the Agency are already in the Record. And any materials that were not before the Agency would be irrelevant to the Board's review in any event, and their absence therefore cannot prejudice Petitioner.

E. Petitioner's arguments rely heavily on misrepresented deposition testimony.

The Motion contains numerous citations to Petitioner's depositions of two Agency employees, whom Petitioner repeatedly misrepresents as speaking for the Agency, using language such as "IEPA stated" and "IEPA admitted." (*See, e.g.*, Motion at ¶¶ 8, 9, 13, 21.) These characterizations are false and misleading for the following reasons.

First, the cited transcript shows that the witnesses were in fact being asked to speak only for themselves, not for IEPA. (*See, e.g.*, Motion at ¶21, claiming that "As IEPA noted, it regularly reviews, utilizes and has access to USEPA guidance documents," and citing to Hunt Dep. at 60, 103, 104, Motion at pp. 59, 62, 63, which shows that the deponent had been asked only about herself, not about the Agency's practices.)

Second, Illinois deposition procedure requires a party wishing to depose an organization through a representative to follow Illinois Supreme Court Rule 206(a)(1), under which the deposing party must "name as the deponent a . . . governmental agency and describe with reasonable particularity the matters on which examination is requested." But Petitioner's deposition notices (filed with the Board May 1, 2024) did not name the Agency as the deponent and did not identify any particular matters on which examination was requested. Therefore Petitioner cannot now claim to have deposed the Agency.

Third, in any event, neither in the deposition notices nor in any other communication did Petitioner communicate any expectation that the witnesses should be prepared to speak on the Agency's behalf.

Fourth, not only did Petitioner not seek a deposition from an Agency representative pursuant to Illinois Supreme Court Rule 206(a)(1), Petitioner did not even seek to depose the decisionmaker in this case. Instead, Petitioner chose to depose two IEPA employees that Petitioner, in a more candid moment, describes as "members of the review team." (Motion at ¶25.)

In sum, Petitioner now seeks to paper over the inconvenient fact that it chose not to depose anyone who could be deposed *either* on the Agency's behalf *or* could speak firsthand to the Agency's decision. Petitioner's claims that discovery was necessary in order to identify the items it now seeks to add to the record are grounded in mischaracterizations of the deposition testimony. Petitioner's arguments are without merit in any event, as detailed in the remainder of this Response. But Petitioner should not now be allowed to cherry-pick statements from individual members of the review team regarding their personal experience and present those statements as having been made on the Agency's behalf.

III. Categories of Documents

The appendices which Petitioner seeks to add to the Agency Record fall into three broad categories: Appendix 1 is incorporated by reference in a document in the Agency Record; Appendices 2 through 22 are cited or excerpted in documents in the Agency Record; and Appendices 23 through 28 are not mentioned in any document in the Agency Record at all. The Agency does not object to supplementing the Agency Record with Appendices 1, 26, 27, and 28, but objects to Appendices 2 through 25, for the following reasons.

A. Document incorporated by reference in a document in the Agency Record

1. The Agency does not object to supplementing the Agency Record with Petitioner's July 28, 2022 Construction Permit application.

Both the construction permit application (Petitioner's Appendix 1) and the operating permit application (R. at R000564-R001588) were incorporated by reference in Petitioner's public comment.[6] (R. at R001787.) The Agency acknowledges that since one of these two documents was included in the Agency Record, it can reasonably be argued that the other should have been included also.

To be clear, in deciding not to concur in the ASD, the Agency did not rely, and had no reason to rely, on any part of the construction permit application not already in the Agency Record. Moreover, Petitioner excerpted the information from the construction permit application that it believed was relevant to the decision, and placed those excerpts in Attachment 1 to its public comment letter (R. at R001789-1936 (also capturing information from other sources)), which is already in the Record. Nonetheless, the Agency recognizes that the construction permit application may contain site-specific information that is reasonably relevant to the question before the Board and *could* reasonably have been included in the Record even though it was not within any of the mandatory categories in Section 105.212(b). The Agency therefore does not object to supplementing the Record with Petitioner's Appendix 1.

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[6] Petitioner refers to the construction permit application as having been "included as a reference" (M. at par. 14, n. 2), but Petitioner's public comment instead purports to *incorporate* it *by* reference. (R. at R001787). Incorporation by reference is "[a] method of making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one." *Black's Law Dictionary*, 8th ed., at 781. At this time, the Agency does not take a position on whether such an incorporation by reference is proper in this context.

B. Documents cited in a document in the Agency Record

Petitioner divides Appendices 2 through 22 into various categories, but all of these appendices share the property of having been cited (and in some cases partially excerpted) in a document currently in the Agency Record. Petitioner argues that all these cited references were "available" to the Agency and therefore the Agency should have relied on them. (*See, e.g.*, Motion at ¶¶ 7, 12, 14, 17, 19.) At points Petitioner also appears to argue that these cited documents should be included in the Record because Petitioner relied on them. (*See, e.g.*, Motion at ¶¶ 13, 16, 29.) But Petitioner never explains why documents it never presented to the Agency or attached to any Agency correspondence related to this matter should now be included in the Agency Record.

Moreover, the Board's Regulations require the ASD to "include a report that contains the factual or evidentiary basis for any conclusions." 35 Ill. Adm. Code 845.650(e). Either Petitioner properly left these documents out because they do not provide the factual or evidentiary basis for its conclusions, or Petitioner erroneously left them out and thus submitted an ASD that does not comply with the Board's Regulations. Either way, these documents should not be belatedly added to the Agency Record now.

Further, if the omission of the full text of these references causes problems for Petitioner, those problems are of its own making. Had Petitioner submitted the full text of these references to the Agency, the full text would now be in the Record. Instead, Petitioner submitted citations to these documents. Now those citations are in the Record.

Finally, suppose all of Petitioner's requests were granted, and every document cited by a document currently in the Agency Record was itself added to the Record. By the same rationale, every document cited in one of *those* documents would now belong in the Record as well. The Record would grow exponentially and would swiftly come to number in the millions of pages. The

Agency respectfully suggests that such an outcome would be contrary to the purpose of Section 105.212 and unhelpful to the Board's review.

The Agency's concerns above apply to all of Appendices 2 through 22. The Agency's specific concerns for each subcategory of documents are detailed below.

1. The Board should reject Appendices 2-4.

Petitioner's Appendices 2, 3, and 4 are documents cited in a Record document and previously submitted by Petitioner to IEPA, but not in connection with the ASD. Appendices 2 and 4 relate to other waste management units at the Newton Power Station. Petitioner points to no evidence that the Agency consulted or relied on these documents in this proceeding (other than portions already in the Agency Record because Petitioner submitted them to the Agency in connection with the ASD). In contrast to *KCBX*, where the documents at issue were filed under the same permit number and Agency procedures called for them to be reviewed (PCB 14-110 (Apr. 17, 2014), slip op. at 17, 19), Petitioner here points to no Agency procedure that required Agency personnel to review these documents in reviewing an ASD. Because the Agency did not rely on these documents, and was not required to rely on them, Appendices 2 and 4 do not belong in the Agency Record.

Appendix 3 is the "underlying groundwater monitoring data" for which the Newton ASD was submitted. (Motion at ¶14 n. 4.) Petitioner states that this data was "necessarily within IEPA's possession," but points to no requirement for the Agency to directly review underlying groundwater data as part of the ASD review, whether that data is in the Agency's "possession" or not. (Motion at ¶13.)

Petitioner cites the testimony of an individual Agency employee in support of its claim that "IEPA noted that it selectively reviewed and relied upon certain of these documents" including

Appendix 3. (Motion at ¶13, citing Mullenax Dep. at 77, Motion at p. 31.) But as the cited testimony shows, every part of this claim is false. First, as noted in section II.E above (page 15), Petitioner chose not to use Supreme Court Rule 206(a)(1) to depose a witness who could speak for "IEPA." Second, the document placed before the witness was not Appendix 3 but Petitioner's public comment (which is already present in the Agency Record as Document 29, and was referred to by Petitioner's counsel as such in the deposition) (Mullenax Dep. at 76, Motion at p. 30). The only "selectivity" here is Petitioner's own selectivity in choosing certain parts of the data as meriting inclusion in its public comment. Third, the witness did not state that she, let alone the Agency, had "relied" on this document for anything. Thus, Petitioner's claim that the Agency "selectively" reviewed or relied on these documents is baseless. Any selectivity comes from Petitioner's own choices about what to put before the Agency.

For all the above reasons, the Board should deny Petitioner's motion to supplement the record as to Appendices 2-4.

2. The Board should reject academic references cited in the ASD.

Petitioner's Appendices 5-13 consist of the full text of all the academic references cited in the ASD. (Motion at ¶17.) The Agency did not consult or rely on any of these documents in reaching the ASD nonconcurrence decision. Moreover, none of the articles appear to present any site-specific data, so in any event it is difficult to understand what bearing they would have on the

question of whether the ASD was sufficient.[7] Therefore, none of these documents belong in the Agency Record under 35 Ill. Adm. Code 105.212(b).

Petitioner argues that these documents should be in the Record because even though Petitioner did not attach them to its ASD, "they were easily accessible through publicly available resources and/or from IPGC." (Motion at ¶17.) Petitioner points to no authority to suggest that all documents the Agency could theoretically request from an applicant belong in the Record.

For these reasons, the Board should deny Petitioner's request to supplement the Record with Appendices 5-13.

3. The Board should reject industry publications cited in Petitioner's public comment.

Petitioner's Appendices 14-18 are industry publications cited in Petitioner's public comment of November 3, 2023. (Motion at ¶19.) These are improper for the same reasons that Appendices 5-13 are improper: the Agency did not consult or rely on them; the Agency had no reason to do so; and Petitioner could have put the full text of these documents before the Agency but chose not to.

In addition, the Agency is concerned by Petitioner's use of the public comment process to supplement the ASD, and particularly by Petitioner's expectation that the Agency review the public comment as if it were part of the ASD. The ASD process laid out in Section 845.650(e) is clear.

[7] The closest any of these cited references come to being site-specific may be Appendix 10 (Panno et al. 2018), which Petitioner cited in its ASD and petition exhibits for various claims about the levels of chloride in Jasper County groundwater. (R. at R001613, R002198). In preparing for this appeal proceeding, the Agency's counsel reviewed that article, seeking to find support therein for any of the statements Petitioner had made. For that reason, the Agency's counsel submitted a number of requests to admit relating to the article, in part to confirm that counsel really was looking at the right article. Petitioner now seeks to further abuse the discovery process by groundlessly asserting that these requests to admit, prepared more than six months *after* the Agency's decision, "indicat[e]" that the Agency "likely considered them in connection with their nonconcurrence decision." (Motion at ¶17 n.6). Petitioner is thus making a groundless claim that purports to be supported by a discovery request that was itself prompted by Petitioner's *previous* groundless claims citing Appendix 10.

First, an exceedance is detected. Second, the facility owner (if it chooses to do so) presents its ASD to the Agency. Third, the public is invited to weigh in on the merits of the ASD. Fourth, the Agency issues its decision. *See* 35 Ill. Adm. Code 845.650(e)(1)-(4). This all follows a strict timeline, and for good reason: to protect the public health and environment of Illinois from the substantial dangers created by CCR impoundments. If a facility owner could shift the goalposts by using the public comment period to supplement the ASD, the timeline would be turned on its head: the owner could moot all other public comments by filing its own at the last minute (as Petitioner did here), thus superseding the earlier version of the ASD to which other public comments had been directed. And under these circumstances the already short timeline would be even shorter: the ASD would not be final until after public comment had closed. Only then could the Agency's review begin.[8] Therefore, Petitioner's use of public comment to supplement the ASD was improper and the Board should give no weight to Petitioner's argument that the Agency should have included every document cited in the public comment in the Record.

Therefore, the Board should deny Petitioner's motion to supplement the Agency Record with Appendices 14-18.

4. The Board should reject USEPA documents cited in Petitioner's public comment.

Petitioner's Appendices 19-22 consist of certain USEPA documents that were cited in Petitioner's public comment. These do not belong in the Agency Record for the same reasons reviewed above for the industry publications cited in Petitioner's public comment.

[8] Further highlighting the impracticality of using public comments in this way is the fact that in this case, there was only a single business day between when Petitioner submitted the comment (Friday, November 3, 2023) and when the Agency's decision was due (Tuesday, November 7, 2023).

Petitioner cites to deposition testimony, claiming that "[a]n Agency witness admitted to reviewing" Appendix 19. (Motion at ¶21.) But the transcript shows otherwise. Presented with the document, the witness acknowledged that she "ha[d] reviewed" the document at some previous time. (Mullenax Dep. at 77, Motion at p. 31.) But on further questioning she promptly clarified that for the ASD review, she did not "seek out or review" this document or any of the others cited in Petitioner's public comment. (Mullenax Dep. at 78, Motion at p. 32.) It should come as no surprise that Agency employees, tasked as they are with many complex responsibilities, often review USEPA documentation. But the Agency Record is not required to contain every document that any member of the review team ever consulted for any reason, at any previous point in that employee's career—only those documents the Agency actually relied on for the appealed decision.

For all of the above reasons, the Board should reject Petitioner's motion to supplement the record with Appendices 19-22.

C. Documents not cited in the Agency Record

1. The Board should reject USEPA documents used as deposition exhibits.

Petitioner's Appendices 23-25 are three USEPA publications: the Federal Register publications of the proposed and final rules corresponding to 40 C.F.R. part 257 subpart D (Appendices 23 and 24), and a 2014 human and ecological risk assessment (Appendix 25). Unlike the previous 22 documents, Petitioner did not mention these documents to the Agency until the depositions on May 28, 2024, and for that reason they are not mentioned anywhere in the Agency Record.

Petitioner argues, without any evident rationale, that "[a] reasonable review of the Newton ASD would have included a review of these documents[.]" As to Appendices 23 and 24, if Petitioner thinks the federal CCR rule is relevant to this proceeding, one might wonder why

Petitioner wants to include the Federal Register publications rather than the relevant section of the Code of Federal Regulations. The deposition transcript suggests an answer: Petitioner hopes to use not the actual rule, but a few USEPA responses to public comments that refer favorably to the use of boron and porewater sampling in contexts unrelated to this appeal. *See, e.g.*, Hunt Dep. at 106, 111 (Motion at pp. 65, 70). Petitioner has presented no basis for considering these federal comment responses to be relevant to the interpretation of the Illinois rules.

Petitioner's evident intent to use Appendix 25's discussion of using porewater sampling for modeling purposes (as reviewed in Hunt Dep. at 114, Motion at p. 73) is even more misguided. A key distinction between the Illinois and federal CCR rules is that the federal rule is risk-based, requiring complex statistical analysis, but the relevant Illinois rule, 35 Ill. Adm. Code 845.650(e), is not. Whatever merits porewater sampling may have for risk modeling, those merits have no bearing on Petitioner's ASD under Illinois rules. Thus, not only was Appendix 25 not before the Agency in its review, it is irrelevant to this appeal.

Petitioner's only concrete argument for including these three documents in the Agency Record is that "members of the IEPA review team were aware of" them or had encountered them before.[9] (Motion at ¶25.) Even taking that claim at face value, being "aware" of a document is a long way from relying on it. Petitioner presents no evidence that the Agency relied on these documents or was required to.

For all of the above reasons, the Board should reject Petitioner's motion to supplement the Record with Appendices 23-25.

[9] In fact, as to Appendices 23 and 24, even this apparent "awareness" seems to reflect the witness's confusion over whether she was being asked about the federal rule or just this particular Federal Register publication of it. *See, e.g.*, Hunt Dep. at 103, Motion at 63 ("It's 40 CFR part 257. The USEPA CCR rule, or at least the preamble, it looks like. I'm not sure. Or the proposed rules. I'm not really sure.") Petitioner's counsel chose not to clarify the point.

2. The Agency does not object to supplementing the Agency Record with Appendices 26-28.

Appendices 26-28 (Motion at ¶26) consist of the initial disclaimer and first two chapters of the USEPA SW-846 standard. Inasmuch as Petitioner's failure to submit "total solids sampling, analysis and reporting in accordance with SW846" was one of the three separate reasons for IEPA's nonconcurrence decision (R. at R001965), these documents may provide additional context that may be helpful to the Board's review. The Agency therefore does not object to supplementing the Agency Record with these documents, though Petitioner's request is surprising given that Petitioner previously argued that SW-846 is wholly irrelevant to the evaluation of an ASD. (See, e.g., R. at R001787-1788).

IV. Conclusion

The Agency respectfully requests that the Board deny Petitioner's motion to supplement the Record as to Petitioner's Appendices 2 through 25 for all the foregoing reasons. In particular the Board should reject the motion as to these appendices because in reaching the nonconcurrence decision under review, the Agency did not rely on or even consult these documents. Nor was the Agency required to do so. Nor did Petitioner avail itself of multiple opportunities to put these documents before the Agency. However, the Agency does not object to supplementing the Record with Petitioner's Appendices 1, 26, 27, and 28, if the Board is persuaded that these documents would be helpful to its review.

Respectfully Submitted,

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