

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

**ILLINOIS POWER GENERATING
COMPANY**

Petitioner

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

PCB 2024-043

NOTICE OF FILING

To: Illinois Pollution Control Board
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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the attached **MOTION FOR SUMMARY JUDGMENT**; and a **CERTIFICATE OF SERVICE**, copies of which are herewith served upon you.

/s/ Samuel A. Rasche

Dated: October 1, 2024

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 1st day of October, 2024:

I have electronically served a true and correct copy of the attached Motion for Summary Judgment by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

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My e-mail address is sam.rasche@afslaw.com

The number of pages in the e-mail transmission is 83.

The e-mail transmission took place before 5:00 p.m.

/s/ Samuel A. Rasche
Samuel A. Rasche

Dated: October 1, 2024

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**ILLINOIS POWER GENERATING COMPANY'S MOTION FOR SUMMARY
JUDGMENT**

Petitioner Illinois Power Generating Company ("IPGC" or "Petitioner") files this motion for summary judgment, pursuant to 35 Ill. Adm. Code § 101.516 and Hearing Officer's Order in this matter dated June 17, 2024.

In support of this Motion, IPGC states as follows:

I. INTRODUCTION

On October 6, 2023, IPGC submitted an alternative source demonstration report ("ASD") for a chloride exceedance found during groundwater monitoring conducted near its Newton Power Plant ("Newton") Primary Ash Pond ("PAP"). In that report, IPGC presented facts and evidence supporting a demonstration that a source other than the PAP caused the chloride contamination and the PAP did not contribute to the chloride contamination. IPGC prepared the ASD based on available facts and evidence, as well as additional relevant facts and evidence that it could reasonably assemble during the 60-day deadline for submission. On November 7, 2023, IEPA

issued a half page letter stating it did not concur with IPGC's alternative source demonstration ("Denial").

IEPA's Denial is not supported by a plain reading of 35 Ill. Adm. Code Part 845 ("Part 845"), and an interpretation of Part 845 that upholds the Denial would result in an impermissible "absurd, unreasonable, inconvenient, or unjust" interpretation of Part 845. The Denial does not take issue with any of the facts or evidence IPGC provided in support of its alternative source demonstration. Instead, it identifies three alleged "Data Gaps" IEPA asserts must have been included in support of the ASD. However, the information in these "Data Gaps" was not required in the ASD as a matter of law. They are not based on any legal requirements under Part 845 and instead were developed through backroom conversations and interpretations at IEPA, of which IPGC had no notice. Requiring IPGC's ASD to have included the information in the "Data Gaps" would further result in an impermissible "absurd, unreasonable, inconvenient, or unjust" application of Part 845 by requiring IPGC to have complied with data "requirements" of which it had no notice and with which it would be unfair or impossible to comply. Accordingly, IPGC is entitled to summary judgment as a matter of law.

II. PETITIONER'S STATEMENT OF UNDISPUTED FACTS

1. Illinois Power Generating Company ("IPGC") owns and operates the Newton Power Plant ("Newton") located in Jasper County, Illinois. Document 12¹ at R001611-001612.

2. Newton includes the Primary Ash Pond ("PAP"), a Coal Combustion Residual ("CCR") surface impoundment regulated under 35 Ill. Adm. Code Part 845. *Id.* at R001612.

¹ Citations to the record filed by IEPA in this matter will refer to the document number(s) and Bates number(s) assigned by IEPA.

3. In October 2021, IPGC submitted an operating permit application for the PAP under Part 845. Together with that operating permit application, IPGC submitted a Part 845 groundwater monitoring program for the PAP. Document 10 at R000565-584, R001242-1263.

4. IEPA has not yet issued an operating permit, or approved IPGC's pending groundwater monitoring program, for the PAP.

5. In the second quarter ("Q2") of 2023, IPGC conducted a round of quarterly groundwater monitoring of the PAP under the groundwater monitoring program submitted with its operating permit application and pending before IEPA. Ramboll, 35 I.A.C. § 845.610(B)(3)(D) *Groundwater Monitoring Data and Detected Exceedances; Quarter 2 2023; Primary Ash Pond, Newton Power Plant, Newton Illinois* (August 7, 2023) (attached as Document 14 to PCB 2024-043, *Illinois Power Generating Company v. Illinois Environmental Protection Agency, August 1, 2024 Expert Report of Mindy Hahn*) ("Q2 Groundwater Monitoring Report").

6. On August 7, 2024, IPGC submitted its Q2 Groundwater Monitoring Report to IEPA, which contained results from its Q2 2023 groundwater monitoring. This groundwater monitoring report included the PAP's groundwater monitoring results for two background and 16 downgradient wells included in the PAP's groundwater monitoring program. *Id.* The groundwater monitoring report also included porewater sampling results for four porewater sampling locations at the PAP. *Id.* The Q2 Groundwater Monitoring Report was also posted to the Newton PAP's 35 Ill. Admin. Code Section 845.810 Publicly Accessible Internet Site.²

7. The Q2 Groundwater Monitoring Report indicated the following exceedances of 35 Ill. Admin. Code 845.600 Groundwater Protection Standards ("GWPS"): chloride at well APW15;

² Available at <https://www.luminant.com/documents/ccr/il-ccr/Newton/2023/2023-Newton%202023%202nd%20quarter%2035%20IAC%20845%20GW%20report-Newton-Primary%20Ash%20Pond-W0798070001-01.pdf>

Lithium at well APW02; sulfate at wells APW02, APW04, APW05S, and APW10; and total dissolved solids at wells APW02, APW04, and APW05S. Q2 Groundwater Monitoring Report at Table 2; Document 12 at R001611.

8. On October 6, 2023, IPGC submitted a 35 Ill. Adm. Code 845.650(e) alternative source demonstration to IEPA for the chloride exceedance at well APW15 included in the Q2 Groundwater Monitoring Report (the “ASD”). Document 12 at R001606-1639.

9. The ASD was submitted within 60 days from the date of determination of an exceedance of a GWPS. Document 12.

10. The ASD submittal was also posted to the PAP’s public CCR website within 24 hours of submittal to IEPA. *Id.* at R001606.

11. The ASD indicated that the lithium, sulfate, and TDS exceedances included in the Q2 Groundwater Monitoring Report would be addressed in accordance with 35 Ill. Adm. Code 845.660. *Id.* at R001611.

12. The ASD was prepared on behalf of IPGC by Ramboll Americas Engineering Solutions, Inc. and is certified by Anne Frances Ackerman, a Licensed Professional Engineer and by Brian G. Hennings, a Licensed Professional Geologist. *Id.* at R001608.

13. The ASD was the very first ASD Illinois EPA reviewed under the 35 Ill. Adm. Code Part 845 program. Deposition of Lauren Hunt at 66:8-66:12 (May 28, 2024) (attached as Document 3 to PCB 2024-043, *Illinois Power Generating Company v. Illinois Environmental Protection Agency, August 1, 2024 Expert Report of Mindy Hahn*) (“Hunt Deposition”).³

³ Relevant excerpts from the Lauren Hunt and Heather Mullenax Depositions are also attached as Exhibit B.

14. The ASD provides a background section with subsections that include “Site Location and Description,” “Description of Primary Ash Pond CCR Unit,” “Site Hydrogeology,” “Regional Bedrock Geology,” “Water Table Elevation and Groundwater Flow Direction,” and “Groundwater and PAP monitoring.” Document 12 at R001612-1614.

15. The ASD identified three lines of evidence (“LOEs”) in support of its conclusions. Document 12 at R001615.

16. The first reported LOE (“LOE 1”) in the ASD states “separation between the UA and the base of ash is approximately 60 feet, which represents the thickness of the low permeability glacial till that comprises the UCU. Based upon these observations there is no complete pathway for transport of CCR constituents to APW15, and the PAP is not the source of the chloride exceedance at that well.” *Id.* LOE 1 also sites to Appendix B of the ASD, which is identified as “Supporting Materials for LOE#1.” *Id.*

17. The second reported LOE (“LOE 2”) in the ASD states that “concentrations of primary CCR indicators in APW15 do not exceed background limits and are not increasing.” *Id.* LOE 2 states that “[b]oron and sulfate can be indicators of CCR impacts to groundwater due to their leachability from CCR and mobility in groundwater,” and “[i]f the groundwater in APW15 had been impacted by CCR from the [PAP], boron and sulfate concentrations would be expected to be elevated above their respective background Upper Tolerance Limits.” *Id.* It also states “[i]f groundwater downgradient of the PAP was being affected by CCR but boron and sulfate did not yet exceed background concentrations, boron and sulfate concentrations would be expected to be increasing.” *Id.* LOE 2 states “[t]he concentration of boron in compliance well APW15 (0.13 mg/L) is less than the boron UTL (0.26 mg/L) and the concentration of sulfate in APW15 (0.40 mg/L) is also less than the sulfate UTL (35.84 mg/L), and the lack of increasing trends in boron

and sulfate concentrations at monitoring well APW15 indicate that this well has not been affected by CCR impacts from the [] PAP.” *Id.* at R001616. LOE 2 cites to the groundwater monitoring plan submitted with the PAP’s operating permit application and the Q2 Groundwater Monitoring Report. *Id.* The ASD also notes that analytical data to support LOE 2 are included in Appendix C to the ASD.

18. The third reported LOE (“LOE 3”) in the ASD states that “if the PAP was the source of chloride in downgradient groundwater, chloride concentrations in PAP porewater would be expected to be greater than the groundwater concentrations. However, the median chloride concentration observed in compliance groundwater monitoring well APW15 is greater than the median chloride concentrations observed porewater, indicating that chloride concentrations are not related to the PAP.” *Id.* LOE 3 provides a table described as “Summary Statistics for Chloride in APW15 and PAP Porewater (February 2021 to April 2023),” and cites to Appendix C, which it describes as containing “[a]nalytical data supporting the summary statistics. *Id.*

19. The ASD further states the following:

Based on the review of regional literature and site-specific bedrock conditions, chloride concentrations in bedrock groundwater are a likely source of chloride observed in APW15 for the following reasons:

- Chloride is present in Pennsylvanian shale in Jasper County at concentrations ranging from 100 to 5,000 mg/L.
- Upward vertical hydraulic gradients and fractures near geologic features provide conduits for these chloride-rich waters to migrate. The Clay City Anticline is present east of the PAP and a saline spring has been mapped adjacent to this anticline approximately 10 miles south of the PAP in Clay County.
- Well APW15 is located in close proximity to bedrock and screened at a lower elevation than other wells monitoring the UA which could explain why this is the only affected well. The screened interval is estimated to be 10 to 15 feet lower than the top of bedrock in adjacent wells. The high hydraulic conductivity of the UA relative to the low hydraulic conductivity of underlying bedrock (Mehnert et al, 1990) at this location provides a potential pathway for interaction with upward-migrating chloride-containing bedrock groundwater.

Id. at R001617.

20. The ASD includes a References section, referencing sixteen documents. *Id.* at R001618-1619.

21. On October 24, 2023, IEPA provided notice to its listserve regarding the ASD, triggering a 14-day period for written comments on the ASD submittal pursuant to 35 Ill. Adm. Code § 845.650(e)(3)

22. On November 3, 2023, within the 14-day period for written comments, IPGC submitted a written comment regarding the ASD in the form of a letter to IEPA (the “Comment Letter”). Document 29. The Comment Letter included hydraulic conductivity and boring log data, all of which was previously provided or referenced in the Newton PAP October 25, 2021 operating permit application (Document 10 and/or July 28, 2022, construction permit application (Document 37) that had been previously submitted to IEPA. *Id.* at R001787-88.

23. On November 7, 2023, IEPA issued a letter notifying IPGC that it “does not concur with the Newton Primary Ash Pond Alternative Source Demonstration” due to three alleged “Data Gaps” (the “Denial”). Document 32, R001965.

24. The “Data Gaps” listed in the Denial were

- a) First, “[s]ource characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with SW846” (“Data Gap 1”).
- b) Second, “[h]ydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and presented with hydrogeologic characterization of bedrock unit” (“Data Gap 2”).

- c) Third, “[c]haracterization to include sample and analysis in accordance with 35 IAC 845.640 of alternative source must be provided with ASD” (“Data Gap 3”).

25. Four individuals were involved in or responsible for (a) the review of the Newton ASD and the Comment Letter and (b) the IEPA Denial. IEPA provided the following information regarding each individual’s responsibility/involvement.

- a) Lauren Hunt’s responsibility/involvement was to conduct the “Technical Review of [the] Agency Newton Generating Station ASD Response.”
- b) Heather Mullenax’s responsibility/involvement was as “Groundwater Section Project Manager for Newton Generating Station.”
- c) Mike Summer’s responsibility/involvement is listed as “Lead Approver and Signatory on Nonconcurrency Letter.”
- d) Lynn Dunaway’s responsibility and involvement is listed as “Copyedited Nonconcurrency Letter.”

Respondent’s Answers to Petitioner Illinois Power Generating Company’s First Set of Interrogatories, Attached as Exhibit A.

26. Lauren Hunt further explained that she was responsible for drafting the “Data Gaps” listed in the Denial letter. Hunt Deposition at 71-72.

27. In IEPA’s Denial, “SW846” refers to "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods", USEPA Publication No. SW-846, as amended by Updates I, II, IIA, IIB, III, IIIA, and IIIB (Doc. No. 955-001-00000-1) (available online at <https://www.epa.gov/hw-sw846/sw-846-compendium>) (“SW846”), which is a guidance document on analytical methods published by the United States Environmental Protection Agency (“USEPA”).

28. IEPA's Denial does not cite to any regulatory provision of 35 Ill. Adm. Code Part 845, guidance document, or other publicly available Agency interpretation document in support of the Denial, other than a reference to "SW846" in "Data Gap 1" and a reference to "35 IAC 845.640" in "Data Gap 3." Document 32 at R001965.

29. IPGC could not have collected the information in the "Data Gaps" within the 60-day period provided to conduct an ASD under 35 Ill. Adm. Code § 845.650(e). Document 33 at R002213; PCB 2024-043, *Illinois Power Generating Company v. Illinois Environmental Protection Agency*, August 1, 2024 Expert Report of Mindy Hahn at 24 ("Hahn Report"); Hunt Deposition at 81:20-82:2.

30. Lauren Hunt explained her interpretation of "Data Gap 1" is that IPGC should have included solid sampling and total solids analysis of the PAP with the ASD consisting of "ten borings" with 30 samples taken equally from "the upper one-third of the boring, the middle one-third of the boring, and the lower one-third of the boring." Hunt Deposition at 66:17-67:2, 80:21-81:13.

31. It would take approximately 21-42 weeks for IPGC to perform a source characterization of CCR in the PAP using total solids sampling techniques under SW846. Document 33 at R002213.

32. SW846 does not contain a laboratory methodology by which to analyze a solid sample for chloride or chlorine. Hahn Report at 18; SW846.

33. Lauren Hunt explained her interpretation of the characterization referenced in "Data Gaps 2 and 3" is that the alternate source must be characterized through sampling that includes the collection of more than one sample. Hunt Deposition 68:10 – 69:12.

34. It would take at least approximately 20-30 weeks to conduct a characterization of the bedrock surrounding the PAP that includes the collection of one or more samples from the bedrock. Document 33 at R002213; Hunt Deposition at 97:1-97:14.

35. IPGC did not have the information listed in the “Data Gaps” available prior to detecting the groundwater exceedance of chloride at APW15.

III. LEGAL BACKGROUND

A. Summary Judgment Standard

Summary judgment is appropriate when the pleadings and depositions, together with any affidavits and other items in the record, “show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460 (1998); 35 Ill. Am. Code 101.516(b); *see also, Brickyard Disposal & Recycling, Inc. v. IEPA*, PCB 16-66, slip op. at 4 (Nov. 17, 2016). The Board considers the pleadings and the record to determine whether a genuine issue of material fact exists, and “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment.” PCB 16-66, slip op. at 4. A “party opposing a motion for summary judgment may not rest on the pleadings, but must ‘present a factual basis which would arguably entitle [it] to judgment.’” *People of the State of Illinois v. Dressler Truck Service Inc.*, PCB 19-73, slip op. at 5 (July 25, 2019), citing *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219, (2nd Dist. 1994).

B. Standard of Review and Deference

This appeal represents the first opportunity for the Board to review a non-concurrence under 35 Ill. Adm. Code § 845.650(e). The burden of proof in an appeal of a final agency decision is upon the Petitioner to show “that the Agency’s reasons for denial are either insufficient or improper.” 35 Ill. Adm. Code § 105.112; *ESG Watts, Inc. v. Pollution Control Bd.*, 286 Ill. App.

3d 325, 331 (3d Dist. 1997), citing *ESG Watts, Inc. v. Illinois Environmental Protection Agency*, PCB 94-243 (Consolidated), slip op. at 6 (March 21, 1996). However, the Board has explained that it will not grant IEPA any special deference where IEPA issues a final agency decision without hearing and where no other “procedures, such as cross-examination, are available for the [petitioner] to test the validity of the information the Agency relies upon in [its decision]” prior to the matter coming before the Board. *EPA v. Pollution Control Board*, 115 Ill.2d 65, 70 (1986). Instead, the Board must “review the entirety of the record to determine (1) if the record supports the IEPA's decision, and (2) that the procedures used by the IEPA are consistent with the Act and Board regulations.” *Des Plaines River Watershed Alliance v. IEPA*, PCB 04-88, slip op.12 (April 19, 2007) (aff'd sub nom. *IEPA v. Pollution Control Board*, 386 Ill. App. 3d 375 (3d Dist. 2008)).

This matter presents the first opportunity for IPGC to “test the validity of the information the Agency” relied upon in its Denial. IPGC had no previous opportunity to conduct cross-examination of the Agency’s decision or other procedure by which to test the Agency’s basis for the Denial. Accordingly, IEPA’s decision and positions are not entitled to any special deference and the Board must conduct a review to determine whether the record supports IEPA’s Denial and whether the procedures used by IEPA to issue the Denial are consistent with the Illinois Environmental Protection Act and the Board’s regulations.

In cases where the issue involves the “proper interpretation of a Board rule” and “the Board itself has not previously interpreted” the rule in question, “any prior interpretations made by the Agency are not binding on the Board” and the “Board approaches the issue de novo.” *Emerald Performance Materials, L.L.C. v. IEPA*, PCB 04-102, slip op. at 18 (Oct. 15, 2009), citing *Village of Fox River Grove v. Pollution Control Board*, 299 Ill. App. 3d 869, 877-78, (2d Dist. 1998) & *Peoria Disposal Co. v. Illinois Environmental Protection Agency*, PCB 08-25, slip. op. at 31

(January 10, 2008). When the Board's decision hinges on statutory or regulatory interpretation "the Board will consider the Agency's arguments on statutory construction, but the Agency's arguments are not considered with any greater or lesser weight than [Petitioner's]." *Atkinson Landfill Company v. IEPA*, PCB 13-008, slip op. at 8 (June 20, 2013).

This matter involves the proper interpretation of the Part 845 regulations, including whether those regulations require particular data be included in an alternative source demonstration submitted under 35 Ill. Adm. Code § 845.650(e). This is a matter of first impression and the Board should, therefore, approach its review of this matter de novo, without giving the Agency's arguments any greater weight.

C. Part 845 Regulatory Background

IPGC's appeal is authorized by and submitted pursuant to 35 Ill. Adm. Code §§ 105 & 845.650(e)(7), which authorize the Board to review a final IEPA decision to not concur with an alternative source demonstration if an owner or operator petitions the Board for review.

IEPA regulates CCR surface impoundments under 35 Ill. Adm. Code. Part 845. Part 845 includes requirements for regular groundwater monitoring at CCR surface impoundments. 35 Ill. Adm. Code § 845.650. The detection of "constituents in exceedance of the groundwater protection standards in Section 845.600" will trigger a series of response requirements by the owner or operator, including a requirement to initiate an assessment of corrective measures within 90 days of the detected exceedance. § 845.650(d).

However, Part 845 permits the owner or operator of a CCR surface impoundment to submit a demonstration to IEPA that "a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination, or that the exceedance of the groundwater protection standard resulted from error in sampling, analysis, statistical evaluation, natural variation in groundwater quality, or a change in the potentiometric

surface and groundwater flow direction.” 35 Ill. Adm. Code § 845.650(e). This demonstration (often referred to as an alternative source demonstration or ASD) “must include a report that contains the factual or evidentiary basis for any conclusions and a certification of accuracy by a qualified professional engineer.” *Id.* This submission must occur “within 60 days after he detected exceedance of the groundwater protection standard.” *Id.*

IEPA must send a public notice of the ASD, and members of the public may submit written comments to IEPA within 14 days of the notice. 35 Ill. Adm. Code §§ 845.650(e)(2) & (3). Within 30 days after receiving an ASD, IEPA “must provide a written response to the owner and operator either concurring or not concurring with the ASD.” § 845.650(e)(4). “If the Agency does not concur with the ASD, the owner or operator may petition the Board for review of the Agency's non-concurrence under 35 Ill. Adm. Code 105.” 35 Ill. Adm. Code § 845.650(e)(7).

IV. ARGUMENT

The Denial’s conclusion that IPGC was required to include information from the three “Data Gaps” in its ASD is not supported by the law.⁴ Legally, the plain language of Part 845 does not require IPGC to have collected the information described in “Data Gap 1,” “Data Gap 2,” or “Data Gap 3,” during the 60-day period to prepare an ASD or prior to that period. Interpreting Part 845 as requiring the “Data Gap” information to be collected during the 60-day period to submit an ASD or prior to that period, would result in a legally impermissible interpretation of Part 845 because it would produce “absurd, unreasonable, unjust, or inconvenient” results. *Midwest*

⁴ IPGC maintains that the information in the “Data Gaps” are irrelevant and/or scientifically and technically unnecessary to support the ASD. For purposes of this Summary Judgment Motion, IPGC maintains even if this information was useful to conducting the ASD, there is no requirement, as a matter of law, that its ASD *must* include this information. Further, interpreting Part 845 to require the “Data Gap” information in an ASD would result in an “absurd, unreasonable, unjust, or inconvenient” construction of the rule.

Sanitary Serv., Inc. v. Sandberg, Phoenix & Von Gontard, P.C., 2022 IL 127327, ¶ 24. IPGC is, therefore, entitled to summary judgment.

A. The plain language of Part 845 does not require IPGC to have collected the information in IEPA's alleged "Data Gaps"

IEPA's Denial is based on its assertion that IPGC's ASD for the PAP must have included the information described in the "Data Gaps." However, this interpretation of Part 845 is not supported by a plain reading. There is no legal requirement for IPGC to have collected the information in the "Data Gaps" or include that information in its ASD.

The most reliable indicator of legislative or regulatory intent is the language of the statute or regulation, given its plain and ordinary meaning. *Bank of New York Mellon v. Laskowski*, 2018 IL 121995, ¶ 12; *Van Zelst Landscape Compost Facility v. IEPA*, PCB 11-7, slip op. at 14 (August 4, 2011) (citing *Ultsch v. Ill. Mun. Retirement Fund*, 226 Ill. 2d 169, 181 (2007)) ("[W]hen reviewing the language of a rule or statute, the law is clear that '[t]he best evidence of legislative intent is the statutory language itself, which must be given its plain and ordinary meaning.'"); *Atkinson Landfill Company v. IEPA*, PCB 13-008, slip op at 9 (June 20, 2013; *Kean v. Walmart Stores, Inc.*, 235 Ill. 2d 351, 368 (2009) (confirming the "plain meaning rule" applies not only to statute but also to regulation). The Board has explained it is "powerless to accept . . . interpretation" of Board rules that contradicts the plain meaning of the text, and to ignore the plain meaning of the rules is to "in effect, amend them through construction rather than the usual rulemaking procedures." *Central Illinois Public Service Co. (Meredosia Unit 3) v. IEPA*, PCB 86-147, slip op. at 6 (March 19, 1987). The plain language of Part 845 does not require collection of the information identified in the "Data Gaps," and thus, IPGC cannot be expected to comply with data "requirements" that are not clear from the plain language of the regulations.

1. The ASD Provision: 35 Ill. Adm. Code § 845.650(e)

As an initial matter, a plain reading of 35 Ill. Adm. Code § 845.650(e), the Part 845 regulatory provision governing alternative source demonstrations, does not require the information in the “Data Gaps” to be included in an alternative source demonstration. Section 845.650(e) does not specify what information must be included in an alternative source demonstration outside of explaining that the owner or operator of the impacted CCR surface impoundment must “submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination.” It further requires the alternative source demonstration “include a report that contains the factual or evidentiary basis for any conclusions and a certification of accuracy by a qualified professional engineer.” 35 Ill. Adm. Code § 845.650(e).

The plain language of § 845.650(e) does not include reference to any of the information in IEPA’s “Data Gaps,” nor does it reference a need to collect or develop *any particular* information in support of an alternative source demonstration. While requiring an ASD to provide the “factual or evidentiary basis” for its conclusions, this provision does not specify what that factual and evidentiary basis must consist of. 35 Ill. Adm. Code § 845.650(e).

Section 845.650(e), relatedly, does not include any cross references to other Part 845 information collection requirements, nor does any other section of Part 845 with information collection requirements cross reference § 845.650(e).⁵ Meaning, on its face, nothing in Part 845

⁵ There is a single other provision in Part 845 that cross references § 845.650(e), 35 Ill. Adm. Code § 845.660(a). This provision does not set forth any data collection requirements. It provides “[u]nless the Agency has concurred with an alternative source demonstration made under Section 845.650(e), the owner or operator must initiate an assessment of corrective measures to prevent further releases, to remediate any releases, and to restore the affected area.” There is one other section in part 845 that does not include a specific cross reference to § 845.650(e) but does reference alternative source demonstrations. 35 Ill. Adm. Code § 845.170(e) references an owner or operator’s responsibilities when the Agency does not concur with an ASD. This provision also does not set forth any ASD data collection requirements.

suggests that particular information must be included for consideration in an ASD. IEPA acknowledged as much during the Part 845 rulemaking when asked about its review of alternative source demonstrations under Part 845. There it was asked:

What, if any, criteria apply to the review process by which the Agency will make a determination whether the exceedance is not the result of the operation of the unit?

IEPA replied:

Section 845.650(d)(4)⁶ requires the owner or operator to provide factual or evidentiary information supporting the conclusion that the exceedance of the GWPS was due to a source other than the CCR surface impoundment caused the contamination, an error in sampling, analysis or statistical evaluation, or due to natural variation in groundwater quality or groundwater flow direction or elevation. No other criteria for review are provided.

In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Am. Code 845, First Supplement to IEPA's Pre-Filed Answers at 27-28, R20-19 (August 5, 2020) (excerpts attached as Exhibit C). Thus, the plain language of 845.650(e) does not require the collection and presentation of the information in "Data Gaps 1-3."

2. Other Part 845 Requirements

Section 845.650(e) exclusively controls the determination of whether there is a legal requirement for the "Data Gap" information to be included in an ASD. However, even putting

⁶ 845.650(d)(4) was the section designation allotted to the ASD provision in IEPA's initial proposal for the Part 845 regulations. Substantively the language in 845.650(d)(4) of IEPA's proposal is the same as the language in 845.650(e). It provided "The owner or operator of a CCR surface impoundment may, within 60 days of the detected exceedance of the groundwater protection standard, submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination, or that the exceedance of the groundwater protection standard resulted from error in sampling, analysis, statistical evaluation, natural variation in groundwater quality, or a change in the potentiometric surface and groundwater flow direction. Any such demonstration must be supported by a report that includes the factual or evidentiary basis for any conclusions and must be certified to be accurate by a qualified professional engineer." Statement of Reasons and Attachments: Proposed New 35 Ill. Adm. Code Part 845, *In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Am. Code 845* at 76, R20-19 (March 30, 2020) (excerpts attached as Exhibit E).

section 845.650(e) aside, no other provision in Part 845 mandates the collection of the information in the “Data Gaps.”

“Data Gap 1”

There is no legal requirement under Part 845 for the owner or operator of a CCR surface impoundment to have completed CCR characterization using “total solids sampling in accordance with SW846.” First, the plain language of the Part 845 regulations makes no reference to “total solids sampling” or a requirement to conduct “total solids sampling.”

Even if total solids sampling was required under a provision of Part 845, the regulations contain no requirement to conduct solids sampling “in accordance with SW846.” Notably, SW846 is incorporated by reference into Part 845 by Section 845.150 (the general incorporations by reference section of the Part 845 regulations). However, its inclusion in the general “incorporations by reference” section of Part 845 does not create an obligation to use SW846 for all activities conducted under Part 845. Rather, the Board has explained that where Illinois rules incorporate analytical methods by reference⁷ via a “centralized listing of incorporations by reference” such as Section 845.150, “Illinois rules further indicate where each method is used *in the body of the substantive provisions.*” See *In the Matter of: SDWA Update, USEPA Amendments (January 1, 2013 through June 30, 2013)*, R 14-8, slip op. at 24-25 (Jan. 23, 2014) (emphasis added). The only place in the “body of the substantive provisions” of Part 845 that indicates SW846 must be used is 35 Ill. Adm. Code § 845.640(j), which provides that “*groundwater samples* taken under [Subpart F of Part 845] must be analyzed by a certified laboratory using Test Methods for Evaluating Solid Waste, Physical/Chemical Methods, SW-846, incorporated by reference in Section 845.150.”

⁷ As explained above, “SW846” refers to a guidance document on various analytical methods published by the United States Environmental Protection Agency (“USEPA”).

(emphasis added). IEPA's alleged "Data Gap 1" does not allege a failure to conduct groundwater sampling or a failure to use SW846 methods for groundwater samples.⁸

Thus, there was no legal requirement for IPGC to collect the information in "Data Gap 1" as part of its ASD or to have had the information in "Data Gap 1" available at the time it discovered the chloride exceedance at APW15.

"Data Gaps 2 and 3"

Part 845 similarly includes no requirement for an owner or operator to collect the information in "Data Gaps 2 and 3." Nowhere in the plain language of Part 845 is there a data collection requirement for "hydraulic conductivities from laboratory or in-situ testing" to be collected, analyzed and presented with a "hydrogeologic characterization of" an alternate source. Nor is there a requirement for a characterization of an alternate source that includes "sample and analysis in accordance with 35 IAC 845.640." Part 845 is a program that is concerned with potential groundwater contamination from the CCR surface impoundments regulated under that program. *See In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R20-19, slip. op. at 1 (April 15, 2021). By suggesting that Part 845 requires characterization of an alternate source, IEPA is changing its previous interpretation regarding the scope of Part 845 and the requirements of ASDs. In the Part 845 rulemaking, IEPA explained why the Board should reject a proposal (which it did)

⁸ SW846, a guidance document and not a legal authority, similarly, contains no requirement that it be used for conducting an alternative source demonstration. Chapter 2 of SW846 states that the methods in that document are not "mandatory" unless specified as such by regulation. United States Environmental Protection Agency ("USEPA"), *SW-846 Update V*, (July 2014), Document 36 at R002247. USEPA guidance also makes clear that SW846 is only legally required where "explicitly specified" in a regulation. USEPA, *Disclaimer for Test Methods for Evaluating Solid Waste, Physical/Chemical Methods (SW-846)*, (July 2014), Document 34 at R002216.

that an “ASD specifically identify any alternate source and its impact on groundwater, respectively,” explaining

Part 845 is designed to regulate CCR surface impoundments. . . . While mitigation of the impacts of [other sources] are important, that task does not fall within the purview of Part 845. The key factor to ascertain from the ASD is that it is not the CCR surface impoundment responsible for the contamination and therefore no action relative to the CCR surface impoundment is required. Other sources of groundwater contamination should be addressed under other remedial programs.

Illinois Environmental Protection Agency’s Final Post-Hearing Comments at 12-13, R 20-19 (October 30, 2020) (excerpts attached as Exhibit D). Thus, Part 845 exists to determine the impacts, or not, of CCR surface impoundments and to address those impacts. It does not include requirements to do a hydrogeologic sampling and analysis characterization of all potential alternate sources.⁹

B. Interpreting Part 845 as requiring IPGC to have included the “Data Gaps” with its ASD would result in “absurd, unreasonable, inconvenient, or unjust” results

Further, it would be inappropriate to interpret Part 845 as requiring IPGC to include the information from the “Data Gaps” in its ASD. Regulations should not be construed in a manner that would lead to consequences that are “absurd, unreasonable, unjust, or inconvenient.” *Midwest*

⁹ While no characterization, including any sampling and analysis, of an alternate source is required based on the plain language of Part 845, “Data Gap 3’s” further suggestion that the alternative source characterization include “sample and analysis in accordance with 35 Ill. Adm. Code § 845.640” is further unfounded and unsupported by the plain language of Part 845. Section 845.640 applies to “[t]he groundwater monitoring program” for a CCR surface impoundment. 35 Ill. Adm. Code § 845.640(a), (b). This section is making reference to the “groundwater sampling and analysis program” for CCR surface impoundments that an owner or operator is required to submit to the Agency as part of its initial operating permit application. 35 Ill. Adm. Code § 845.610(b)(C). Alternate source sampling and analysis is not part of a CCR surface impoundment’s groundwater monitoring program. *See* 35 Ill. Adm. Code § 845.610, 85.630 845.650(a)-(d) (describing elements of groundwater monitoring program and the scope of the groundwater monitoring system installed under that program, to measure the potential impact of the CCR surface impoundment).

Sanitary Serv., Inc., 2022 IL 127327, ¶ 24 (“When interpreting statutory language, we are to give effect to the plain and ordinary meaning, avoiding absurd, unreasonable, unjust, or inconvenient results.”); *People v. Wilhelm*, 346 Ill. App. 3d 206, 208 (2004), citing *McMahan v. Industrial Comm’n*, 183 Ill.2d 499, 513–14 (1998) (“A court should not construe a regulation in a manner that would lead to consequences that are absurd, inconvenient, or unjust”); *Bank of New York Mellon*, 2018 IL 121995, ¶ 18 (January 19, 2018) (rejecting a party’s interpretation of a statutory filing deadline “with which it is legally impossible to comply”). *See also*, *Village of Fox River Grove*, 299 Ill.App.3d at 880 (1998) (the Board “has the power to construe its own rules and regulations to avoid absurd or unfair results.”). Interpreting Part 845 as requiring IPGC to provide the information in the “Data Gaps” with its ASD would result in an interpretation of Part 845 that leads to “absurd, unreasonable, inconvenient, or unjust” consequences because it would require IPGC to have complied with data “requirements” of which it had no notice and with which it would be unfair to or impossible to comply.

1. “Data Gap 1”

Alternative source demonstrations must be submitted within “60 days after the detected exceedance.” 35 Ill. Adm. Code § 845.650(e). It is undisputed that it would have been impossible for IPGC to collect the data requested by IEPA in its alleged “Data Gap 1” during the 60-day period IPGC had to compile the ASD. IPGC presented evidence demonstrating that it would have taken approximately 21-42 weeks (i.e., well over 60 days) to collect the information IEPA seeks through alleged “Data Gap 1.” Document 13 at R002213 (Affidavit of Cynthia Vodopivec). IEPA has presented no evidence suggesting that the information identified in “Data Gap 1” as interpreted by IEPA could be collected within 60 days of identifying an exceedance of a GWPS. IEPA witnesses involved in and responsible for review of the ASD and issuance of IEPA’s Denial

agreed that it would take 21-42 weeks of time to collect the information identified in “Data Gap 1” as interpreted by IEPA. Hunt Deposition at 81:20-82:2; Deposition of Heather Mullenax at 46:20-47:1 (May 28, 2024) (attached as Document 4 to PCB 2024-043, *Illinois Power Generating Company v. Illinois Environmental Protection Agency, August 1, 2024 Expert Report of Mindy Hahn*) (“Mullenax Deposition”); Exhibit A. An interpretation of Part 845 that would require the information in “Data Gap 1” to be collected in support of an alternative source demonstration during the 60-day period to compile such a demonstration is, therefore, absurd.

The only way IPGC could have included the information from “Data Gap 1” in the ASD is if it had started collecting that information well before the detection of the chloride exceedance in APW15. However, absent fair notice, an owner or operator should not have to collect particular data in support of an ASD prior to the detection of a GWPS exceedance indicating an ASD may be necessary. As explained above, the plain language of Part 845 does not require “Data Gap 1” and IPGC only became aware of IEPA’s interpretation that “source characterization of the CCR at the Primary Ash Pond” with “total solids sampling in accordance with SW846” was necessary for an ASD *after* its submittal of the ASD. Concluding that IPGC must have prospectively collected the information in “Data Gap 1” so it could be used in case IPGC did, one day, conduct an ASD is unjust. An owner or operator should not have to engage in significant efforts for hypothetical future occurrences. Particularly, without notice.

Finally, IEPA’s “Data Gap 1” is an absurdity because there is no SW846 solids sampling methodology for chloride. SW846 contains multiple types of sampling methodologies, including various total solids sampling techniques for metals. *See USEPA SW-846 Chapter 2, Choosing the Correct Procedure* (July 2014) (Document 36). IEPA’s Denial does not specify which SW846 methodology IEPA believes could have or should have been used to conduct total solids sampling

of chloride (or its related constituent chlorine) at the PAP. In deposition, Lauren Hunt, who was responsible for drafting the “Data Gaps” further stated that IEPA purposefully did not include which SW846 methodology it believed IPGC should have used to conduct “total solids sampling,” noting “I know that metals has a number of different analyses that are approved depending on the constituent. So we just said SW846 instead of parsing which methods.” Hunt Deposition at 77:7-77:15; Exhibit A. However, “there is no EPA SW-846 method that includes chloride or chlorine as an analyte in a solid sample so [IEPA’s] request for ‘total solids sampling’ using an SW-846 method for chloride or chlorine is not possible as written.” Hahn Report at 18; *See also* Document 36. IEPA cannot base a denial on an impossibility.

For these reasons IEPA’s Denial based on “Data Gap 1” is inappropriate and cannot stand as a matter of law.

2. “Data Gaps 2 and 3”

It is undisputed that it would have been equally impossible for IPGC to collect the information IEPA seeks through “Data Gaps 2 and 3” during the 60-day period it had to develop an ASD demonstration. Hahn Report at 21; Document 13 at R002213. Conducting a characterization of the bedrock surrounding the PAP, including sampling and analysis, would take approximately 20-30 weeks. Document 13 at R002213. IEPA has provided no evidence that collecting this information would have taken less time. In deposition, IEPA witnesses involved in and responsible for review of the ASD and issuance of IEPA’s Denial agreed that it would take at least this long, if not longer, to conduct the alternative source characterization IEPA is requesting in “Data Gaps 2 and 3.” Hunt Deposition at 97:1-97:14; Mullenax Deposition at 52:11-52:20; Exhibit A.

Thus, similar to “Data Gap 1,” the only way IPGC could have included the information from “Data Gaps 2 and 3” in the ASD is if it had started collecting that information well before the detection of the chloride exceedance in APW15. But it is an absurd interpretation of Part 845 to require collection of the information described in “Data Gaps 2 and 3” prior to the 60-day period for conducting an alternative source demonstration. This would conceivably have required IPGC to forecast any and all potential alternative sources that might impact its groundwater samples and to complete a physical characterization of each of those sources before even knowing there has been an exceedance. It is absurd, unjust and highly inconvenient to expect the owner or operator of a CCR surface impoundment to prospectively collect data characterization of any and all potential alternative sources. Not only does it result in significant efforts for hypothetical future occurrences, it reads into Part 845 a requirement that is clearly outside the scope of Part 845. As IEPA itself noted, “Part 845 is designed to regulate CCR surface impoundments.” Exhibit D at 12-13 (October 30, 2020). Characterizing (and mitigating if appropriate) the impacts of alternate sources may fall under the purview of other Illinois programs, but it is not under the purview of Part 845. *Id.* Reading such a requirement into Part 845 would result in unlawfully amending Part 845. *Central Illinois Public Service Co. (Meredosia Unit 3) v. IEPA*, PCB 86-147, slip op. at 6 (March 19, 1987).

Thus, interpreting Part 845 to require IPGC’s ASD to have included the information in the “Data Gaps” would result in an absurd, unreasonable, inconvenient, or unjust consequence.

V. CONCLUSION

IEPA is not authorized to read data requirements into an alternative source demonstration that do not exist under the plain reading of the law. A plain reading of Part 845 did not require the Newton PAP ASD to include the information in “Data Gaps 1, 2 or 3.” Reading such a requirement into Part 845 would result in an absurd, unreasonable, inconvenient, or unjust consequences. For

the reasons explained above, Illinois Power Generating Company respectfully requests that the Board grant its Motion for Summary Judgment.

Respectfully submitted,

/s/ Bina Joshi

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*Attorneys for Illinois Power Generating
Company*

**BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD**

**ILLINOIS POWER GENERATING
COMPANY**

Petitioner

v.

**ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY**

Respondent.

PCB 2024-043

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EXHIBIT B	Excerpts from the May 28, 2024, depositions of Lauren Hunt and Heather Mullenax
EXHIBIT C	<i>In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Am. Code 845</i> , First Supplement to IEPA's Pre-Filed Answers at 27-28, R20-19 (August 5, 2020)
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EXHIBIT E	<i>In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845</i> , Statement of Reasons, R 20-19 (March 30, 2020).

EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

**RESPONDENT’S ANSWERS TO PETITIONER ILLINOIS POWER
GENERATING COMPANY’S FIRST SET OF INTERROGATORIES**

NOW COMES Respondent, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, by and through its attorney, KWAME RAOUL, Attorney General of the State of Illinois, and hereby answers PETITIONER ILLINOIS POWER GENERATING COMPANY’S FIRST SET OF INTERROGATORIES as follows.

RESPONDENT’S GENERAL OBJECTION: Respondent raises the following objection to all of the requests below:

Objection. This interrogatory seeks information outside the scope of discovery. The scope of discovery in Board proceedings is limited to “relevant information and information calculated to lead to relevant information.” 35 Ill. Adm. Code 101.616(a). The Board’s review of final Agency decisions is “based exclusively on the Agency record before the Agency at the time the permit or decision was issued.” 35 Ill. Adm. Code 105.214(a). The information this interrogatory seeks is outside the Agency record. The information requested is therefore not relevant to this proceeding and is not calculated to lead to relevant information.

1. Identify each current or former IEPA employee, agent, contractor or other third person who was involved in or responsible for (a) the review of the Newton ASD and the Comment Letter and (b) the IEPA Denial. For each individual, describe their role and responsibilities in connection with the review of the Newton ASD and the Comment letter and in decision-making for the IEPA Denial.

ANSWER: Subject to and without waiving Respondent's General Objection: The individuals and their respective roles and responsibilities are as follows:

Individual	Role	Responsibility/Involvement
Lauren Hunt	Environmental Protection Geologist III	Technical Review of Agency Newton Generating Station ASD Response
Heather Mullenax	Environmental Protection Geologist II	Groundwater Section Project Manager for Newton Generating Station
Mike Summers	Groundwater Section Manager	Lead Approver and Signatory on Nonconcurrence Letter
Lynn Dunaway	Title at the time: Environmental Protection Specialist IV Current title: Contract Employee	Copyedited Nonconcurrence Letter

2. Identify the person or persons who included or considered the following documents in the Agency Record: Documents identified as 1, 2, 3, 4, 5, 6, 7, 8, 11, 25 and 26. Please list the individual(s) by document.

ANSWER: Subject to and without waiving Respondent's General Objection: The persons who considered these documents, listed by document, are as follows:

Document 1	Lauren Hunt
Document 2	Lauren Hunt
Document 3	Heather Mullenax
Document 4	Lauren Hunt
Document 5	Lauren Hunt
Document 6	Lauren Hunt
Document 7	Lauren Hunt
Document 8	Lauren Hunt
Document 11	Lauren Hunt
Document 25	Lauren Hunt
Document 26	Lauren Hunt

3. Identify the person or persons who authored the handwritten notes located on Document 17 in the Agency Record.

**ANSWER: Subject to and without waiving Respondent's General Objection:
Heather Mullenax.**

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: _____
Samuel Henderson, #6336021
Assistant Attorney General
Environmental Bureau
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(217) 720-9820
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Dated: May 23, 2024

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS POWER
GENERATING COMPANY,

Petitioner,

V.

ILLINOIS ENVIRONMENTAL PROTECTION
AGENCY,

Respondent.

PCB 2024-043

(Petition for review – Alternative Source Determination)

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, 735 ILCS 5/1-109 (2022), Lauren Hunt certifies that she is employed by the Illinois Environmental Protection Agency; that she has direct and personal knowledge as to the IEPA nonconcurrence decision at issue in this matter, that she has read the foregoing RESPONDENT'S ANSWERS TO PETITIONER'S INTERROGATORIES; and that the factual statements set forth in said answers are true and correct, except as to those matters 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.


Lauren Hunt

Dated: 5-23-24

EXHIBIT B

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

ILLINOIS POWER GENERATING
COMPANY,

Petitioner

-vs-

No. PCB 2024-043

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

DEPOSITION OF LAUREN HUNT

May 28, 2024

2:00 PM

133 S. Fourth Street
Springfield, IL 62706

Reported In Person By:

Deann K. Parkinson: CSR 84-002089

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15 * * * *

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DISCOVERY DEPOSITION

The deposition of LAUREN HUNT taken on
behalf of the Petitioner at 133 South 4th
Springfield, IL on May 28th, 2024, before Deann K.
Parkinson, Certified Shorthand Reporter of the
State of Illinois. Deposition taken pursuant to
the discovery provisions of the Illinois Code of
Civil Procedure and the Rules of the Supreme Court
promulgated pursuant thereto.

1 data submittal requirement general to all ASDs, or
2 specific to the Newton and JOPPA ASDs?

3 A. Generally to all.

4 Q. And did the agency reach any conclusions
5 at this meeting or at any other time on what is
6 required for an alternative source data submittal?

7 A. Not necessarily at this meeting. But
8 yes, we did. Because -- so, I basically asked if
9 there was source characterization, both of the
10 alternative source and then also of the CCR at
11 Newton, so that was because it was the first
12 one -- it was the first one that got discussed.
13 And I took that to Mike Summers. And he said
14 correct; if there's no source characterization of
15 both, then we do not concur.

16 And so that was kind of the end of that.

17 Q. Okay. And what is the scope of source
18 characterization that would be needed of let's
19 start with the CCR surface impoundment?

20 A. So, according to Mike Summers, it was
21 determined that we needed a ten percent source
22 characterization of the CCR surface impoundment.
23 So, that was basically ten borings with a sample
24 in the upper one-third of the boring, the middle

1 one-third of the boring, and the lower one-third

2 of the boring. And that's -- yeah.

3 Q. And did you have a discussion as to why
4 that was needed?

5 A. We had a discussion about the fact that
6 source characterization needed to occur. We had
7 thrown out -- I had thrown out ideas on what we
8 could do, or to just establish a baseline for all
9 of them. And that is what management decided.

10 Q. And did you discuss what method had to
11 be used for that source characterization?

12 A. Well, it was source characterization per
13 the rule, which is that the solids have to be
14 characterized.

15 Q. And when you say, per the rule?

16 A. 845.

17 Q. And what portion of 845 are you
18 referring to?

19 A. Hold it. I have it marked. Okay. So,
20 source characterization is required in
21 845.230(a)15. That's all initial operating
22 permits.

23 Q. Does it -- are there any -- is there any
24 specificity in 845.230(a)15 on what needs to be

1 done for source characterization?

2 A. No. Not in 230, no.

3 Q. All right. So, what regulation,
4 guidance or other document to your knowledge was
5 the agency relying upon in reaching the conclusion
6 that it needed this ten percent source
7 characterization that you referred to?

8 A. That was the professional judgment of
9 Mike Summers.

10 Q. And then going to the second piece of
11 characterization that you were talking about, the
12 characterization of the alternate source, are you
13 aware of whether the agency concluded what
14 information would be required for characterization
15 of that alternate source?

16 A. Well, our management has agreed that one
17 sample is not sufficient to characterize any media
18 because SW846 specifies that you must have a
19 sampling rationale and that must include more than
20 one sample.

21 Our interpretation as an agency is that
22 you have to have sampling of the alternative
23 source here, and it's in 845.650(e), right, is it?
24 Yeah, 650(e).

1 Q. Can you point me to where in 845.650(e)
2 it discusses requiring sampling of the alternate
3 source?

4 A. So, we are interpreting, the agency
5 interpreted the submit a demonstration to the
6 agency that a source other than CCR surface
7 impoundment caused the contamination, and CCR
8 surface impoundment did not contribute to the
9 contamination to mean that you had to have data to
10 substantiate that claim that it came from an
11 alternative source. So that would require an
12 analysis of samples from the alternative source.

13 Q. So --

14 A. Because without data, you're making --
15 you're just making -- it's just an opinion.

16 Q. Do you agree that there can be data
17 other than direct sampling that could support the
18 conclusion that something is coming from an
19 alternative source?

20 A. There has to be data. Now, the media
21 that gets sampled for the alternative source may
22 depend on availability of the media or field
23 conditions.

24 Q. Going back to that FUD site where you

1 were investigating TCE, you said you came in sort
2 of towards the end of that process?

3 A. Uh-huh.

4 Q. Okay. Do you have any idea how long it
5 took to try to figure out the source there as part
6 of that process that you were involved in?

7 A. It was upwards of ten years likely.

8 Q. Going back to the document, Exhibit 22,
9 going back to Exhibit 22, that item number three
10 reads, other items the team is curious about or
11 needs to brush up on. Do you see that?

12 A. Uh-huh.

13 Q. What is that referring to?

14 A. That's just an open, like, dialogue for
15 any other things that have come up in any of their
16 work, if they needed to have that conversation
17 while we're having a conversation about data and
18 geochemistry. So --

19 Q. Did any of that discussion relate to the
20 Newton ASD?

21 A. I'm sure some of it did. But, I don't
22 know about number three though. Yeah, I don't
23 recall.

24 Q. Okay. Going to move on to another

document that's already been marked as Exhibit No.

7.

Are you familiar with this document?

A. Yes.

Q. What is it?

A. It is the ASD nonconcurrence letter from
the agency.

Q. Were you involved in drafting this
letter?

A. Yes.

Q. What portions of it did you draft?

A. I helped draft one, two and three.

Q. So, do you mean the items that are
listed here as one, two and three?

A. Uh-huh. Yes.

Q. Okay. Did anyone else help you draft
items one, two and three?

A. I -- in what manner? Because I asked
questions, and then they told me. Like, we had an
open dialogue. Basically I was like, here's what
we need for an ASD. And then, yeah. Then we got
that approval from Mike. And then had the
conversation about what was there and what wasn't.

Q. And who did you have the conversation

1 with, other than Mike Summers?

2 A. Heather Mullenax.

3 Q. And did Mr. Summers sign off on the
4 language in here before he signed the letter?

5 A. Yeah.

6 Q. Did he do any editing to the portion
7 that you wrote prior to sending the letter?

8 A. I don't recall.

9 Q. Is this generally consistent with what
10 you presented, though, or originally drafted?

11 A. Generally, yes.

12 Q. What was the scope of discussion that
13 you had with Mr. Summers about whether or not to
14 include each of these data gaps in this letter?

15 A. So, the first one, source
16 characterization, he agreed that the mass
17 transport equation has to be answered. We have to
18 have waste characterization or source
19 characterization to be able to talk about whether
20 or not the CCR surface impoundment has or does not
21 have the potential to provide or contribute to the
22 contamination as specified here in 650(e).

23 Additionally, it was our agency position
24 that they had to have sampling from the

1 A. It's possible, but leach testing, again,
2 wouldn't replace the total solid source
3 characterization that needs to be done to be able
4 to start that mass transport equation
5 conversation. And that's where you -- that's a
6 missing link.

7 Q. Okay. So, taking a step back then, when
8 you're talking about total solid sampling in data
9 gap one, what method are you referring to?

10 A. So, any of that are appropriate for
11 total solids of those metals constituents, and I
12 know that metals has a number of different
13 analyses that are approved depending on the
14 constituent. So we just said SW846 instead of
15 parsing which methods.

16 Q. Okay. Did you mean to refer -- was this
17 meant to refer to the SW846 methodologies we
18 discussed earlier in this deposition?

19 A. No.

20 Q. Okay. It was meant to refer to
21 something other than that, is that right?

22 A. Correct.

23 Q. Okay. Do you agree that pore water
24 collection and sampling is a way to characterize

1 Q. Going to refer you to what's been marked
2 as Exhibit 8.

3 This is an excerpt from record document
4 number 33. Have you ever reviewed this document
5 before?

6 A. What is this document? I mean, it's
7 possible that I've seen it.

8 Q. Sure.

9 A. I'm not sure.

10 Q. This is an excerpt from record document
11 33, which is Illinois Power's petition in this
12 case.

13 A. Okay. No, I have not been able to get
14 that far into that.

15 Q. Okay. Can I direct your attention to,
16 please, paragraph four of that declaration.

17 And would you just take a moment to
18 review that paragraph and just let me know when
19 you're done.

20 A. Okay.

21 Q. So, the first sentence there says,
22 performing source characterization of the CCR at
23 the Newton Primary Ash Pond using total solid
24 sampling techniques under SW846 would require

1 drilling within the Newton Primary Ash Pond up to
2 ten borings using specialized equipment to collect
3 20 samples. Do you agree with that statement?

4 A. Well, it would be 30 samples; if you do
5 one-third in the upper, one-third in the middle,
6 one-third at the bottom. That's 30, not 20. But
7 generally, yes.

8 Q. And why are you saying -- are you saying
9 30 samples is what the agency believes is
10 appropriate?

11 A. Yeah. We were saying 30 samples, not
12 20. But yeah, ten borings with three samples at
13 each one.

14 Q. The next sentence reads, it would
15 further require complete laboratory analyses, data
16 evaluation and reporting for these samples.

17 Do you agree that it would involve that
18 process?

19 A. Yeah. Yes.

20 Q. The next sentence reads, assuming a
21 driller is readily available, which is not always
22 the case, this process would likely take
23 approximately 21 to 42 weeks to complete.

24 Based on your experience, do you agree

1 with that statement?

2 A. Yeah.

3 Q. All right. Moving back to exhibit 7.

4 Let's talk about that second listed data gap. Can
5 you describe what information this data gap is
6 referring to?

7 A. In our review, we determined that the
8 hydraulic conductivity of the bedrock unit had not
9 been presented with ASD.

10 Q. So, what hydraulic conductivities is
11 this referring to? Just the bedrock unit?

12 A. It is, yeah.

13 Q. What type of in-situ hydraulic tests are
14 you thinking would be necessary?

15 A. In-situ hydraulic tests can be anything
16 from a spinner or some kind of down hole
17 geophysical method that engages flow within the
18 bedrock, or you can also do packer testing.
19 There's -- yeah, there's various methods.

20 Q. Do you believe any of those methods you
21 just listed would be appropriate?

22 A. It's possible, but it would depend on
23 the conditions after it was properly logged with
24 discontinuities logged and understood better.

1 Q. Okay. And going back to that second
2 sentence, it reads assuming a driller is readily
3 available, which is not always the case, this
4 process would take approximately 20 to 30 weeks.
5 Do you agree with that statement if we were
6 talking about, say, one well?

7 A. Potentially, yes.

8 Q. Okay. And if we were talking about more
9 wells than one, would you agree with that
10 statement?

11 A. No.

12 Q. Okay. And do you believe it would
13 require more time?

14 A. Yeah.

15 Q. Okay. And going back to confirm, you
16 would also agree that the costs would probably be
17 greater than the \$150,000 represented in this
18 document?

19 A. Yes, that's an extremely low number.

20 Q. Okay. All right. I'm going to hand you
21 a document that's been marked as exhibit 9. This
22 is an excerpt of record document number ten, which
23 is the operating permit application that was
24 submitted for the Newton PAP.

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

ILLINOIS POWER GENERATING
COMPANY,

Petitioner

-vs-

No. PCB 2024-043

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Respondent.

DEPOSITION OF HEATHER MULLENAX

May 28, 2024

9:00 AM

133 S. Fourth Street
Springfield, IL 62706

Reported In Person By:

Deann K. Parkinson: CSR 84-002089

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22 * * * *

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DISCOVERY DEPOSITION

The deposition of HEATHER MULLENAX taken on behalf of the Petitioner at 133 South 4th Springfield, IL on May 28th, 2024, before Deann K. Parkinson, Certified Shorthand Reporter of the State of Illinois. Deposition taken pursuant to the discovery provisions of the Illinois Code of Civil Procedure and the Rules of the Supreme Court promulgated pursuant thereto.

1 Q. Okay. So, if you could just take a
2 moment to review paragraph four of this document
3 to refresh your recollection on it.

4 A. Okay.

5 Q. In paragraph four, Cynthia states that
6 using total solid sampling techniques under SW846
7 would require drilling within the Newton primary
8 ash pond with up to ten borings using specialized
9 equipment to collect 20 samples.

10 Do you agree that that would be required
11 in order to conduct solid sampling in accordance
12 with SW846?

13 A. Yes.

14 Q. And that next sentence reads, it would
15 further require complete laboratory analyses, data
16 evaluation and reporting for those samples. Do
17 you agree that solid sampling under SW846 would
18 require those steps?

19 A. Yes.

20 Q. The next sentence reads, assuming a
21 driller is readily available, which is not always
22 the case, this process would likely take
23 approximately 21 to 42 weeks to complete. Do you
24 agree with that statement?

1 A. I would -- yeah, I would agree.

2 Q. All right. Let's go back to what I
3 believe has been marked as Exhibit 7, which is the
4 denial letter.

5 Referring to the second data point on
6 here. Can you please describe what information
7 the agency is looking for through the second data
8 gap?

9 A. This is the data reports of hydraulic
10 conductivity within the wells, which would include
11 bedrock wells.

12 Q. Okay. Let's break this down a little.
13 What hydraulic conductivities is this referring
14 to? Conductivity of what unit or units?

15 A. This would look at multiple units with
16 the primary focus of bedrock.

17 Q. Okay. Any other units?

18 A. No.

19 Q. So just bedrock?

20 A. Yes.

21 Q. So, this is looking for the hydraulic
22 conductivity of the bedrock?

23 A. Yes.

24 Q. And what type of in-situ hydraulic test

1 A. Yes.

2 Q. Okay. All right. Well, then looking at
3 paragraph five, do you agree that conducting a
4 characterization of the bedrock surrounding the
5 Newton Primary Ash Pond in accordance with 35
6 Illinois admin code 845.640 would require drilling
7 to bedrock, well installation, solids and
8 groundwater sampling and analyses and data
9 evaluation and reporting?

10 A. Yes.

11 Q. Then that next sentence reads, assuming
12 a driller is readily available, which is not
13 always the case, this process would take
14 approximately 20 to 30 weeks. Do you agree with
15 that statement?

16 A. Yes. And I would also like to rephrase
17 to your question; it would be for data gap two,
18 and then would conjoin with data gap three. It's
19 not, I guess my understanding was specifically
20 just data gap three.

21 Q. Would you agree that data gap two and
22 data gap three both are referring back to like
23 characterization of the bedrock unit?

24 A. Yes.

EXHIBIT C

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R 2020-019
STANDARDS FOR THE DISPOSAL)	
OF COAL COMBUSTION RESIDUALS)	(Rulemaking - Water)
IN SURFACE IMPOUNDMENTS:)	
PROPOSED NEW 35 ILL. ADM.)	
CODE 845)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **NOTICE OF FILING** and **FIRST SUPPLEMENT TO IEPA'S PRE-FILED ANSWERS** on behalf of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: August 5, 2020

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Christine Zeivel
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
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Petitioner,

BY: /s/ Christine Zeivel
Christine Zeivel

THIS FILING IS SUBMITTED ELECTRONICALLY

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R 2020-019
STANDARDS FOR THE DISPOSAL)	
OF COAL COMBUSTION RESIDUALS)	(Rulemaking - Water)
IN SURFACE IMPOUNDMENTS:)	
PROPOSED NEW 35 ILL. ADM.)	
CODE 845)	

FIRST SUPPLEMENT TO ILLINOIS EPA'S PRE-FILED ANSWERS

NOW COMES the Illinois Environmental Protection Agency (Illinois EPA or Agency), by and through one of its attorneys, and submits the following information with respect to this first supplement to its pre-filed answers.

1. On March 30, 2020, the Illinois EPA filed a rulemaking, proposing new rules at 35 Ill. Adm. Code 845 concerning coal combustion residual surface impoundments at power generating facilities in the State.

2. Public Act 101-171, effective July 30, 2019, amended the Illinois Environmental Protection Act, by among other things, adding a new Section 22.59 (415 ILCS 5/22.59). Public Act 101-171 includes a rulemaking mandate in Section 22.59(g) which directs the Board to adopt rules "establishing construction permit requirements, operating permit requirements, design standards, reporting, financial assurance, and closure and post-closure care requirements for CCR surface impoundments." 415 ILCS 5/22.59(g). The Board is required to adopt new rules for 35 Ill. Adm. Code part 845 by March 30, 2021.

3. The Agency timely filed pre-filed testimony for eight witnesses.

4. Based on the pre-filed testimony, Illinois EPA received over 1000 questions counting subparts.

5. On June 30, 2020, the Agency asked that it be granted until August 3, 2020 to respond to the pre-filed questions.

6. On July 14, 2019, the hearing officer granted the Agency's request.
7. On August 3, 2020, the Agency filed Pre-Filed Answers to Little Village Environmental Justice Organization, ELPC, Prairie Rivers Network and Sierra Club, CWLP, Illinois Environmental Regulatory Group, Ameren, and the Board.
8. Since receiving all the pre-filed the questions, Agency staff has been working diligently to respond to all the pre-filed questions. However, despite the extra time granted the Agency was not able to prepare final answers by the August 3, 2020 filing deadline for Dynegy and Midwest Generation.
9. The Agency is today filing responses to all of Midwest Generation's pre-filed questions and responses to Dynegy's pre-filed questions, numbers 1-84.
10. The Agency will continue to work to address the remaining questions raised by Dynegy and hopes to file written answers before the first hearing. If that is not possible, the Agency will be prepared to address those pre-filed questions at the August hearing.
11. It should be noted that if a question was directed at a witness and the Agency answered it as a panel, the answer is provided as: "Agency Response".

or operator is not relieved of the requirements of 845.650(d) if they choose to wait. If the Agency does not concur with the ASD, initiation of corrective action must begin 90 days after the initial exceedance of a GWPS is detected.

b) May an owner/operator rely upon the Alternative Source Demonstration prepared pursuant to the Federal CCR Rules?

Response: The owner or operator could submit an ASD prepared for the Federal CCR Rule for Agency review. The Agency would not be obligated to concur with such an ASD.

c) Is the 60 days from the date of the initial sampling or from the date of the resampling?

Response: The 60-day period starts with the receipt of monitoring results, by the owner or operator, of the initial detection of a GWPS exceedance.

d) Is the formal confirmation of exceedance considered from the date of sample collection or the date of receipt of all analytical data?

Response: Please see the answer to Question #71(e).

e) The Federal Rule allows for 90 days to conduct an ASD. The 90 days allows enough time to conduct a Leaching Environmental Assessment Framework (LEAF) method or a combination of LEAF methods. The analytical turnarounds alone for these tests can range anywhere from 28 days to 84 days, depending on objective of the study and the appropriate LEAF method to meet that objective. What is the Illinois EPA's basis to establish the 60-day timeframe for completing an ASD?

Response: The federal Rule also requires the initiation of corrective action within 90 days of an exceedance of a GWPS. Because the Federal Rule does not require review with concurrence or non-concurrence as does Part 845, the Agency reduced the time allowed for an ASD to 60 days, to allow 30 days for review and response to the ASD by the Agency within the overall 90-day time frame.

f) Once the ASD is submitted to Illinois EPA for review, will Illinois EPA provide review comments and provide the owner/operator an opportunity to respond to those comments?

Response: Given the required short time frames, Part 845 does not incorporate such an exchange of information.

g) What, if any, criteria apply to the review process by which the Agency will make a determination whether the exceedance is not the result of the operation of the unit?

Response: Section 845.650(d)(4) requires the owner or operator to provide factual or evidentiary information supporting the conclusion that the exceedance of the GWPS was due to a source other than the CCR surface impoundment caused the contamination, an error in

sampling, analysis or statistical evaluation, or due to natural variation in groundwater quality or groundwater flow direction or elevation. No other criteria for review are provided.

h) If the Agency concurs with the owner or operator's ASD that the release is not attributable to a unit but is either due to natural causes or another source, does the owner or operator have to continue thereafter to notify the Agency of confirmed detections of concentrations above any groundwater quality standard for these constituents?

Response: Part 845 does not include a limitation on the number of times an alternative source demonstration may be required. Whether additional ASDs would be required may vary depending on the cause of the initial ASD.

i) If the Agency disagrees with a company's ASD, will the Agency give the company an opportunity to develop more data to respond to the Agency's concern?

Response: Part 845 does not prohibit the owner or operator from submitting additional data within the time frames allotted.

j) If the Illinois EPA disagrees with the conclusions of the ASD and the owner/operator believes that its CCR surface impoundment is not the source of the exceedance, what is the process to appeal the Agency's decision?

Response: The Agency's position is that non-concurrence with an ASD is a final decision which can be appealed pursuant to Part 105 of the Board's rules.

Section 845.660 Assessment of Corrective Measures

73. On page 13 of your testimony, you state that this subsection is intended to "distinguish between a long-term release to groundwater and a sudden catastrophic release to the surface." Please confirm that "detection of a release" in Section 845.660(a)(1) means a sudden catastrophic release. If not, please provide the Agency's definition of "detection of a release."

Response: Please see Response to Board Question 49(b).

74. The Draft Rule states that the owner/operator must discuss the results of the assessment of corrective measures at a public meeting at least 30-days prior to the selection of a remedy as required under Section 845.240. Section 845.240 specifies that two public meetings are to be held at least 30-days before the submission of a construction permit application.

a) Is this intended to also mean that the public meeting must be held before selecting a remedy based on the assessment of corrective measures?

Response: No, the public meetings required in Section 845.240(a) are to be held after the assessment of corrective measures. Selection of a remedy occurs upon submission of a permit application.

EXHIBIT D

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	R 2020-019
STANDARDS FOR THE DISPOSAL)	
OF COAL COMBUSTION RESIDUALS)	(Rulemaking - Water)
IN SURFACE IMPOUNDMENTS:)	
PROPOSED NEW 35 ILL. ADM.)	
CODE 845)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S FINAL POST-HEARING COMMENTS**, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: October 30, 2020

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

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Petitioner,

BY: /s/ Stefanie Diers
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THIS FILING IS SUBMITTED ELECTRONICALLY

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) R 2020-019
STANDARDS FOR THE DISPOSAL)
OF COAL COMBUSTION RESIDUALS) (Rulemaking - Water)
IN SURFACE IMPOUNDMENTS:)
PROPOSED NEW 35 ILL. ADM.)
CODE 845)

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S
FINAL POST-HEARING COMMENTS

NOW COMES the Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”), by and through one of its attorneys, and hereby submits its Final Post Hearing Comments as directed by the Hearing Officer Orders entered on October 4 and 20, 2020 in the above captioned rulemaking.

I. Procedural Background

On March 31, 2020, the Illinois EPA filed its proposed rulemaking for coal combustion residual surface impoundments pursuant to Section 22.59 of the Illinois Environmental Protection Act, along with a Statement of Reasons (“SOR”) in support. On April 24, 2020 the Illinois Pollution Control Board (“Board”) accepted Illinois EPA’s proposal for hearing and set prehearing deadlines. On June 2, 2020, Illinois EPA filed with the Board pre-filed testimony of eight witnesses: Lynn Dunaway, Darin LeCrone, Melinda Shaw, William Buscher, Lauren Martin, Amy Zimmer, Chris Pressnall, and Robert Mathis (Hrg. Ex. 1). Illinois EPA filed Answers to Pre-Filed Questions from the Board, Little Village Environmental Justice Organization, the Environmental Law and Policy Center, Prairie Rivers Network, and Sierra Club (“Environmental Groups,” collectively), Springfield City Water, Light, and Power, the Illinois Environmental Regulatory Group, Ameren, Midwest Generation, and Dynegy on August 3 (Hrg. Ex. 2), August 5 (Hrg. Ex.

operations. The option to retrofit a CCR surface impoundment would be substantially decreased if floodplains are included in the location restrictions in Subpart C. Currently, new solid waste landfills that meet applicable siting and construction requirements are not prohibited from being placed in floodplains. Therefore, retrofitted CCR surface impoundments, new CCR surface impoundments, and lateral expansions of CCR surface impoundments that meet the criteria of Part 845 should not be prohibited in floodplains.

Mr. Hutson proposes that Sections 845.220(c)(2)(A), 845.220(d)(1)(A) and 845.750 be revised to prohibit the permitting of any corrective action or closure with a final cover when CCR is in contact, either intermittently or permanently with groundwater. Hrg. Ex. 14, p. 9. Part 845 requires that any corrective action and closure approved by the Agency must achieve the groundwater protection standards of Section 845.600. The groundwater protection standards are protective of human health and the environment. Therefore, any groundwater contacting CCR will be protective of human health and the environment. The Agency recommends that the Board not accept any revisions to these Sections of Part 845 except for the Agency's suggested revisions to Section 845.750(c)(4). See Section V below and Attachment A.

Mr. Hutson's testimony proposes Sections 845.630(a)(1) and 845.650(d)(4) be revised to have background wells that are not impacted by any site operations, not just CCR surface impoundments. Hrg. Ex. 14, p. 14, 17. Mr. Hutson also proposes that the Alternative Source Demonstration (ASD) be part of a permit and that the ASD specifically identify any alternate source and its impact on groundwater, respectively. Hrg. Ex. 14, p. 16-18. Part 845 is designed to regulate CCR surface impoundments. Regarding the proposed revision of Section 845.630, it may be necessary for owners and operators to monitor groundwater down gradient of other sources to distinguish between contaminants originating from a CCR surface impoundment and

those originating from another source, for example: a coal pile. While mitigation of the impacts of the example coal pile are important, that task does not fall within the purview of Part 845. The key factor to ascertain from the ASD is that it is not the CCR surface impoundment responsible for the contamination and therefore no action relative to the CCR surface impoundment is required. Other sources of groundwater contamination should be addressed under other remedial programs. The inclusion of an ASD in a permit under Part 845 is not feasible. Owners and operators have only 60 days after an exceedance of a groundwater protection standard has been confirmed to submit an ASD to the Agency for review, and only 90 days after that confirmation to initiate an assessment of corrective measures. Extending the time between the confirmation of a groundwater protection standard exceedance and the initiation of an assessment of corrective measures is not as protective and comprehensive as Part 257 and is unacceptable. The Agency recommends that the Board not accept any revisions to these Sections of Part 845 except for the Agency's suggested revisions to Section 845.650. See Section V and Attachment A.

Mr. Hutson proposes that Sections 845.600(a)(1) be revised to include numerical groundwater protection standards for Iron, Manganese and Vanadium. Hrg. Ex. 14, p. 14. When evaluating which chemicals to include in Part 257 Appendix III and Appendix IV, USEPA evaluated and discarded, Iron, Manganese and Vanadium from their list of monitored constituents. Hrg. Ex. 5 at 21449-21452. Further Illinois has Part 620 groundwater quality standards for Iron, Manganese and Vanadium, which remain generally applicable. Therefore, the Agency recommends that the Board not accept any revisions to Section 845.600 except those revisions suggested by the Agency. See Section V and Attachment A.

Mr. Hutson testifies that he believes ongoing measurements of pore water elevation in CCR surface impoundments is needed in order to properly determine groundwater flow

EXHIBIT E

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) R 2020-019
STANDARDS FOR THE DISPOSAL)
OF COAL COMBUSTION RESIDUALS) (Rulemaking - Water)
IN SURFACE IMPOUNDMENTS:)
PROPOSED NEW 35 ILL. ADM.)
CODE 845)

NOTICE OF FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board a **NOTICE OF FILING; APPEARANCE; STATEMENT OF REASONS; and ATTACHMENTS: PROPOSED NEW 35 ILL. ADM. CODE PART 845;** and a **MOTION FOR ACCEPTANCE** on behalf of the Illinois Environmental Protection Agency, a copy of which is herewith served upon you.

Respectfully submitted,

Dated: March 30, 2020

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY,

Rex L. Gradeless, #6303411
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Illinois Environmental Protection Agency
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Petitioner,

BY: /s/ Rex L. Gradeless
Rex L. Gradeless

THIS FILING IS SUBMITTED ELECTRONICALLY

SERVICE LIST

ILLINOIS POLLUTION CONTROL BOARD

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James R. Thompson Center
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ILLINOIS DEPARTMENT OF NATURAL RESOURCES

Office of Legal Services
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ILLINOIS ATTORNEY GENERAL

Matt Dunn, Division Chief Environmental
69 W. Washington, Suite 1800,
Chicago, IL 60602

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) R 2020-019
 STANDARDS FOR THE DISPOSAL)
 OF COAL COMBUSTION RESIDUALS) (Rulemaking - Water)
 IN SURFACE IMPOUNDMENTS:)
 PROPOSED NEW 35 ILL. ADM.)
 CODE 845)

STATEMENT OF REASONS

NOW COMES the Illinois Environmental Protection Agency (“Illinois EPA”), by and through its counsel, and hereby submits this Statement of Reasons to the Illinois Pollution Control Board (“Board”) pursuant to Sections 13, 22, 27 and 28 of the Environmental Protection Act (“Act”) (415 ILCS 5/13, 22, 27 and 28) and 35 Ill. Adm. Code 102.202 in support of the attached proposed regulations.

I. INTRODUCTION

The Illinois EPA has developed a rule of general applicability for coal combustion residual (“CCR”) surface impoundments at power generating facilities. The proposal contains comprehensive rules for the design, construction, operation, corrective action, closure and post-closure care of surface impoundments containing CCR. CCR is commonly referred to as coal ash, and CCR surface impoundments are commonly referred to as coal ash ponds or coal ash pits. This proposed rule includes groundwater protection standards applicable to each CCR surface impoundment at the waste boundary and requires each owner or operator to monitor groundwater. Illinois EPA’s proposed rule will include a permitting program as well as all federal standards for CCR surface impoundments promulgated by the United States Environmental Protection Agency (“USEPA”) under the Solid Waste Disposal Act of 1970, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6901. In addition, the proposed rules

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE G: WASTE DISPOSAL
CHAPTER I: POLLUTION CONTROL BOARD
SUBCHAPTER j: COAL COMBUSTION WASTE SURFACE IMPOUNDMENTS

PART 845
STANDARDS FOR THE DISPOSAL OF COAL COMBUSTION
RESIDUALS IN SURFACE IMPOUNDMENTS

SUBPART A: GENERAL PROVISIONS

Section:	
845.100	Scope and Purpose
845.110	Applicability of Other Regulations
845.120	Definitions
845.130	Surface Impoundment Identification
845.140	Right of Inspection
845.150	Incorporations by Reference
845.160	Severability
845.170	Inactive Closed CCR Surface Impoundments

SUBPART B: PERMITTING

Section	
845.200	Permit Requirements and Standards of Issuance
845.210	General Provisions
845.220	Construction Permits
845.230	Operating Permits
845.240	Pre-Application Public Notification and Public Meeting
845.250	Tentative Determination and Draft Permit
845.260	Draft Permit Public Notice and Participation
845.270	Final Permit Determination and Appeal
845.280	Transfer, Modification and Renewal
845.290	Construction Quality Assurance Program

SUBPART C: LOCATION RESTRICTIONS

Section	
845.300	Placement Above the Uppermost Aquifer
845.310	Wetlands
845.320	Fault Areas
845.330	Seismic Impact Zones
845.340	Unstable Areas
845.350	Failure to Meet Location Standards

SUBPART D: DESIGN CRITERIA

Section	
845.400	Liner Design Criteria for Existing CCR Surface Impoundments
845.410	Liner Design Criteria for New CCR Surface Impoundments and Any Lateral Expansion of a CCR Surface Impoundment
845.420	Leachate Collection and Removal System
845.430	Slope Maintenance
845.440	Hazard Potential Classification Assessment
845.450	Structural Stability Assessment
845.460	Safety Factor Assessment

SUBPART E: OPERATING CRITERIA

Section	
845.500	Air Criteria
845.510	Hydrologic and Hydraulic Capacity Requirements for CCR Surface Impoundments
845.520	Emergency Action Plan
845.530	Safety and Health Plan
845.540	Inspection Requirements for CCR Surface Impoundments
845.550	Annual Consolidated Report

SUBPART F: GROUNDWATER MONITORING AND CORRECTIVE ACTION

Section	
845.600	Groundwater Protection Standards
845.610	General Requirements
845.620	Hydrogeologic Site Characterization
845.630	Groundwater Monitoring Systems
845.640	Groundwater Sampling and Analysis Requirements
845.650	Groundwater Monitoring Program
845.660	Assessment of Corrective Measures
845.670	Corrective Action Plan
845.680	Implementation of the Corrective Action Plan

SUBPART G: CLOSURE AND POST-CLOSURE CARE

Section	
845.700	Required Closure or Retrofit of CCR Surface Impoundments
845.710	Closure Alternatives
845.720	Closure Plan
845.730	Initiation of Closure
845.740	Closure by Removal
845.750	Closure with a Final Cover System
845.760	Completion of Closure Activities
845.770	Retrofitting

845.780 Post-Closure Care Requirements

SUBPART H: RECORDKEEPING

Section

845.800 Facility Operating Record

845.810 Publicly Accessible Internet Site Requirements

SUBPART I: FINANCIAL ASSURANCE

Section

845.900 General Provisions

845.910 Upgrading Financial Assurance

845.920 Release of Financial Institution and Owner or Operator

845.930 Cost Estimates

845.940 Revision of Cost Estimates

845.950 Mechanisms for Financial Assurance

845.960 Trust Fund

845.970 Surety Bond Guaranteeing Payment

845.980 Surety Bond Guaranteeing Performance

845.990 Letter of Credit

AUTHORITY: Implementing Sections 12, 22, and 22.59 of the Environmental Protection Act [415 ILCS 5/12, 22, and 22.59] and authorized by Sections 22.59, 27, and 28 of the Environmental Protection Act [415 ILCS 5/22.59, 27, and 28].

SOURCE: Adopted in R__-__ at __ Ill. Reg.____, effective _____.

SUBPART A: GENERAL PROVISIONS

Section 845.100 Scope and Purpose

- a) This Part establishes criteria for the purpose of determining which CCR surface impoundments do not pose a reasonable probability of adverse effects on health or the environment. CCR surface impoundments failing to satisfy any of the requirements of this Part are considered open dumps, which are prohibited.
- b) This Part applies to owners and operators of new and existing CCR surface impoundments, including any lateral expansions of CCR surface impoundments that dispose or otherwise engage in solid waste management of CCR generated from the combustion of coal at electric utilities and independent power producers. Unless otherwise provided in this Part, these requirements also apply to CCR surface impoundments located off-site of the electric utility or independent power producer.

- A) For existing CCR surface impoundments, a minimum of eight independent samples from each background and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a) and Calcium no later than 180 days after the effective date of this Part.
 - B) For new CCR surface impoundments, and all lateral expansions of CCR surface impoundments, a minimum of eight independent samples for each background well and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a) and Calcium during the first 180 days of sampling.
- 2) The groundwater elevation monitoring frequency shall be monthly.
- c) The number of samples collected and analyzed for each background well and downgradient well during subsequent quarterly sampling events must be consistent with Section 845.640, and must account for any unique characteristics of the site, but must include at least one sample from each background and downgradient well.
- d) If one or more constituents are detected, and confirmed by an immediate resample, in exceedance of the groundwater protection standards in Section 845.600 in any sampling event, the owner or operator must notify the Agency which constituent exceeded the groundwater protection standard and place the notification in the facility's operating record as required by Section 845.800(d)(16). The owner or operator of the CCR surface impoundment also must:
 - 1) Characterize the nature and extent of the release and any relevant site conditions that may affect the remedy ultimately selected. The characterization must be sufficient to support a complete and accurate assessment of the corrective measures necessary to effectively clean up all releases from the CCR surface impoundment pursuant to Section 845.660. The owner or operator of the CCR surface impoundment must submit the characterization to the Agency and place the characterization in the facility's operating record as required by Section 845.800(d)(16). Characterization of the release includes the following minimum measures:
 - A) Install additional monitoring wells necessary to define the contaminant plume(s);
 - B) Collect data on the nature and estimated quantity of material released including specific information on the constituents listed in Section 845.600 and the levels at which they are present in the material released;

- C) Install at least one additional monitoring well at the facility boundary in the direction of contaminant migration and sample this well in accordance with subsection (a) and (b) of this Section; and
 - D) Sample all wells in accordance with subsection (a) and (b) of this Section to characterize the nature and extent of the release.
- 2) Notify all persons who own the land or reside on the land that directly overlies any part of the plume of contamination if contaminants have migrated off-site as indicated by sampling of wells in accordance with subsection (d)(1) of this Section. The owner or operator must send notifications made pursuant to this subsection (d)(2) to the Agency and place the notifications in the facility's operating record as required by Section 845.800(d)(16).
 - 3) Except as provided in subsection (d)(4), within 90 days of the detected exceedance of the groundwater protection standard, initiate an assessment of corrective measures as required by Section 845.660.
 - 4) Alternative Source Demonstration. The owner or operator of a CCR surface impoundment may, within 60 days of the detected exceedance of the groundwater protection standard, submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination, or that the exceedance of the groundwater protection standard resulted from error in sampling, analysis, statistical evaluation, natural variation in groundwater quality, or a change in the potentiometric surface and groundwater flow direction. Any such demonstration must be supported by a report that includes the factual or evidentiary basis for any conclusions and must be certified to be accurate by a qualified professional engineer.
 - A) The Agency shall provide a written response either concurring or not concurring with the demonstration within 30 days.
 - B) If the Agency concurs with the demonstration, the owner or operator must continue monitoring in accordance with this Section. The owner or operator must also include the demonstration in the annual groundwater monitoring and corrective action report required by Section 845.610(e), in addition to the certification by a qualified professional engineer.
 - C) If the Agency does not concur with the written demonstration made pursuant to subsection (d)(4) of this Section, the owner or operator of the CCR surface impoundment must initiate the assessment of corrective measures requirements under Section 845.660.