BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS POWER GENERATING COMPANY Petitioner **v.** **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY** Respondent.	**PCB 2024-043**

NOTICE OF FILING

To:

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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 **RESPONSE TO IEPA'S MOTION FOR SUMMARY JUDGMENT**; and a **CERTIFICATE OF SERVICE**, copies of which are herewith served upon you.

/s/ *Samuel A. Rasche*
Dated: October 31, 2024

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 31st day of October, 2024:

I have electronically served a true and correct copy of the attached Response to IEPA's 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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The number of pages in the e-mail transmission is 102.

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

/s/ Samuel A. Rasche
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Dated: October 31, 2024

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ILLINOIS POWER GENERATING COMPANY'S RESPONSE TO IEPA'S MOTION FOR SUMMARY JUDGMENT

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

In support of this Response, IPGC states as follows:

I. INTRODUCTION

IEPA's October 1, 2024, submittal in this matter (the "Motion") is a summary judgment motion in name only. The Motion is rife with and based on disputed material facts, reading more like a post-hearing brief than a motion for summary judgment. The Motion further presents new facts and opinions that are largely conclusory in nature, often without evidentiary support. This includes an inappropriate attempt to reframe the scope of this appeal through the insertion of new bases for IEPA's nonconcurrence with IPGC's alternative source demonstration ("ASD"). In several instances, the Motion misrepresents or misconstrues scientific principles and evidence at the heart of this proceeding.

Summary judgment is not the stage at which the Board weighs the evidence. Rather a summary judgment motion must be based on no genuine dispute of material fact. Contrary to what IEPA may desire, it is not entitled to absolute discretion when concurring or not concurring with an alternative source demonstration. IEPA's Motion must be denied because (1) it improperly expands the scope of IEPA's denial and (2) is based on disputed material facts that the Board must weigh at hearing.

II. LEGAL STANDARDS

A. Summary Judgment Standard and Burden of Proof

IEPA correctly notes that "the purpose of summary judgment is to determine whether a genuine issue of material fact exists" and that a genuine issue of material fact exists if "the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." Motion at 4, *quoting Adames v. Sheahan*, 233 Ill.2d 276, 295-296 (2009).

But IEPA's recitation of the standard is too shallow. It neglects to recognize that for "a summary-judgment motion, the [Board] does not decide a question of fact but, rather, determines whether one exists. Thus, [the Board] cannot make credibility determinations or weigh evidence in deciding a summary judgment motion." *Coole v. Cent. Area Recycling*, 384 Ill. App. 3d 390, 396 (2008) (citing *AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill.App.3d 17, 31 (2005)); *see also, Schulenburg v. Rexnord Inc*., 254 Ill. App. 3d 445, 451 (1993) ("credibility of a witness is a question for the trier of fact to resolve, not a matter to be decided on a motion for summary judgment"). Thus, "[i]f there is present any fact or facts on which reasonable persons may disagree, or inferences which may be fairly drawn from those facts and may lead to different conclusions, the motion court must stay its hand and permit the resolution of those facts and inferences to be

made at trial." *Lefton Iron and Metal Co., Inc., et al. v. Moss-American, Inc., et at.*, PCB 87-191, slip op. at 2 (Sept. 28, 1989) (*quoting Nolan v. Johns-Manville Asbestos and Magnesium Materials Co.*, 74 Ill.App.3d 778, 794 (1979)).

Accordingly, the Board "construe[s] all evidence strictly against the moving party and liberally in favor of the nonmoving party" and may only grant summary judgment "where the movant's right is clear and free from doubt." *Hastings v. Jefco Equipment Co., Inc.*, 2013 IL App (1st) 121568, ¶ 4; *see also Sierra Club, et al. v. Midwest Generation, LLC*, PCB 13-15, slip op. at 3 (Jan. 19, 2017).

IEPA's Motion is not based on undisputed material facts. Rather, it inappropriately calls on the Board, at this summary judgment stage, to weigh the evidence.

1. IEPA has the Burden to Prove there is No Genuine Issue of Material Fact and it is Entitled to Relief as a Matter of Law.

IEPA correctly notes that the ultimate burden of proof in this proceeding is upon IPGC. Motion at 7. However, it appears that IEPA is "confusing the standard for granting summary judgment with the burden of proof in the . . . appeal." *Estate of Gerald D. Slightom v. IEPA*, PCB 11-25, slip op. at 15 (April 19, 2012). For purposes of this Motion, the burden is upon IEPA, not IPGC, to affirmatively show that there is no genuine issue of material fact and that the correctness of IEPA's position is "free and clear from doubt." *Id.* at 15-16; PCB 13-15, slip op. at 3 (Jan. 19, 2017).

IEPA must meet that burden by either "affirmatively demonstrating that some element of the case must be resolved in [its] favor or by establishing that there is an absence of evidence to support" IPGC's position. *Shaw v. U.S. Financial Life Ins. Co.*, 2022 IL App (1st) 211533, ¶ 27. Facts asserted in a motion "that are not of record in the proceeding must be supported by oath, affidavit, or certification" and the Board will not consider any unsupported facts presented in a

motion for summary judgment. 35 Ill. Adm. Code § 101.504; *see also Frederickson v. Grelyak*, PCB 04-19, slip op. at 3 (May 5, 2005). This rule "provides no exceptions." *Dorothy v. Flex-n-Gate Corp.*, PCB 05-49, slip op. at 9 (Oct. 20, 2005). Moreover, even where an affidavit is presented in support of a motion for summary judgment, that affidavit may not include unsupported "opinions and legal conclusions." *Id.* Much of the information IEPA presents in its Motion consist of unsupported opinions and conclusions not supported by oath, affidavit, or certification.

B. Standard of Review

IEPA again correctly states that the "typical standard of review in Board appeals of final Illinois EPA decisions is *de novo* based on the record before the agency." Motion at 5. As IEPA admits, the "Board is a technically qualified body" and as such "the Board places itself in Illinois EPA's position and reviews the entire record *de novo* without deference to the agency's findings." *Id., citing City of East Moline v. IEPA,* PCB 86-218, slip op. at 8 (Sep. 8, 1988), *& Sierra Club et al. v. IEPA et al.,* PCB 15-189 slip op. at 5 (Jan. 19, 2017). IEPA further recognizes that *de novo* review "also applies in other appeals of final actions, such as facility siting appeals." *Id.*[1]

IEPA nevertheless appears to argue that its final decisions regarding alternative source demonstrations are an exception entitled to a special deference that the Board should review for abuse of discretion. Motion at 6. But that argument is contrary to Board precedent and Illinois case law, and would lead to gross unfairness. First, the Board and Illinois Courts have made clear that IEPA will receive no special deference where IEPA issues a final decision without hearing and where no other "procedures, such as cross-examination, are available for the [petitioner] to test the

[1] The Board similarly has not deferred to Agency decisions regarding Underground Storage Tank Fund reimbursement (*see, e.g., Landwehrmeier v. IEPA*, PCB 94-55 (June 2, 1994)) and corrective action plan modifications (*see, e.g., Illinois Ayers Oil Co. v. IEPA*, PCB 03-213 (April 1, 2004)).

validity of the information the Agency relies upon in [its decision]." *EPA v. Pollution Control Board*, 115 Ill.2d 65, 70 (1986). Allowing the Board to hold a hearing and review the full record *de novo* is "essential" because, "due to the time restraints placed on the Agency, it cannot hold full hearings to develop the issues of the case." *ESG Watts, Inc. v. Pollution Control Board*, 286 Ill.App.3d 325, 331 (1997).[2] IEPA points to the lack of procedural safeguards and limited time for review as arguments in favor of greater Agency discretion (Motion at 6-7), when in actuality the Board and courts have consistently found those exact factors weigh heavily in favor of *less deferential* review. *See ESG Watts, Inc. v. Pollution Control Board*, 286 Ill.App.3d 325, 331 (1997) (*citing EPA v. Pollution Control Board* and holding that the Board could not defer to the Agency when, due to time constraints, the Agency could not hold hearings and fully develop evidence).

Additionally, "when the question involved is a matter of law involving proper interpretation of a Board rule, the Agency's interpretation is not binding upon the Board." *Emerald Performance Materials, L.L.C. v. IEPA*, PCB 04-102, slip op. at 18 (Oct. 15, 2009); *see also Peoria Disposal Co. v. IEPA*, PCB 08-25, slip. op. at 31 (Jan. 10, 2008) ("[W]hen the Agency has resolved a legal question such as interpretation of a statutory provision, the Agency's determination is not binding upon the Board."). Because "the Board has not previously interpreted" the requirements of Section 845.650(e), "any prior interpretations made by the agency are not binding on the Board" and "[t]he Board approaches the issue *de novo.*" PCB 04-102, slip op. at 18 (Oct. 15, 2009). Thus, any IEPA interpretations regarding the elements, evidentiary standards, standard of proof, and the

[2] IEPA acknowledges the applicability of the *ESG Watts* decision to this proceeding and cites to it for the proposition that the arbitrary and capricious standard does not apply here. Motion at 5. But IEPA misleadingly omits that the *ESG Watts* court (and the Board below it) held that arbitrary and capricious standard was too deferential, and that *less deference* was required. 286 Ill.App.3d at 331.

applicability of other statutes and regulations for alternative source demonstrations are not entitled to any deference and must be reviewed *de novo.*

IEPA can cite to only one case, *U.S. Steel Corp. v. Ill. Pollution Control Bd.*, 384 Ill.App.3d 457 (2008), in support of its request for special deference. Motion at 6-7. *Id.* The *U.S. Steel* case involved the Board evaluating the appropriateness of IEPA's determination of a *subjective* issue (whether there was "sufficient" public interest) regarding the *procedural* step of holding a public hearing. This is in stark contrast to an alternative source demonstration, where the Board is tasked with reviewing IEPA's determination on an *objective* issue (whether a source other than the CCR surface impoundment cause contamination and whether the CCR surface impoundment is contributing to contamination) resulting in a *substantive* ruling by IEPA (whether the exceedance is subject to corrective measures requirements under Part 845).

Because IPGC's substantive rights are at stake, it is entitled to due process and the Board must apply a *de novo* standard and "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 et al. v. IEPA*, PCB 04-88, slip op. at 12 (April 19, 2007) (*aff'd sub nom. IEPA v. Ill. Pollution Control Bd.*, 386 Ill.App.3d 375 (2008)). To apply a more deferential standard in this case "would essentially remove the procedural safeguards of the administrative appeal process." *ESG Watts,* 286 Ill.App.3d at 331.

C. Scope of Review

While admitting that typically an Agency's denial letter frames the issues on appeal, IEPA confusingly concludes again (without support) that alternative source demonstrations should be an exception to the general rule because "it does not appear that such narrow framing would be possible in a nonconcurrence appeal where the nonconcurrence is not subject to any formal

requirements." Motion at 7. IEPA suggests that this is because in permitting appeals the statute specifies what must be included in an Agency denial, whereas there is no statute or regulation specifying what must be in an ASD nonconcurrence. But the Board has long held that the Agency's denial must frame the review regardless of whether there exist "formal requirements" because "[p]rinciples of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases" for IEPA's denial. *Centralia Environmental Services, Inc. v. IEPA*, PCB 89-170, slip op. at 7 (May 10, 1990); *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142, slip op. at 5-6 (Dec. 20, 1990) (barring IEPA from asserting on appeal new bases for denial that were not disclosed in the denial letter).

IPGC prepared its petition for review and evidence in this case to challenge the statements made in IEPA's denial letter for the ASD. It would be impossible for IPGC to prepare its case for review before the Board if it had no notice of the evidence needed to establish its case. PCB 89-170, slip op. at 6 (May 10, 1990). The Board should not, as IEPA suggests, adopt a fundamentally unfair interpretation of Section 845.650(e) simply because the exact contents of a denial letter were not spelled out in the regulation.

D. Burden of Proof for Review of Alternative Source Demonstrations

The parties are in agreement that the ultimate burden of proof in this appeal is upon IPGC to show by a preponderance of the evidence that it is entitled to relief. Motion at 7 (*citing Aqua Illinois, Inc. v. IEPA*, PCB 23-12, slip op. at 8 (Dec. 15, 2022)). IPGC clarifies that it is entitled to relief if it can show by a preponderance of the evidence that IEPA's "reasons and regulatory and statutory bases for denial are inadequate to support [] denial."[3] PCB 90-142, slip op. at 6 (Dec. 20,

[3] Thus, IPGC must demonstrate by a preponderance of evidence that the Agency's reasons for denial were not appropriate. IEPA incorrectly attempts frame burden of proof and scope of review as applying to IPGC's ASD. It does not. As explained by the case law discussed in this section,

1990); *see also KCBX Terminals Co. v. IEPA*, PCB 14-110, slip op. at 46 (June 19, 2014). "A proposition is proved by a preponderance of the evidence when it is more probably true than not." *Polchow v. Village of Rankin*, PCB 15-57, slip op. at 3 (Feb. 28, 2019).

IEPA also correctly notes inferences and expert conclusions drawn from circumstantial evidence must "be both reasonable and probable, not merely possible." Motion at 8 (*citing Westlake v. C. House Corp.*, 2011 IL App (1st) 100653, ¶ 18). However, it should be added that "[t]he factual basis for an expert's opinion generally does not affect his standing as an expert; it is for the [fact finder] to determine the weight of the opinion. . . . While opinions based on sheer speculation should be stricken as irrelevant, testimony based on 'expert analysis of the known physical facts' is admissible." *Petraski v. Thedos*, 382 Ill.App.3d 22, 31 (2008).

E. Legal requirement to identify an alternative source

IEPA's Motion raises the issue of whether an alternative source demonstration must identify a "specific alternative source." Motion at 11-12, 35-37, 39-41. Here, this legal and policy argument is of little relevance, as IPGC did identify a "specific alternative source" – naturally occurring chloride in the bedrock underlying APW15. R. 12 at R001617.

IEPA argues that an alternative source demonstration must identify a "specific" alternative source. IEPA bases its argument on the statutory provision requiring the Board establish rules that "describe the process and standards for identifying a specific alternative source of groundwater pollution when the owner or operator of the CCR surface impoundment believes that groundwater contamination on the site is not from the CCR surface impoundment." 415 ILCS 5/22.59(g)(11). 845.650(e) does not use the term "specific alternative source," but does provide that the owner or

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the preponderance of the evidence standard applies to issues being appealed, which in turn are framed by the reasons and bases provided in the Agency's denial letter.

operator 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." 35 Ill. Adm. Code 845.650(e). In the course of the Part 845 rulemaking, a participant proposed modifying the alternative source demonstration requirements "to require an affirmative demonstration of the location of the alternative source and the extent of the source's impact to water quality." *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, Prefiled Testimony of Mark Hutson at 17-18, R20-19 (August 27, 2020).[4] In its post-hearing brief, IEPA acknowledged and advocated against this proposal to have "the ASD specifically identify any alternate source and its impact on groundwater." IEPA Post-Hearing Comments, P.C. #120 at 12, R20-19 (October 20, 2020).[5] IEPA explained "845 is designed to regulate CCR surface impoundments . . . 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." *Id.* at 12-13. The Board did not revise the alternative source demonstration requirements in response to the participant's proposal.

Significantly, assuming 845.650(e) is read to always require that an alternative source demonstration identify the alternative source, it provides no specification regarding the degree of specificity or what evidence must be included in support of that demonstration. "[A] court may not add provisions to a statute nor read any conditions not expressed in the language." *Walker v.*

[4] Available at https://pcb.illinois.gov/documents/dsweb/Get/Document-102854.

[5] Available at https://pcb.illinois.gov/documents/dsweb/Get/Document-103357.

Dart, 2015 IL App (1st) 140087, ¶ 51 (*citing Schultz v. Illinois Farmers Ins. Co.*, 237 Ill.2d 391, 408 (2010)). The Board clearly did not promulgate standards requiring an alternative source demonstration to provide the exact location of that alternative source, for the demonstration to identify the alternative source with a specific level of exactitude, or for sampling or other specific types of analyses of an alternative source to be conducted as part of an alternative source demonstration. *See* 35 Ill. Adm. Code 845.650(e). Putting aside the practicalities of reading such requirements into 845.650(e),[6] Part 845 is a program governing CCR surface impoundments and whether corrective action is needed with respect to CCR surface impoundments. The process and standards for fully characterizing and delineating an alternative source fall under the regulatory authority of the Board's other programs. Section 845.650(e), meanwhile, is written to provide discretion to the qualified professional compiling the alternative source demonstration to exercise judgment in determining what facts and evidence to consider when reaching a determination.

III. ANALYSIS

First, the Agency's arguments in Section IV.A of the Motion are an improper attempt to revise the Agency's November 7, 2023, nonconcurrence of Petitioner's ASD ("Denial"). Perhaps recognizing that Petitioner can demonstrate by a preponderance of the evidence that the reasons and bases provided in IEPA's Denial are inadequate to support its nonconcurrence, IEPA seeks to claim additional bases for its Denial by questioning, for the first time, specific evidence presented in Petitioner's ASD submittal. However, the Agency's Denial frames the scope of Petitioner's appeal. PCB 90-142, slip op. at 6 (Dec. 20, 1990). The Agency cannot now expand its Denial through motion.

[6] As IPGC has explained, IEPA's Data Gaps 2 and 3 cannot be accomplished within 60 days.

Second, regardless of whether IEPA may now raise additional reasons for its nonconcurrence, all of the arguments the Agency raises regarding whether IPGC's ASD was "adequate on its face" and regarding whether the Agency reasonably declined to concur with the ASD based on the "Data Gaps" in the Denial are issues of fact that are inappropriate for summary judgment. As discussed below, IPGC's ASD provided evidence demonstrating that a specific source other than the Newton Power Plant ("Newton") Primary Ash Pond ("PAP") caused the chloride contamination in APW15 and the PAP did not contribute to the contamination. IEPA now tries to argue against the evidence provided by IPGC in the ASD (and supported through expert opinion provided in this proceeding). As discussed below, it does so largely through arguments based on a flawed scientific understanding of the facts, ignoring (or misunderstanding) the well-supported facts in Petitioner's ASD and expert declarations, and by expounding unsupported opinions and assertions. At most, IEPA's arguments amount to differing expert opinions regarding the facts and evidence in IPGC's ASD and what those facts and that evidence demonstrates. These are issues for the Board to consider and weigh at hearing. They are not appropriate for summary judgement.

A. Section IV.A. of IEPA's Motion Seeks to Improperly Expand the Basis for Its Denial

Section IV.A of the Motion is largely an attempt by IEPA to rewrite its Denial. Allowing IEPA to, at this stage of the appeal, argue that its nonconcurrence with IPGC's ASD is based on reasons other than those provided in the Denial is unfair to IPGC and contrary to Board precedent.

As explained above, for review of a final agency decision, it is well established the Agency's denial must frame the issues on review and allowing the Agency to introduce new bases for denial at the review stage would violate principles of fundamental fairness. PCB 90-142, slip op. at 6 (Dec. 20, 1990); *Centralia Environmental Services. Inc. V. IEPA*, PCB 89-170, slip op. at

6 (May 10, 1990); City of Metropolis v. IEPA, PCB 90-8 (February 22, 1990); *Id.* This principle of fairness is imperative in an appeal of a final agency decision because "the burden of proof is on the petitioner to prove that the Agency's denial letter was insufficient to warrant affirmation."[7] *Cassens and Sons, Inc. v. IEPA*, PCB 01-102, slip op. at 10 (Nov. 18, 2004); *Id.* This standard of fairness applies to appeals of final agency decisions beyond permitting appeals. *See e.g.*, PCB 90-142, slip op. at 6-7 (Dec. 20, 1990); PCB 01-102, slip op. at 5 (Nov. 18, 2004) (applying the standard to the Agency's denial of reimbursement for corrective action at a UST site); *Illinois Ayers Oil Company v. IEPA*, 2004 WL 762529, at *7 (applying the standard to IEPA's decision to modify the high priority corrective action plan and budget for a UST site); *Midwest Generation Eme, LLC v. Illinois Environmental Protection Agency*, PCB 04-185, slip op. at 2 (Jan. 20, 2005) (noting the standard applies in a trade secret appeal). This makes logical sense as, regardless of the final Agency decision being appealed, the petitioner must have fair notice of the reasons for the Agency's decision in order to fairly cross examine the Agency and meet its burden of proof on appeal.

IEPA's November 7, 2023, letter of nonconcurrence states that IEPA "does not concur with the Newton Primary Ash Pond Alternative Source Demonstration" due to three alleged "Data Gaps" (the "Denial"). R. 32 at R001965. First, "[s]ource characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with SW846" ("Data Gap 1"). Second, "[h]ydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and

[7] IEPA appears to be suggesting that Petitioner's burden of proof in this matter is not to demonstrate by a preponderance of evidence that the Agency's Denial was "insufficient to warrant affirmation" but rather to demonstrate by a preponderance of evidence that its ASD demonstrated "a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination." This is an improper redirecting of the scope of an appeal of a final Agency decision. *See* PCB 90-142, slip op. at 6.

presented with hydrogeologic characterization of bedrock unit" ("Data Gap 2"). 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"). Other than suggesting that the information from these "Data Gaps" should have been included in the ASD and that the ASD was incomplete without such data, the Denial does not discuss any of the facts or evidence presented in the ASD. The Denial presents no other bases for the Agency's decision. The Denial further cites to no statutory or regulatory provision the Agency believes the ASD is in violation of other than a mention of 35 Ill. Adm. Code 845.640 in "Data Gap 3."

Through Section IV.A of the Motion, IEPA now attempts to argue that Petitioner's ASD submittal is "inadequate on its face" and for the first time maintains that its nonconcurrence is also based on a disagreement with certain evidence presented in IPGC's ASD. However, the Motion presents no evidence, through affidavit or otherwise, that IEPA considered the information or analysis presented in Section IV.A when issuing its Denial. Instead, it is clear IEPA is conducting an after-the-fact analysis of the information in IPGC's ASD in an attempt to bolster and expand the reasons for its denial. For example, in the Motion IEPA disputes, for the first time, Petitioner's reliance on two scientific studies from the Illinois State Geological Survey ("ISGS") and "Mehnert et al 1990" cited in Petitioner's ASD. Motion 12-17. Significantly, IEPA did not even include the two ISGS documents or the "Mehnert et al 1990" document, referenced as evidence in IPGC's ASD and discussed now in IEPA's Motion, in its record for this proceeding. More importantly, two of the main IEPA employees involved in reviewing the ASD admitted at deposition that they had never reviewed these documents in connection with IPGC's ASD. Deposition of Lauren Hunt at 127:17-21 (May 28, 2024) ("Hunt Deposition"); Deposition of Heather Mullenax at 74:5-7 (May

28, 2024) ("Mullenax Deposition").[8] Nonetheless, IEPA now asserts these documents do not support the conclusions drawn from them in the ASD identifying chloride in the bedrock as the alternative source of the chloride exceedance in APW15.

Additionally, the Motion for the first time takes issue with Petitioner's conclusions that "the PAP is separated from the [Uppermost Aquifer] at APW15 by a Thick Layer of Low Permeability Glacial Till" resulting in no complete pathway from the PAP to APW15, "that concentrations of primary CCR indicators at APW15 do not exceed background limits and are not increasing" indicating that APW15 "has not been affected by CCR impacts from the PAP," and that the magnitude in variations between porewater chloride concentrations and chloride concentrations at APW15 demonstrate the APW15 "chloride concentrations are not related to the PAP." Motion at 18-24; R. 12. IEPA also asserts for the first time that IPGC's ASD should have considered leach testing data and included supporting laboratory documentation. None of these critiques were referenced in IEPA's Denial. If IEPA took issue with or disagreed with facts and evidence presented in Petitioner's ASD, it should have included those among the reasons for nonconcurrence in the Denial. Otherwise, IPGC is left without notice as to all of the reasons and bases for the Agency's denial and cannot adequately and fairly prepare its evidence for appeal.[9]

[8] The Hunt and Mullenax Deposition transcripts were attached as Document 3 and 4, respectively, to PCB 2024-043, *Illinois Power Generating Company v. Illinois Environmental Protection Agency*, August 1, 2024, Expert Report of Mindy Hahn ("Hahn Report"). For convenience, Deposition excerpts are also included as Exhibit C to this Response.

[9] IEPA witnesses raised some, but not all, of the issues IEPA now raises here in depositions that were taken earlier in this proceeding. However, just because they belatedly raised an issue in deposition also should not make it fair game. The Agency's reasons for denial cannot be an ever-moving topic. As explained, Petitioner's job is to cross examine IEPA's reasons for denial. To do so, it must be fairly provided IEPA's reasons for denial in the Agency's denial letter.

IEPA cannot now claim that its nonconcurrence is based on the additional reasons it sets forth in Section IV.A of the Motion. Doing so would be unfair to Petitioner and contrary to Board precedent.[10]

B. IEPA's Arguments Regarding Whether the ASD Meets the Requirements of 845.650(e) and Whether IEPA Reasonably Declined to Concur with the ASD Based on the Data Gaps Go to the Weight of the Evidence and Are Not Appropriate for Summary Judgment

Assuming IEPA's Section IV.A is appropriately within the scope of this proceeding and IEPA's new reasons for nonconcurrence are properly before the Board, every argument the Agency raises in Section IV.A is a question of fact inappropriately raised at this stage of the case. Additionally, IEPA's arguments in Section IV.B, that it reasonably declined to concur with IPGC's ASD based on the "Data Gaps" presented in the Denial, are also questions of fact for the Board to weigh and decide after a hearing.

1. The Facts, Evidence, and Conclusions in an ASD are the Subject of Professional Judgment by a Qualified Professional Engineer, and thus, any Difference of Opinion Regarding Those Facts, Evidence and Conclusions are Issues of Material Fact

IEPA's entire argument that the ASD is deficient is based on opinions that differ from those of IPGC's Qualified Professional Engineer and Geologist ("QPEs") and expert, making IEPA's Motion inappropriate for summary judgment.[11] In a motion for summary judgment "the pleadings,

[10] IPGC acknowledges that the scope of evidence in the ASD may be relevant as part of a discussion regarding whether the Data Gaps IEPA identified are an appropriate basis for denial. However, fair discussion of information in the ASD in connection with whether the Data Gaps are or are not appropriate is not the same as identifying additional reasons for not concurring with the ASD, as IEPA does here.

[11] IEPA makes one, completely unsupported argument, in favor of summary judgment as a matter of law: that IPGC did not identify a "specific alternative source." As is clear from the face of IPGC's ASD and as further discussed below, IPGC's ASD identified nearby bedrock as the alternative source for the chloride exceedance. This argument too, is based on differing opinions regarding the evidence IPGC provided in support of the alternate source and, thus, a question of fact that is inappropriate for summary judgment.

depositions, admissions, and affidavits on file must be construed against the movant and in favor of the opponent of the motion." *Brill v. Latoria*, PCB 00-219, slip op. at 2 (Nov. 2, 2000) (*quoting Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill.2d 240 (1994)). Conflicting expert opinions demonstrate that factual issues exist. *Nicholas v. City of Alton*, 107 Ill. App. 3d 404, 408 (1982) (finding the court's grant of summary judgment improper where conflicting expert opinions demonstrated factual issues existed); PCB 13-15, slip op. at 5 (Jan. 19, 2017); *Rock v. Pickleman*, 214 Ill.App.3d 368, 377 (1991). Furthermore, it is well established that the trier of fact considers the weight to be given to conflicting expert opinions. *Walski v. Tiesenga*, 72 Ill. 2d 249, 260 (1978); *Dabros v. Wang*, 243 Ill. App. 3d 259, 264 (1993*); Jarke v. Jackson Products*, Inc., 282 Ill. App. 3d 292, 300 (1996). Thus, competing expert opinions or conclusions are not ripe for resolution during summary judgment and must be weighed by the Board at hearing.

The alternative source demonstration provisions of Part 845 do not provide specific criteria that must be included or evidence that must be collected in connection with an alternative source demonstration. 35 Ill. Adm. Code § 845.650(e). Instead, they provide only that the owner or operator 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 . . .." *Id.* Rather than prescribe specific information that must be included in an alternative source demonstration, the regulation provides that the owner or operator must prepare a report with the "factual or evidentiary basis for any conclusions" and with "a certification of accuracy by a qualified professional engineer." *Id.* To read any additional legal requirements into the alternative source demonstration requirements would be contrary to the rules of statutory and regulatory interpretation. *Walker*, 2015 IL App (1st) 140087, ¶ 51 (citing *Schultz*, 237 Ill.2d at 408) (explaining requirements cannot be read into statutory and regulatory language). Thus, the

regulations contemplate that a qualified professional engineer[12] will make judgements regarding what evidence to collect and consider for an alternative source demonstration, what methodology to apply in conducting the alternative source demonstration, and how that evidence and methodology supports (or does not support) an alternative source demonstration.

As IPGC's expert, Dr. Hahn,[13] explains, alternative source demonstrations are a type of environmental forensic analysis. Hahn Report at 11. A qualified professional will "use their judgment and rely on commonly accepted lines of evidence to identify or rule out sources." *Id.* at 12. Information considered for such an analysis can be site-specific, regional, or from literature. *Id.* at 11-12.[14] Thus, it is clear why 845.650(e) does not lay out more specific criteria. An alternative source demonstration requires independent professional judgment to determine what data and analytical techniques should be used in the assessment. Hahn Report at 12 (explaining that "forensic analysis for an ASD requires gathering and evaluating available facts and evidence, based on site characteristics within the time-period provided for conducting the ASD"). "Consistent with standard scientific practice for forensic analysis, the PE must draw conclusions based on reliable data using standard analytical techniques to a reasonable degree of scientific

[12] A Professional Engineer has satisfied educational requirements in collegiate engineering, gained sufficient experience, and has passed a licensing exam. Hahn Report at 13.

[13] Dr. Hahn's qualifications, which includes significant experience with environmental forensic analysis, are discussed in her Declaration and accompanying resume in this proceeding. R. 33 at R002193-2194, R002204-2208.

[14] Citing U.S. EPA, Office of the Science Advisor, Risk Assessment Forum, Weight of Evidence in Ecological Assessment, EPA/100/R-16/001, December 2016, p. 20 et seq. and U.S. EPA, U.S. Navy SPAWAR Systems Center, GeoChem Metrix Inc., and Battelle Memorial Institute, A Handbook for Determining the Sources of PCB Contamination in Sediments, Technical Report, TR-NAVFAC EXWCEV- 1302, October 2012, p. 30.

certainty such that a reasonable engineer or scientist would agree." *Id.* at 13; *See also* **Exhibit A,** Declaration of Melinda Hahn (Oct. 31, 2024).

Thus, the issues IEPA raises in Section IV.A regarding whether the evidence presented in the ASD is sufficient or how probative that evidence is in supporting the conclusions in the ASD are matters of differing expert opinions,[15] inappropriate for summary judgement. Similarly, the issues IEPA raises in Section IV.B regarding whether IEPA reasonably declined to concur with the ASD because it did not include the "Data Gap" information are matters of differing expert opinion, again, inappropriate for summary judgment. The Board need not look any further to determine that summary judgment based on the Motion is inappropriate. Nonetheless, below, IPGC responds to the specific evidentiary arguments made in IEPA's Motion to illustrate the differing opinions.

2. The Issues IEPA Raises Regarding the Sufficiency of the ASD are Issues of Fact

a) The ASD Identifies the Alternative Source

IEPA argues it is entitled to summary judgment because the ASD does not identify an alternative source. Motion at 11-12. But IPGC's ASD does just that – it identifies naturally occurring chloride from underlying bedrock as the source of the chloride exceedance in APW15. R. 12 at R001613, 1617. IEPA's arguments on this issue are, thus, entirely based on the weight of the evidence IPGC has presented identifying the bedrock as the alternative source and whether that evidence (together with the other facts and evidence provided in the ASD) is sufficient to

[15] Notably, in many instances IEPA does not support the opinions and conclusions raised in its Motion with an affidavit or other evidence confirming the opinion or conclusion was made by someone qualified to review and reach a qualified opinion or conclusion regarding the evidence in IPGC's ASD.

demonstrate "that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination."

The Motion incorrectly claims that "the professionals responsible for the ASD do not claim that the submittal demonstrated that a specific alternative source caused the exceedance." Motion at 11. That is a blatant mischaracterization of the submittal. The QPEs who prepared the ASD note that "it has been demonstrated that the GWPS exceedance of chloride at APW15 is not due to the PAP but is from a source other than the CCR unit" and "[b]ased on the review of regional literature and site-specific bedrock conditions, chloride concentrations in bedrock groundwater are a likely source of chlorine observed in APW 15 . . .." R. 12 at R001617. In response to questions and requests raised by IEPA prior to its decision deadline on the ASD, the same QPE provided a letter to the Agency explaining "[t]he combined strength of the lines of evidence in the Primary Ash Pond ASD demonstrates that the Primary Ash Pond is not the source of the chloride exceedance at APW15 (and did not contribute to the chloride exceedance at APW15) and that the likely source is native bedrock." R. 29 at R001940. The letter goes on to explain that evidence in the ASD "are strong indictors that the bedrock beneath the Primary Ash Pond also contains chloride." *Id.*[16] Significantly, IEPA's argument on this point ignores the evidence referenced and discussed in the ASD. R12 at R001613, 1617-1619.[17]

[16] IPGC has also presented expert testimony in this proceeding supporting the analysis and conclusions of the QPE's regarding the alternative source. See Hahn Report.

[17] *See also* Hahn Report at 16, noting that the ASD cited to and relied upon the following sources: Panno, S.V et al, Recharge and Groundwater Flow Within and Intracratonic Basin, Midwestern Unites States, Groundwater, Vol. 56, Jan/Feb 2018, pp. 32-45 (originally published online in July 2017); Kelley, et al (ISWS, ISGS, and University of Illinois at Urbana-Champaign), The Sources, Distribution and Trends of Chloride in the Waters of Illinois, March 2012; Cartwright, K., Groundwater Discharge in the Illinois Basin as Suggested by Temperature Anomalies, Water Resources Research, Vol. 6, No. 3, 1970. pp. 912-918; Panno and Hackley, Geologic Influences on Water Quality, In Geology of Illinois, ed. Kolata and Nimz, Illinois State Geological Survey, 2010, pp. 337-350; Siegel, Geochemistry of the Cambrian-Ordovician Aquifer System in the

Thus, the ASD specifies bedrock as the source. IEPA's arguments are really about how evidence in the ASD supporting the bedrock as the alternative source should be weighed.

b) IEPA's Arguments Regarding IPGC's Alternative Source Evidence Are Incorrect, Unpersuasive and Questions of Fact

The Motion tries to argue around what are clearly disputed facts by contending evidence presented by IPGC in support of the bedrock as the alternative source is "speculative." IEPA seems hung up on semantics rather than evidence. The weight that evidence should be provided, including expert opinion, is a question for the trier of fact (and not appropriate for summary judgement). *See Nicholas*, 107 Ill.App.3d at 408. IPGC further notes the ASD did not suggest that bedrock "might" or "could" be the alternate source. Rather, it used best available evidence to conclude it was the "likely" alternate source. Meaning it was more probable than not. Importantly, this conclusion is based on site-specific information and regional-specific scientific literature (that is indicative of site-specific conditions), evaluated by QPEs. R. 12 at R001617-R001619. Thus, the Motion's accusations that the evidence in Petitioner's ASD regarding the alternative source is speculative are completely unsupported and not ripe for review at the summary judgment stage.

(1) <u>IEPA Misinterprets Documentation Regarding Chloride in Bedrock Beneath APW15</u>

IEPA's arguments in Section IV.A.1.b, revolve around the Agency's interpretation of evidence regarding chloride concentrations in the bedrock near APW15.[18] First, IEPA takes issue with evidence provided with IPGC's ASD demonstrating that bedrock within Jasper County has

Northern Midwest, U.S. Geological Survey Professional Paper 1405-D, 1989; and Willman et al, Geologic Map of Illinois: Illinois State Geological Survey Map, scale 1:500,000, 1967.

[18] Significantly, the Motion cites to no affidavit, oath or certification in support of the interpretation and conclusions raised in Section IV.A.1.b. Motion at 12-13. Thus, the evaluation and conclusions raised by the Motion in this section can be assumed to be nothing more an attorney's interpretation and analysis IPGC's ASD evidence. Meanwhile, IPGC's ASD was certified by a QPE and IPGC's expert has provided support for the probativeness and correct interpretation of the evidence.

elevated levels of chloride. R. 12 at R001617-1618, *See* Hahn Report, Document 13 at 41 (Fig. 7) (the "Panno article"). IEPA attempts to interpret a figure included in that evidence.[19] Its interpretation and resulting conclusions are incorrect. Below is a copy of the figure IEPA attempts to analyze:

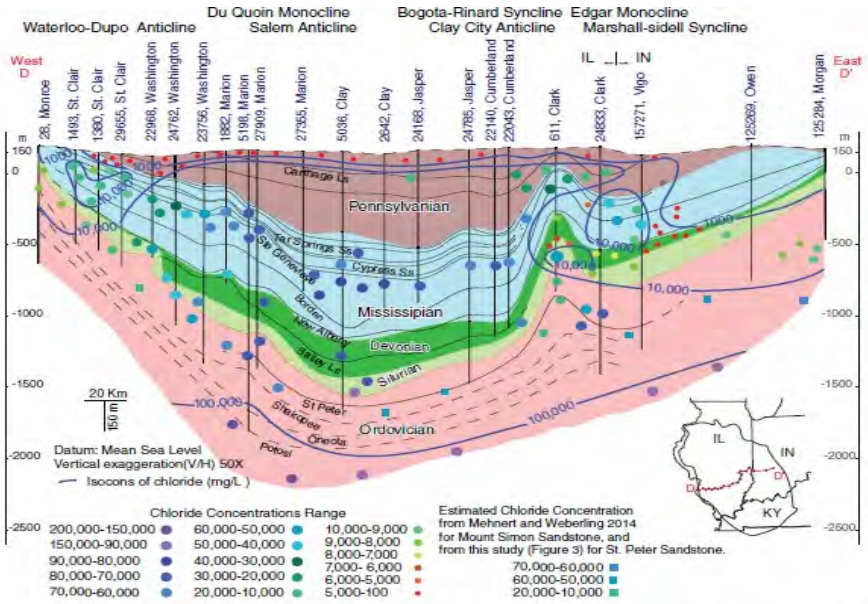

Figure 7. Cross section D–D′ extending east-west across southern Illinois and southern Indiana. Freshwater recharge affects the western and eastern margins of the basin, but not to the extent seen in cross sections farther north. Brines are also diluted along the LaSalle Anticlinorium (groundwater movement toward the reader). Again, the most concentrated brines are present in the Cambrian strata.

IEPA's Motion asserts, without providing any technical or expert support, that the figure is not representative of bedrock throughout Jasper County. Motion at 12-13. It further opines it is probative of only two distinct data points in Jasper County and not indicative of chloride concentrations in bedrock near APW15. *Id.* at 13-14. These assertions demonstrate a basic lack of scientific understanding of the figure and the data it represents. As Dr. Hahn explains, the information from Panno is indicative of chloride in bedrock *throughout* southern Illinois. Hahn

[19] IEPA provides no evidence that this information was reviewed by or that its interpretation was provided by a qualified member of IEPA's staff. Thus, one is left to assume the interpretation discussed in this section was completed by IEPA's attorneys.

Report at 16 (explaining that chloride content in the bedrock in Illinois "does not show significant variability"); See also R. 29 at R001940. As shown in its right-hand corner, the figure is a cross section of southern Illinois based upon data collected at various intervals. The figure provides estimates of chloride levels at unsampled locations based on measurements from known points. Hahn Report 16. Thus, the Panno article provides relevant evidence of chloride concentration data in the uppermost bedrock *across* southern Illinois, including across Jasper County (including near APW15), which can be used to support the determination that bedrock is the alternative source. *Id.* (explaining "[t]he plotted chloride isoconcentration line (a line through which concentrations are the same value) shows that chloride concentrations at 1,000 mg/L are present at the top of the Pennsylvanian shale (uppermost bedrock) across seven counties from Washington County in Illinois to Vigo County in Indiana. This includes Jasper County. The consistency in the data (i.e., lack of variability in the data) suggests that future sampling would yield very similar results."). IEPA, meanwhile, provides no evidence disputing the lack of variability in southern Illinois chloride data provided in the Panno article or explaining why similar chloride concentrations would *not* be expected in the bedrock near APW15.

Second, IEPA's Motion makes the misguided and unsupported conclusion that information in the Panno article "would be consistent with both Jasper County measurements being below the 270 mg/L measured at APW15." Motion at 13. This is a complete misinterpretation of Figure 7 of the Panno report. As evidenced from that figure, the red dots represent chloride concentrations ranging from 100 to 5000 mg/L. R. 12 at R001617. The location of three points relative to the 1,000 mg/L isoconcentration line plotted in and near Jasper County suggest they may be somewhat less than 1000 mg/L; however, they are clearly abutting or extremely close to the 1,000 mg/L isoconcentration line (a line through which concentrations are the same value), indicating their

values are closer to 1000 mg/L. Hahn Report at 16. A clear visual inspection of the figure shows that these dots cannot reasonably be interpreted to suggest the measurements are below 270 mg/L. Further, IEPA's argument ignores the observation that the 1,000 mg/L isoconcentration line itself is located near the top of the uppermost bedrock throughout Jasper County. *Id.*

Significantly, IEPA points to no evidence that would contradict the findings regarding bedrock impacts to APW15 contained in the ASD. IEPA similarly points to no evidence contradicting statements made by IPGC's QPEs and expert indicating that this was the best available information to identify the alternative source of chloride in APW15 during the 60-day period available to IPGC to conduct the ASD. R. 29 at R001940; Hahn Report at 16, 18, 21. The issues IEPA now attempts to raise are ones of professional judgement – understanding the nature of data, what it represents, and how it may be interpreted and extrapolated. These are questions that must be weighed and decided by the Board after a hearing.

(2) IEPA Misinterprets Data Regarding Structural Features of the Bedrock

IEPA then attempts to opine on the sufficiency of evidence provided in Petitioner's ASD indicating the presence of conduits for groundwater to leave the bedrock and enter the upper aquifer (where APW15 is located). Motion 14-15. First, IEPA throws out a red herring, suggesting a need to know the exact distance of the Clay City Anticline from the PAP without providing a scientific basis for why that information is relevant or would or should change the conclusions of the ASD. The relevant information, as provided in the ASD, is the existence of the saline spring mapped 10 miles from the PAP adjacent to the Clay City Anticline. R. 12 at R001617, Hahn Report at 17. The ASD presents information from scientifically supported sources indicating the presence of this saline spring. R. 12 at R001613, 1617; R. 29 at R001940; Hahn Report at 17. Further, the Panno Figure reproduced above identifies the Clay City Anticline adjacent to Jasper County. The

ASD also relies upon a peer reviewed report jointly prepared by the Illinois State Water Survey, the ISGS, and the Prairie Research Institute at the University of Illinois at Urbana-Champaign to conclude "A saline spring was identified in Clay County [] approximately 10 miles south of the NPP and is adjacent to the Clay City Anticline which runs north into Jasper County and east of the NPP." R. 12 R001613; Hahn Report, Document 13. As the QPEs who prepared the ASD explain, and as further confirmed by Dr. Hahn, this geologic feature supports the presence of a potential pathway for chloride to migrate from the underlying bedrock to APW15. R. 12 at R001613; R. 29 at R001940; Hahn Report at 17.

IEPA goes on to express the conclusory and unsupported opinion that the data regarding the saline spring cannot be probative of site-specific migratory pathways.[20] Again, this misses the point at this stage of the case. These are questions that mut be weighed and decided by the Board after a hearing. IEPA provides no support for why it believes the saline spring's 10-mile distance is not or should not be probative of conditions near the PAP. Motion at 15. More importantly, bedrock of the type near APW15 is known to contain fissures and cracks that could result in the movement of groundwater from the bedrock to APW15. R. 12 at R001613, 1617; R. 29 at R001940; Hahn Report at 17.

This is an issue of professional scientific judgement – understanding the nature of data, what it represents, and how it may be interpreted and extrapolated. IEPA provides, what appears to be nothing more than its attorney's opinion on the usefulness of this data.

(3) IEPA's Motion Misunderstands the Evidence Showing a Pathway for Bedrock Chloride to Reach APW15

[20] As is a common theme in the Motion, IEPA appears to suggest the ASD must include evidence that provides absolute, unqualified certainty as opposed to reasonable scientific certainty.

IEPA, again for the first time, incorrectly interprets and offers unsubstantiated opinions regarding evidence provided in IPGC's ASD regarding the presence of a pathway for chloride from the bedrock to reach APW15. Motion at 16-17. First, IEPA tries to compare APW15 to APW02. This is an irrelevant comparison that misses the point. APW15 is the only well impacted by a chloride exceedance *and, relevantly*, it is also located in close proximity to bedrock and screened at a lower elevation than other wells monitoring the upper aquifer. R. 12 at R001611, 1617. While this is not the forum to get into the reasons IPGC concluded the exceedances in APW02 were caused or contributed to by the PAP, IPGC notes some key distinctions presented in the evidence. APW02 may be the only well with a lithium exceedance, but it *also* contains sulfate and TDS exceedances, and contains a signature consistent with constituents originating from the PAP. R. 12 at R001611, 1615-1616 (explaining how sulfate serves as an indicator for CCR impacts); *see also* Hahn Report, Document 14. The screened interval of APW02 is approximately 100 feet more shallow than that of APW15. R. 10 at R000744. All to say, there is no reasonable basis for whatever unsupported analogy IEPA is now attempting to make between these two wells – APW15 is unique.

IEPA also (without support) suggests that chloride from the bedrock may not reach APW15 due to the existence of a Lower Confining Unit ("LCU") between the bedrock and APW15 (Motion at 16), but this ignores evidence demonstrating geologic features supporting the potential transport of chloride upward from the bedrock, as well as differences between the thickness and permeability of the Upper Confining Unit ("UCU") and LCU. R. 12 at R001612-1613; R. 10 at R00723 (showing the Upper Confining Layer is thicker and less permeable). Finally, IEPA mistakenly suggests that Petitioner's submitted drawings portray "at least 25 feet of till between the APW15 screen and bedrock." Motion at 17. Cross-section diagrams require some amount of interpolation

and extrapolation of existing data from discrete locations. A close review of the figure to which the Motion refers, using the provided distance key, indicates the correct extrapolated distance is less than 25 feet. R. 10 at R000776. Additionally, the boring log for APW15, a more reliable source of information regarding the thickness of the LCU, indicates there is at least 5.7 feet of clay (the LCU) below the silty sand unit where the well is screened and data from adjacent wells shows the bedrock surface is nearby. R. 10 at R00797-925 (APW 15 boring logs at R000820-825). IEPA's suggestion of a 25-foot thick (at a minimum) layer of till between the APW15 screen and bedrock is clearly an inappropriate extrapolation of available data and the thickness of the LCU below APW15 is obviously much less than the 60-foot Upper Confining Unit that precludes a pathway from the PAP. R. 12 at R001615.

Clearly, these are issues of differing expert opinion for the Board to consider after a hearing, not at the summary judgement stage.

c) IEPA's Arguments in opposition to the remaining lines of evidence in the Newton ASD are questions of fact that the Agency disputes through unsupported opinion and incomplete scientific knowledge.

(1) <u>ASD Evidence That the PAP is Separated from the Upper Aquifer at APW15 by a Thick Layer of Low Permeability Glacial Till</u>

The Agency, for the first time, questions the sufficiency of the evidence in the ASD supporting the lack of a pathway between the PAP and APW15. First, while IEPA's Denial does not take issue with the location of IPGC's groundwater monitoring network or raise that as a basis for its denial, IEPA now questions why APW15 is located in an area with an incomplete pathway from the PAP. Those reasons are contained within Part 845's groundwater monitoring requirements and IPGC's proposed groundwater monitoring program. *See* R. 10 at R001242-1263. Importantly, IPGC is conducting its groundwater monitoring in accordance with its proposed groundwater monitoring network, included in its October 2021 operating permit application. *Id.* If

IEPA has an issue with the location of well APW15, that issue is one for its review of IPGC's operating permit application and has no relevance to this proceeding. Regardless, CCR surface impoundment groundwater monitoring networks are established based on criteria provided under the Part 845 regulations. *See* 35 Ill. Adm. Code 845.630. The regulations provide that a groundwater monitoring system must monitor for "[a]ll *potential* contaminant pathways." 35 Ill. Adm. Code 845.630(a) (emphasis added). As the regulations suggest, this monitoring system includes wells at various locations surrounding a CCR surface impoundment and at various vertical depths so as to accurately capture groundwater that *may* potentially be passing through the waste boundary of the CCR surface impoundment. 35 Ill. Adm. Code 845.630(a)(2), (b); R000779 (figure depicting PAP monitoring well locations). Certainly, if every monitoring well were certain to be part of a pathway for porewater from a CCR surface impoundment to reach groundwater as IEPA now contends, there would be no reason to have an alternative source demonstration process.

IEPA further questions whether there may be "joints or sand lenses" in the Upper Confining Layer through which contaminants could travel from the PAP to APW15. Again, a question of fact. More importantly, this unsupported, theoretical question ignores evidence presented in the ASD demonstrating that there is no pathway between the PAP and APW15. This includes boring log data for APW15, data regarding the low permeability of the glacial till in the Upper Confining Layer, and evidence of an approximately 60 feet separation between the upper aquifer (where APW15 was sampled) and the base of the ash in the PAP. R. 12 at R001615, 1626-1634. IEPA's differing opinions are, again, inappropriate for summary judgement.

(2) <u>ASD Evidence that Concentrations of Primary CCR Indicators in APW15 Do Not Exceed Background Limits and are Not Increasing</u>

IEPA suggests for the first time that its nonconcurrence was appropriate based on the unsupported and *contested* contention that chloride leaking from the PAP may not necessarily be

accompanied by elevated boron and sulfate. Motion at 19-20. IEPA's contention is unsupported and contrary to reliable, widely accepted scientific evidence developed by the United States Environmental Protection Agency ("USEPA") regarding the behavior of boron, sulfate and chloride from CCR units. **Exhibit A** at 3-4 (Oct. 31, 2024); Hahn Report at 6 (explaining that boron, sulfate and chloride are all conservative solutes that "will travel in groundwater at approximately the same speed as the groundwater itself"); Hahn Report, Document 24 (80 Fed. Reg. 21397) (explaining that boron, chloride and sulfate are all among "parameters for detection monitoring" that would be expected to migrate from a CCR unit at similar rates).

> In its final rulemaking for CCR land disposal, EPA identified the following CCR constituents as indicator parameters for CCR detection monitoring: boron, chloride, fluoride, pH, sulfate and TDS. These parameters are commonly observed in CCR leachate. Out of all constituents in CCR and CCR leachate, EPA determined that these parameters would behave most conservatively (flow with groundwater) in an aquifer, and when observed together in monitoring wells, might signal a CCR release is impacting that well. Also, EPA determined that, out of all the coal ash constituents modeled, boron has the fastest travel time, meaning that boron is likely to reach potential receptors (or a well that is being impacted) before any other constituents, although this difference is likely to be small for other constituents that behave like conservative solutes in groundwater such as sulfate and chloride.

.
Hahn Report at 14 (*citing* 80 Fed. Reg. 21342 and 83 Fed. Reg. 11588). Thus, contrary to IEPA's unsupported assertion that boron and sulfate have higher mobilities than chloride and could "separate from boron and sulfate" (Motion at 20), boron, sulfate and chloride are all conservative solutes known to travel at fairly similar rates[21] (that rate being with the flow of groundwater). Hahn Report at 14-15.

IEPA then, again for the first time and without evidentiary support, argues that it does not agree with the ASD's findings indicating that groundwater chemistry at APW15 is inconsistent

[21] As Dr. Hahn explains, boron may travel somewhat faster, however, the difference is likely to be small compared to other constituents like sulfate and chloride that behave as conservative solutes.

with an impact from the PAP. IEPA opines the porewater samples are not representative of porewater contamination that could be leaving the PAP. However, as Dr. Hahn explains

> The evidence presented in LOE 2 shows that the boron, sulfate, and chloride fingerprint at APW15 is marked by only background levels of boron and sulfate, but significantly elevated chloride. On the other hand, the CCR porewater data have elevated concentrations of boron and sulfate, but concentrations of chloride consistent with background. In other words, the ratio of chloride to boron and chloride to sulfate is much lower in APW15 than the ratios that exist in PAP porewater. The CCR SI is not a source of chloride at APW15 because it is not accompanied by either boron or sulfate. On the other hand, the CCR indicator concentrations in wells with exceedances attributed to the PAP have ratios similar to the porewater. The ASD further reported that the boron and sulfate concentrations at APW15 are not increasing with time, as one would expect if CCR leachate was migrating to APW15. The lack of an increasing trend of boron and sulfate further supports that the PAP is not contributing.

Hahn Report at 14-15. IEPA's argument offers a differing expert opinion on the interpretation and supportiveness of the evidence (though without an affidavit, oath or other appropriate evidence) and should not be adjudicated through summary judgment.

First, IEPA characterizes the samples as coming from "one corner of the PAP." However, far from clustered in one corner of the PAP, the porewater monitoring wells are spread out across the PAP (spanning more than 3,200 feet) in locations where it is technically feasible for such wells to be installed. R. 10 at R000774; Exhibit A at 3-4; **Exhibit B**, Declaration of Brian Hennings (October 31, 2024) (explaining the reasons for the porewater sampling locations and why they "represent the best available characterization of the porewater at the PAP"). Moreover, IEPA implies that because the porewater wells are not installed on the southern end of the PAP (where they could not be installed due to infeasibility (See Exhibit B)) they are not representative of potential CCR impacts to the south of the PAP. (Motion at 20). This is refuted by the evidence. APW02 is located on the southwest side of the PAP and was found to contain exceedances of lithium, sulfate and TDS (and to contain boron above background) consistent with the fingerprint

of porewater samples. *See* Hahn Report, Document 14; Exhibit A at 4. By IEPA's logic, IPGC should be wary of relying upon its porewater sampling data to support its conclusion that the exceedances at APW02 are from the PAP.

IEPA also misinterprets IPGC's expert's explanation regarding the benefits of collecting porewater at the base of a surface impoundment (which is where IPGC's porewater samples were collected). Motion at 22. Contrary to IEPA's assertion, Dr. Hahn's does not claim that porewater samples must be taken at the lowest possible *elevation* to be representative of leachate that is potentially leaving. Rather, she explains that "[t]he porewater data are representative of the range of leachate quality potentially leaving the PAP because they were collected at the base of the SI (where L/S ratios should be lowest and leachate concentrations highest) in multiple locations over multiple sampling events." Hahn Report at 14. Thus, she notes that porewater at the "base" (i.e. bottom) of the impoundment is where leachate concentrations are expected to be the highest. Here porewater samples were collected from four different locations, at the base of the impoundment, over multiple sampling events – all aiding in their representativeness. *Id.*; R. 12 at R001616, 1635-1639; Exhibit B. All of this clearly illustrates that the issues presented in IEPA's Motion present questions of fact for the Board to weigh after a hearing.

(3) ASD Evidence that Concentrations of Chloride at APW15 are Greater than Source Concentrations

The ASD further evaluated statistics for chloride in APW15 and PAP porewater to conclude that chloride concentrations in APW15 are not related to the PAP. R. 12 at R001616. This conclusion is based on scientific principles regarding chloride migration and statistical observations concluding that "the median chloride concentration observed in compliance groundwater monitoring well APW15 is greater than the median chloride concentrations observed in porewater, indicating that chloride concentrations are not related to the PAP." *Id.*

IEPA now states, for the first time, that it disputes whether the evidence in the ASD allows IEPA to make an "informed comparison of these values" because the ASD does not analyze possible chemical differences that might affect solubility and does not contain documentation regarding sampling techniques, chain of custody, or extraction techniques for the porewater results. Motion at 21. As framed by IEPA, this issue is clearly not ripe for summary judgment – IEPA questions whether the data is sufficient.

On the first point, IEPA does not point to any specific "chemical differences" other than "possible pH variations over time and space." However, evidence (including scientific text IEPA claims to have independently pulled and reviewed in its review of the ASD) demonstrates that such an analysis is unnecessary because chloride is a conservative solute and is therefore unlikely to be impacted by chemical variations such as pH. R. 3 at R000024-R000031. As Dr. Hahn explains, conservative solutes like chloride "are *not subject* to decay, adsorption, or other chemical processes" and "will travel in groundwater at approximately the same speed as the groundwater itself." Hahn Report at 6. Additionally, such an analysis is not relevant or necessary because other wells within the monitoring network, such as APW02, show monitoring results consistent with the porewater signature from the PAP. Hahn Report, Document 14; Exhibit A at 5.

On the second point, IEPA's suggestion that documentation of the sampling techniques used, chain of custody, or extraction techniques "was not part of the record before the Agency" is disingenuous. While IPGC did not attach what would have amounted to voluminous underlying laboratory documentation to its ASD (and IEPA points to no requirement suggesting IPGC must have done so), such documentation was provided to IEPA in groundwater monitoring reports. Hahn Report; Document 14. These groundwater monitoring reports are included as a reference in

the ASD. R. 12 at R001618. Once again, IEPA is raising issues of fact regarding whether these documents were provided or were necessary to support the ASD.

IEPA also repeats arguments questioning the representativeness of porewater sampling results (Motion at 21-24), which IPGC has disputed through evidence (as discussed above in Section III.B.2(c)(2)).

d) Porewater data is the most relevant data for characterizing a CCR surface impoundment's impact to groundwater

In connection with its discussion of the ASD's statistical analysis of chloride, IEPA's Motion questions the relevance of porewater data in characterizing the potential impact of a CCR surface impoundment to groundwater. Motion at 22-23. The Motion rattles off several regulatory subsections under the Part 845 regulations (such as operating permit waste characterization requirements, and regulations related to groundwater monitoring and sampling) that are not relevant here. *Id.* It then suggests that because Part 845 does not use or reference the term "porewater," porewater cannot be used to characterize the PAP's potential impact to groundwater for purposes of an ASD. Clearly this is a question of differing opinion.

IEPA's arguments are contested, unsupported and go against sound science. In no instance does IEPA cite to any Part 845 requirement to use a specific methodology to characterize a CCR surface impoundment's potential impact to groundwater for an ASD. Meanwhile, as USEPA has explained, porewater data "best reflect leachate as it is released into underlying soils" and have been "determined to be the most representative data available for impoundments because these data are field-measured concentrations of leachate present at the bottom of [CCR surface impoundments]." *See* Hahn Report, Document 23 at 4-5, 5-17;[22] Hahn Report, Document 18 at 3-

[22] IEPA's footnote 6, while hard to follow, appears to make the illogical argument that statements made by USEPA in its federal risk assessment document related to the superiority of using porewater to characterize CCR surface impoundment impacts to groundwater are irrelevant

18 (explaining porewater were used instead of TCLP (a type of laboratory leach test) in part because "they represent actual leachate conditions at the sampled sites"). Dr. Hahn further elucidates

> After extensive research on the topic, as described above in Section 3.4, EPA found that actual porewater data for CCR SIs are best to represent the source term for risk assessment for the pathway of migration to groundwater because they are direct measurements, rather than estimates or simulations, of actual leachate quality at the CCR SIs, and are best representation of field conditions such that no further data are necessary.

Hahn Report at 19. Thus, Petitioner's evidence, contrary to IEPA's assertion, demonstrates porewater is a preferred methodology to determine the leachate quality at a CCR surface impoundment, an issue that should be resolved after hearing.

e) *IEPA inappropriately confuses leach testing with porewater sampling; regardless, Petitioner has presented evidence that porewater sampling is superior to leach testing for purposes of characterizing CCR surface impoundment impacts to groundwater*

Finally, IEPA suggests IPGC should have evaluated the PAP CCR using a leach testing methodology in SW-846 for purposes of the ASD or conducted porewater sampling using an unapplicable USEPA porewater guidance document for sediment.[23] Motion at 23-24. In doing so, IEPA confuses the idea of porewater sampling and laboratory leach testing. As Dr. Hahn explains

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because the federal rule is risk based while the portions of Part 845 relevant here "apply the strict numerical groundwater protection standards listed in 35 Ill. Adm. Code 845.600." This makes no sense. The issue of concern here is how to best characterize the impact a CCR surface impoundment has on groundwater. It does not matter the ultimate purpose for which that information may be used. As explained above, the reasons EPA supports the use of porewater sampling for leachate characterization is because it most accurately represents leachate conditions at a CCR surface impoundment.

[23] The Motion suggests this porewater guidance document is an SW-846 methodology. It is not. It is an internal Operating Procedure for EPA's Lab Services & Applied Sciences Division, but has not been incorporated into SW-846 through the public comment process and is also not listed in EPA's "Validated Test Methods" (the most current and up to date recommended methods that

> "Leaching tests" are performed on a solid sample in an effort to predict the chemical quality of water that has been in contact with the solid and received constituent mass transfer from the solid (the "leachate"). A leach test cannot represent all aspects of real world conditions, but is a laboratory simulation where conditions or parameters are selected to attempt to predict the chemical quality of interstitial porewater in a solid under land disposal conditions. Parameters of the leach tests that can impact final results include the liquid-to-solid ratio (L/S ratio), the starting chemistry of the water contacting the solid, or the eluent, the geometry of the system (including either "batch" or "column"), and the contact style and time. After completion of the leach test, the resulting water is called the eluate.
>
> A "porewater sample" [] is a liquid sample of the interstitial water (porewater) within the void space of a solid.

Hahn Report at 2. IPGC conducted porewater sampling of the PAP. Thus, IEPA's discussion of leach tests here, and suggestion that IPGC should have conducted a Method 1314, 1315 or 1316 leach test in connection with the ASD, is irrelevant (other than to belatedly raise an additional "Data Gap") and a question of differing expert opinion. Regardless, Dr. Hahn has explained that these three leach testing methodologies would not be useful to the ASD:

> IEPA included three documents from SW-846, each related to LEAF testing methods. None are useful to the ASD. LEAF Testing Method 1314 documentation notes, "This method provides eluate solutions considered indicative of leachate under field conditions only where the field leaching pH is controlled by the alkalinity or acidity of the solid material and the field leachate is not subject to dilution or other attenuation mechanisms." The test would not be representative of field conditions at the PAP due to codisposal of wastewaters. Further, in contrast to field conditions, LEAF tests use small volumes of solid samples and reagent grade water rather than rainwater that is naturally acidic. These shortcomings of rather idealized laboratory conditions highlight the fact that these tests merely provide estimates of potential leachate quality, and that direct measurement of porewater quality is much more accurate in terms of understanding the actual source concentration of contaminant available for transport from the SI because it is the integral result of lifetime variability of the L/S and spatial variability of the CCR itself. Further, multiple porewater samples can give a picture of the fieldscale variability in leaching potential due to differences in CCR chemistry of all placed materials. Documentation for other LEAF methods, Methods 1315 and 1316, in IEPA's Record have similar statements regarding their lack of representation of field leaching conditions. This is consistent with EPA's decision to select field

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have not yet been formally incorporated through public comment, available at https://www.epa.gov/hw-sw846/validated-test-methods-recommended-waste-testing).

> porewater data over laboratory leachate tests to model the potential migration of CCR constituents to groundwater. Method 1315 further relates to monolithic and compacted granular material. In my opinion CCR in a SI behaves more like a porous medium than a monolithic or compacted granular material.

Hahn Report at 22-23. Thus, IPGC has presented evidence as to why none of these leach test methods are an appropriate method by which to characterize CCR impacts on groundwater.

IEPA further suggests that IPGC's porewater sampling should have been done in accordance with a USEPA guidance document on collecting porewater samples in sediment. Here, again, IPGC has presented evidence explaining why this document is irrelevant and unhelpful to the ASD.

> While none of IEPA's data gaps appear to refer to the porewater sampling IPGC conducted to characterize what might be leaching from the Newton ASD, the document in IEPA's record is not relevant to the analysis of CCR SI porewater because it describes sampling of porewater in a shallow water body with a handheld direct push device and a mechanism to collect a grab sample of porewater from relatively shallow depths, typical of shallow rivers or streams. This is not relevant to a CCR SI because SI porewater samples representative of liquid that may migrate to groundwater is typically collected using monitoring wells. The presence of this document in the record may suggest that IEPA misunderstands how porewater data were collected at the Newton PAP and are typically collected for a CCR SI. The Newton PAP porewater samples were collected from wells with screens set at the base of the CCR (in the zone where CCR would be most consolidated with a lower L/S ratio and higher leachate concentration) using low-flow sampling techniques. This is an appropriate methodology for collecting porewater samples from a CCR SI because saturated CCR is effectively a porous medium, similar to natural sands, gravels and silts, with interstitial water that may be sampled with a monitoring well.

Hahn Report at 23-24. Again, this is an issue of disputed fact, including expert opinion, not ripe for summary judgement.

Thus, IEPA's arguments in Section IV.A all rest on issues of material fact (and, in some instances on unsupported and conclusory opinions by IEPA's attorneys), and support denial of IEPA's Motion.

3. Petitioner Has Presented Evidence that IEPA's "Data Gaps" Are Not Required by Law and are Irrelevant and/or Unnecessary to Support Petitioner's ASD

In Section IV.B, IEPA's Motion focuses on whether its stated reasons for denial of Petitioner's ASD (as framed by the Denial) are appropriate. However, IEPA fails to argue, let alone prove, that the three "Data Gaps" were required as a matter of law and that they were appropriate bases for denial under the undisputed facts. IEPA points to no legal requirement that the specified "Data Gap" information must be provided in an ASD. Meanwhile, IPGC has presented significant evidence disputing the relevance, appropriateness, and need for the "Data Gap" information. Thus, the entirety of IEPA's arguments in Section IV.B are based on disputes of material fact. IEPA's attempts to argue about why the Data Gaps are justified further demonstrates that these are issues of differing expert opinions. Thus, the issue of whether the "Data Gaps" are appropriate or necessary may not be decided on summary judgment.[24] To illustrate this point, below is a discussion of IEPA's "Data Gaps."

a) "Data Gap 1"

Data Gap 1 suggests the ASD must have included total solids sampling data for the CCR in the PAP using an SW-846 methodology. The Motion's discussion of "Data Gap 1" is based on a complete misunderstanding and mischaracterization of the facts and scientific principles presented as evidence in this matter.

First, the Motion mischaracterizes total solids sampling as a "groundwater method" that is "governed by SW-846" citing to 35 Ill. Adm. Code 845.640(j). Section 845.640(j) applies to "groundwater samples." 35 Ill. Adm. Code 845.640(j). *Solids* sampling is not a *groundwater*

[24] In contrast, IPGC's October 1, 2024, Motion for Summary Judgment in this matter argues that the "Data Gaps" are not required, and may not be required, as a matter law, thus summary judgment in favor of IPGC is appropriate.

method, nor does it involve analyzing a *groundwater sample*. *See* Hahn Report at 2. It is, as its name suggests, the sampling of solids. *Id*. Thus, IEPA's reference to section 845.640(j) to suggest that Part 845 contains a requirement to conduct solids sampling in accordance with SW-846 methodologies for an ASD is completely unsupported.[25] IEPA's Motion further points to no legal requirement to conduct total solids sampling for an alternate source demonstration under Part 845 (or elsewhere under Part 845) or to perform total solids sampling using SW-846.[26] This basis for IEPA's nonconcurrence is founded entirely on IEPA's unsupported and challenged *opinion* that total solids sampling for chloride is necessary to determine whether the PAP is contributing to groundwater contamination. But it is not. As Dr. Hahn explained:

> [T]otal solids analysis provides information regarding constituents that are currently within the solids in a CCR SI. It does not provide information regarding the concentrations of constituents in porewater that are potentially leaving a CCR SI and entering into groundwater. Meaning, if solids sampling and total constituent analysis was conducted at the Newton PAP (regardless of the methodology or number of borings and samples) it would not, by itself, provide useful information for an ASD to determine whether contaminants leaching from a CCR SI are contributing to contamination in groundwater.

[25] IEPA's Motion references a portion of IPGC's petition arguing "[t]he only substantive provision of Part 845 specifically requiring analysis using SW-846 is Section 845.640(e), which applies to analyzing groundwater monitoring samples under a groundwater program and is not at issue here." Petitioner acknowledges here that this was a typographical error and that Petitioner intended to reference Section 845.640(j) not (e). Section 845.640(e) makes no reference to SW-846. The only specific provision of Part 845 that references SW-846 is 845.640(j).

[26] As IPGC points out in its Motion for Summary judgment, where Illinois rules incorporate analytical methods by reference 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, 2012 through June 30, 2012)*, R 13-2, slip op. at 11 (Oct. 18, 2012) (emphasis added). For SW-846 that incorporation into the body of the substantive provisions is in 845.640(j) and nowhere else. Any suggestion by IEPA that SW-846 – a guidance document – is mandatory outside of an indication in the body of the substantive regulatory provisions is, thus, inapposite to basic legal principles. No Illinois regulation requires solid sample analysis using SW-846.

Hahn Report at 18. IEPA has pointed to no scientific sources or testimony refuting Dr. Hahn or explaining why solids sampling is required to characterize what is leaching from a CCR surface impoundment. Absent a legal requirement to conduct solids sampling for an alternative source demonstration, IEPA's Motion must be denied as the question is one of professional judgment which is not ripe for review on summary judgment.

Third, and significantly, it is an undisputed fact that "there is no EPA SW-846 method that includes chloride or chlorine as an analyte in a solid sample so the request for 'total solids sampling' using an SW-846 method for chloride or chlorine is not possible as written." Hahn Report at 18; *see* USEPA, The SW-846 Compendium: Methods (2024) (*available at* https://www.epa.gov/hw-sw846/sw-846-compendium#methods).[27] This makes IEPA's "Data Gap 1" an impossibility.

Finally, when discussing "Data Gap 1," IEPA responds to evidence Petitioner raised *not* related to total solids sampling but rather related to laboratory leach testing. Motion at 27-28 (referencing a paragraph of IPGC's Petition referencing why the ASD uses porewater data to characterize the PAP's potential impact to groundwater over laboratory leach tests). This discussion is irrelevant to "Data Gap 1" and, again, the Motion misconstrues facts and scientific principles. IEPA's "Data Gap 1" in no way relates to evidence regarding the potential for the PAP

[27] Notably, while IPGC takes issue that any legal requirement for solids sampling in accordance with SW-846 exists for ASDs and provides evidence that total solids sampling using an SW-846 methodology is impossible for chloride and irrelevant and unnecessary for an ASD, it does not dispute that SW-846 must be used for groundwater sampling under Subpart F of Part 845 or that it can serve as useful guidance in other contexts. As Dr. Hahn points out, as part of the CCR characterization IPGC conducted for its operating permit application, IPGC provided data regarding the total concentration of SW-846 analytes in Newton CCR samples i.e. IPGC provided "total solids sampling" results using SW-846 methodology for metals regulated under Part 845 for which there is an SW-846 method including the constituent as an analyte in a solid sample. *See* R. 10 at R000715, 738 (providing the results of solid samples collected from within the PAP).

to leach. It provides that the ASD must include "total solids sampling in accordance with SW-846," not laboratory leach testing. Accordingly, the Motion's discussion of leach testing in the context of "Data Gap 1" is irrelevant. The important question for purposes of an ASD is whether constituents in porewater are potentially leaving a CCR surface impoundment and entering into groundwater. Hahn Report at 18. IEPA's Denial and "Data Gap 1" does not get to this important question.[28]

Any suggestion that IEPA, as a matter of law, should be allowed deference to issue a Denial based on its desire for information that is not legally required, impossible to provide, and irrelevant cannot stand.

b) "Data Gap 2"

"Data Gap 2" suggests the ASD required two types of information regarding the alternative source identified in IPGC's ASD: hydraulic conductivity data from laboratory or in-situ testing and hydrogeologic characterization of the bedrock. In its Motion, IEPA argues it "reasonably required this information." Motion at 28.

IEPA does not argue or point to any legal requirement that this information be included or considered in an alternative source demonstration. Instead, IEPA argues the data was required to be collected for the PAP's operating permit application and that it must, therefore, also be included and considered with its ASD.[29] That is a question of professional judgment. Certainly,

[28] While "Data Gap 1" has nothing to do with laboratory leach testing, as discussed above, IPGC has presented evidence indicating that laboratory leach testing would not provide useful information for the ASD. *See* Section III.B.2(e) above. It has also provided evidence detailing why characterization using porewater sampling of the PAP is superior to laboratory leach testing. *See* Section III.B.2(d) above.

[29] IPGC submitted a hydrogeologic site characterization including all of the elements listed in 845.620(b) with its operating permit application. *See* R. 10 at R000696-1240. Any disagreement regarding IPGC's operating permit application should be addressed in the context of that application process. That said, IEPA misconstrues the hydrogeologic site characterization

information included in an owner or operator's operating permit application may be useful when conducting an alternative source demonstration. However, nothing in Part 845's alternative source demonstration requirements demands the consideration of specific information. See 35 Ill. Adm. Code 845.650(e). Thus, the question of whether information (whether required in an operating permit application or not) should be considered in an alternative source demonstration is a matter of professional judgment, over which IPGC and IEPA have differing opinions that should be adjudicated by the Board after a hearing.

Even if there is a requirement to collect hydraulic conductivity data and to characterize bedrock in another context under Part 845 – that is not determinative of whether the ASD is facially deficient. At the summary judgement stage, the relevant question is whether the information must have been included and considered as part of IPGC's ASD determination. The answer to that question is a resounding no. The data analyzed for an alternative source demonstration is left to the purview of the QPE. What information should or should not have been considered and the weight that information should be afforded is the heart of the dispute between IEPA and IPGC. This issue is not appropriate for summary judgment.

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requirements in its Motion. IEPA suggests 845.620(b)(16) requires hydraulic conductivity data but fails to note that it requires this data only for geologic layers identified as migration pathways and geologic layers that limit migration. IPGC's operating permit application includes this information for the applicable geologic layers. *See e*.g., R 10. at R000706-707, 721-723, 747. IEPA further suggests 845.620(b)(18)'s requirement to include "[a]ny other information requested by the Agency that is relevant to the hydrogeologic site characterization" supports a conclusion that the hydrogeologic characterization include sampling and analysis of the bedrock beneath APW15 for chloride. That is hardly a logical argument considering IEPA first "requested" that IPGC collect this information in connection with this ASD. IEPA also cites to 845.620(b)(13) and (15) without explaining why or how these sections would require the specific information they are now seeking in the context of the ASD. That said, the hydrogeological site characterization in IPGC's operating permit application included the information in 845.620(b)(13) and (15). *See e.g.*, See R. 10 at R000706, R000714-718.

Furthermore, the hydraulic conductivity of the bedrock would not change the conclusions of the ASD. Exhibit A at 3 ("There are three primary modes of groundwater transport for solutes: advection, dispersion, and diffusion. The first two modes depend on the velocity of groundwater (and hence hydraulic conductivity), but the third does not. Solute motion due to diffusion depends only on the concentration gradient – solutes will move in the direction of decreasing concentration by random molecular motion according to Fick's Law. The cited report from the ASD, from authors at the Illinois State Geological Survey, clearly shows in cross-section that chloride concentrations in bedrock aquifers of southern Illinois increase dramatically with depth. This means that chloride would move upward in the bedrock aquifers even if the groundwater itself was stationary."). Nor is the direct sampling of bedrock. Hahn Report at 21 (explaining available data made collection of this additional information unnecessary).

Finally, IPGC has provided evidence that the hydraulic conductivity and characterization IEPA seeks through "Data Gap 2" (and "Data Gap 3") could not have reasonably been collected in the 60-day period IPGC had to compile its ASD. R. 33 at R02213-14. Thus, even to the extent this data could have been useful, there was no practical way IPGC could have collected and considered it prior to submitting its ASD. These are clearly issues for the Board to consider after a hearing.

c) "Data Gap 3"

In IEPA's Denial, "Data Gap 3" reads "[c]haracterization to include sample and analysis in accordance with 35 IAC 845.640 of alternative source must be provided with ASD." On its face, this language in this "Data Gap" is unclear. IEPA's Motion suggests it means IPGC must have provided the documentation specified in 845.640(a) for samples collected of the alternative source (i.e. bedrock). Motion at 32-33.

That is incorrect. 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 referencing 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 "groundwater monitoring program" in 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, 845.630, 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). Accordingly, 845.640(a) does not apply to sampling of an alternative source.

Thus, at most, IEPA is asserting that this underlying documentation is necessary as a matter of professional judgement in support of an ASD. This, again, is an issue of the weight of the evidence for the trier of fact to decide.

C. IEPA's Arguments Regarding Consideration of Evidence in IPGC's Comment Letter Are Unsupported and Unconvincing

The Motion argues the Board should not consider information provided in a Comment Letter submitted by IPGC to IEPA during the comment period for the ASD. Motion at 33-35. Procedurally, IEPA's argument on this point is misplaced in its motion for summary judgment as opposed to an evidentiary motion. That said, any evidentiary motion on this point would fail.

The Comment Letter was included by IEPA in the record it filed for this proceeding, meaning it is clearly within the scope of evidence that may be considered in this proceeding. 35 Ill. Adm. Code 105.212, 105.214; R. 29. As correspondence with the Petitioner, including documents or materials submitted by the Petitioner (35 Ill. Adm. Code 105.212), the Comment Letter should also have been considered by IEPA in making its ASD decision. Critically, Petitioner

did not submit the additional information to the Agency regarding its ASD in a vacuum. The Comment Letter was submitted to IEPA *in response* to questions and requests raised by the Agency prior to the decision deadline. R. 20 at R001762-1763 (October 26, 2023, correspondence from IEPA to IPGC requesting a technical contact for Newton to discuss questions and requests); R. 23 at R001770 (documenting meeting held between Petitioner and Agency on October 31, 2024); R. 29 at R001787. Under IEPA's logic, the Agency should have the right to ask questions and make requests of IPGC before the decision deadline, but IPGC should not have a right to respond to those questions and requests, or for that response to be considered by the Agency when issuing its decision. That would result in gross unfairness.

Additionally, IEPA's arguments related to the timing of the Comment Letter are unconvincing – the timing of the Comment Letter was necessarily dictated by the timing of IPGC's receipt of IEPA's "questions and requests." [30]

D. IEPA's Policy Arguments Regarding the Gavin Power Federal Alternative Source Demonstration Are Irrelevant

Finally, IEPA discusses federal review of an alternative closure deadline request for Gavin Power in Ohio.

As an initial matter, USEPA's decision in that matter has been appealed. *See Gavin Power, LLC v. United States Env't Prot. Agency*, Case No. 24-41 (S.D. Ohio). The appeal challenges

[30] Immediately after its discussion of the Comment Letter, IEPA expresses disagreement with arguments in the Petition (supported by the QPE's determinations in the ASD and Petitioner's expert's review of the evidence) indicating that the information in the "Data Gaps" would not change the conclusions of the ASD. Motion at 35. IEPA's argument fails to understand the scientific forensic analysis process, which involves the development of evidence to the point where the scientist has a reasonable degree of confidence in their findings. *See* Hahn Report at 11-13. Once confidence in the scientist's findings has been achieved, it necessarily results in a stopping point. Otherwise, the analysis would result in the never-ending process of collecting data, though such data collection is unnecessary based on confidence in existing evidence. *Id.*

USEPA's determination that its denial was justified. Accordingly, USEPA's decision is under review and should not be relied upon for guidance or precedent.

More importantly, as USEPA has acknowledged in its Motion to Dismiss in that case, USEPA's findings did not determine rights or obligations or carry any legal consequences (with respect to findings made regarding the alternative source demonstrations or other 40 C.F.R. Part 257 requirements). USEPA Motion to Dismiss, *Gavin Power, LLC v. Env't Prot. Agency,* Case No. 24-41 (S.D. Ohio, Oct. 16, 2024) (Docket No. 41) at 12-13.[31] USEPA's determination was nothing more than a determination that "Gavin had failed to meet its burden under the regulation of demonstrating that, at the time of its extension application for the Bottom Ash Pond, its facility was in compliance with all regulatory requirements." *Id.* at 13. In other words, USEPA determined that Gavin failed to make a demonstration for an alternative closure deadline, not that as a matter of law it was out of compliance with the alternative source demonstration or other 40 C.F.R. Part 257 requirements. As such, by USEPA's admission, the Gavin decision should not be relied upon for guidance or precedent.

IV. CONCLUSION

For the reasons described above, the Board should deny IEPA's Motion for Summary Judgment.

Respectfully submitted,

/s/ Bina Joshi
Bina Joshi

[31] Attached as Exhibit D.

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BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

ILLINOIS POWER GENERATING COMPANY Petitioner **v.** **ILLINOIS ENVIRONMENTAL PROTECTION AGENCY** Respondent.	**PCB 2024-043**

INDEX OF EXHIBITS

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EXHIBIT B	Declaration of Brian G. Hennings (October 31, 2024)
EXHIBIT C	Excerpts from: Depositions of Lauren Hunt and Heather Mullenax (May 28, 2024)
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EXHIBIT A

DECLARATION OF MELINDA W. HAHN, PhD

In support of IPGC's Petition for Review of IEPA's Non-concurrence with the Newton Alternative Source Demonstration and Request for Stay

I, Dr. Melinda W. Hahn, declare and state as follows:

1) I am an Environmental Engineer and Senior Managing Consultant with BBJ Group LLC. Attached as Attachment 1 is a true and accurate copy of my Curriculum Vitae.

2) I hold a PhD in Environmental Engineering from Johns Hopkins University. The focus of my research for my PhD dissertation was contaminant transport in porous media (e.g., groundwater).

3) My practice over my 25-year career includes site investigation and remediation in multiple state and federal programs, such as voluntary remediation, Resource Conservation and Recovery Act (RCRA) corrective action, and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) response action. My work in these programs includes contaminant fate and transport modelling, site investigation and remediation, and statistics and forensic analysis of environmental contamination data. I have evaluated sites from many

different industrial sectors with many different contaminants of concern, including volatile organic compounds (VOCs), which includes chlorinated volatile organic compounds (CVOCs), semivolatile organic compounds (SVOCs), metals, polychlorinated biphenyls (PCBs), and dioxins/furans.

4) To prepare this Declaration, I reviewed the Illinois Power Generation Company (IPGC) October 6, 2023 Alternative Source Demonstration (ASD) Report for chloride concentrations observed in groundwater from well APW15 at the Newton Power Plant Primary Ash Pond (PAP), the November 3, 2023 IPGC letter to the IEPA with supplementary information on the ASD, the November 7, 2023 IEPA denial of the ASD, and supporting information for the ASD. I reviewed the documents submitted by IPGC independently and was not personally involved in their preparation. I also reviewed the IEPA's Motion for Summary Judgment.

5) The conclusions of the IPGC ASD Report for Newton were drawn to a reasonable degree of scientific and technical certainty. My concurrence with these conclusions, including that the ASD Report demonstrates that a source other than the PAP caused the contamination and the PAP did not contribute to the contamination, were also determined to a reasonable degree of scientific and technical certainty. Reasonable degree of scientific and technical certainty means more likely than not (at a minimum) and that others in the field would agree with the opinion. Collecting additional data, such as the hydraulic conductivity of the

bedrock will not change the conclusion because there is no hydraulic conductivity value that could contradict the conclusion reached through the evidence considered in the ASD.

6) There are three primary modes of groundwater transport for solutes: advection, dispersion, and diffusion. The first two modes depend on the velocity of groundwater (and hence hydraulic conductivity), but the third does not. Solute motion due to diffusion depends only on the concentration gradient – solutes will move in the direction of decreasing concentration by random molecular motion according to Fick's Law. The cited report from the ASD from authors at the Illinois State Geological Survey clearly shows in cross-section that chloride concentrations in bedrock aquifers of southern Illinois increase dramatically with depth.[1] This means that chloride would move upward in the bedrock aquifers even if the groundwater itself was stationary. Therefore, a low observed hydraulic conductivity value or absence of cracks or fissures in a given test boring would not change the conclusions of the ASD.

7) In its Motion for Summary Judgment, the IEPA claims that "Petitioner's identification of boron and sulfate as 'site-specific key indicators of CCR' relies on porewater samples from one corner of the PAP, there is no reason

[1] Panno, V.P. et al, Recharge and Groundwater Flow Within an Intracratonic Basis, Midwestern United States, Groundwater, 2017, Vol. 56, No. 1, p. 41.

to believe that these samples are representative of the entire PAP, or of all contamination that could come from it." Motion at 20. This statement is not true for a number of reasons. First, boron and sulfate are not only site-specific key contaminants, they are recognized by USEPA as key contaminants for CCR in general. The Newton PAP has always received primarily CCR. Second, the porewater samples (from wells XPW01, XPW02, XPW03, and XPW04) were collected in a transect across the northern end of the PAP that spans more than 3,200 feet (more than half a mile)[2], rather than from a single corner. Samples from each of the porewater wells have elevated concentrations of boron and sulfate relative to background.[3] Third, there is reason to believe that the porewater is representative of impacts from the PAP because well APW02, located on the southwestern edge of the PAP approximately 4,000 feet from the nearest porewater well (APW15 is located at the southern edge of the PAP approximately 5,000 feet from the nearest porewater well), was determined to be impacted by the PAP and is being carried forward for assessment of corrective measures.[4] This well has the expected CCR and Newton PAP signature of elevated boron and sulfate. IPGC is applying the same criteria or lines of evidence to determine whether a well is carried forward for corrective action, or whether an ASD is warranted.

[2] Ramboll, Hydrogeologic Characterization Report, Newton PAP, October 21, 2021, Figure 2-5.
[3] Ramboll, Hydrogeologic Characterization Report, Newton PAP, October 21, 2021, Table 2-3.
[4] Ramboll, Alternative Source Demonstration Report Newton PAP, October 6, 2023, p. 3.

8) IEPA also claims in its Motion for Summary Judgment that IPGC has not provided sufficient information for it to compare the chloride concentrations in APW15 and in the four porewater wells. IEPA suggests that variations of pH in time or space may account for the significantly higher chloride concentration in APW15. This is incorrect because chloride behaves in groundwater as a conservative solute, which means that it generally does not participate in chemical reactions that would change its concentration based on pH levels. The chloride concentrations in APW15 may be directly compared with those in the porewater wells.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 30, 2024

Melinda W. Hahn, PhD

ATTACHMENT 1

Curriculum Vitae of Melinda Hahn, PhD

MELINDA HAHN, PhD
PRINCIPAL SCIENTIST

Education

B.S., Mathematics, Department of Natural Science, The University of Texas at Austin, 1990

B.S., Physics, Department of Natural Science, The University of Texas at Austin, 1990

Ph.D., Environmental Engineering, Department of Geography and Environmental Engineering, The Johns Hopkins University, 1995

Academic Honors

National Science Foundation Graduate Fellow (1992 – 1995)

Most Distinguished Environmental Engineering Dissertation, American Association of Environmental Engineering Professionals

Professional Training

OSHA 40-Hour Health and Safety Course for Hazardous Waste Sites

Operations and Annual 8-Hr Refresher course (HAZWOPER)

GENERAL CAREER BACKGROUND

Dr. Hahn joined BBJ Group in 2024, where she currently serves as a Principal Scientist, working on site investigation, remediation, and litigation projects involving soil, groundwater and sediment contamination. Prior to that, she was a Senior Manager for ENVIRON and Ramboll Americas Engineering Solutions. Dr. Hahn started her career at ERM North Central in Deerfield, Illinois, and has served Midwest and national clients for more than 25 years.

REPRESENTATIVE CLIENT EXPERIENCE

Dr. Hahn's practice areas include site investigation and remediation, contaminant fate and transport modelling, statistics of environmental data, forensic analysis, and litigation support, including primarily toxic tort, environmental liability and cost allocation. Regulatory areas include RCRA, CERCLA, TSCA, Coal Combustion Residuals and Voluntary Cleanup/Risk-Based Corrective Action. Dr. Hahn has experience in the following industry categories: energy (electric utilities, petroleum dispensing, pipeline operations, former manufactured gas plant sites), industrial equipment manufacturing, metal working and metal recycling, automobile manufacturing, ink and chemical manufacturing, wood treating, mining, cement manufacturing, milling and smelting operations, secondary aluminum production, and dry cleaning.

GEOGRAPHICAL AREAS OF EXPERTISE

Dr. Hahn has completed projects in many states, including Alabama, California, Connecticut, Delaware, Louisiana, Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Oregon, Tennessee, Texas, and Wisconsin, Europe and the British Virgin Islands.

EXAMPLE PROJECTS

- Provided technical litigation support for over 50 matters regarding extent, severity, timing, and source of soil, sediment, air and ground water contamination, necessity for and costs of remediation, toxic tort liability, Superfund cost allocation (including consistency with the NCP), insurance cost recovery, and the siting and monitoring of a hazardous waste landfill. The regulatory frameworks included Illinois Voluntary Cleanup Program, Illinois Leaking Underground Storage Tank Program, RCRA, CERCLA, TSCA, NCP, and California Proposition

65. Contaminants of concern included chlorinated solvents, metals, PCBs, pesticides, dioxins/furans and PFAS. Completed projects in more than twenty states, with a focus in the Midwest.

- Provided expert testimony in matters involving Superfund cost allocation, statistics of environmental data, and contaminant fate and transport.
- Provided strategic support for sites undergoing investigation and remediation where multiple on- and off-site sources are in play.
- Provided litigation support for environmental liability/cost allocation mediation and litigation at several large sediment sites. Evaluated historical information on industrial processes and discharges, and conducted forensic/statistical analysis to estimate the relative contribution of contaminants to sediments.
- Provided litigation support for a number of insurance cost recovery projects, including a former wood treating facility, a jewelry manufacturer, metal plating facility, machine shop and dry cleaner. Tasks included the identification of likely sources and timing of contamination.
- Provided litigation support to a PRP for a municipal wellfield with chlorinated solvent contamination, including analysis of source areas and migration pathways. Completed an estimate of relative cost allocation between sources based on soil and groundwater data, and groundwater flow and contaminant transport modeling.
- Provided strategic support to a PRP responding to a release of chlorinated solvents and PFAS at a manufacturing site and off-site disposal area.
- Litigation support for a confidential client involving remediation response costs and Natural Resource Damage claims at multiple locations. Analysis included necessity and cost of remediation, identification of parties responsible for remediation, and assessment of claims of Natural Resource Damage injuries.
- Provided strategic support to a PRP in responding to a release of chlorinated solvent in an area with complex hydreogeology and deep municipal water supply wells contaminated with coal tar compounds, chlorinated solvents, 1,4-dioxane and PFAS.
- Evaluated claims of residents living near a scrap metal facility of transport and deposition of lead-containing particles in their homes using statistical analysis of plaintiffs' chemical data. Provided expert testimony based on this analysis.
- Evaluated the hydrogeological setting of a proposed petroleum pipeline pumping station and estimated the likelihood of a release and groundwater contamination. Provided expert testimony based on this analysis.
- Provided expert testimony on proposed coal ash impoundment closure regulations and proposed new state groundwater standards in Illinois.

- Retained as an expert on environmental fate and transport and environmental liability for arsenic at an urban inorganic pesticide manufacturing site.
- Conducted environmental forensic evaluations to determine sources of observed environmental contamination in soil, groundwater, sediment and sub-slab/indoor air for sites in litigation and pre-litigation phases.
- Performed multivariate statistical analyses of data for forensic analysis, for contaminant ecological impact analysis, to determine appropriate remedial objectives, and as part of human health and ecological risk assessments.
- Lead RCRA Corrective Action at a former manufacturing facility.
- Directed and assisted in the closure of a number of sites in the Illinois Voluntary Cleanup Program and the Illinois Leaking Underground Storage Tank Program.
- Evaluated the potential contribution of urban industrial sources of heavy metals to urban soil and sediments using both simple data comparisons and multivariate statistical techniques.
- Performed ground water and contaminant fate and transport modeling using MODFLOW and MT3D for use as a Superfund cost allocation tool in support of expert testimony. Relative mass of TCE from two PRP's properties was used as a basis for cost allocation. A Monte Carlo analysis was also performed to evaluate the sensitivity of the proposed allocation to changes in key variables.
- Performed Monte Carlo analysis of risk to ground water posed by a proposed petroleum pipeline in support of expert testimony. The analysis examined the likelihood of the exceedance of the Illinois Class I ground water standard for benzene per mile of proposed pipeline.
- Performed Monte Carlo cost allocation among four PRPs for a Superfund Site in support of expert testimony. Total volume, volume of hazardous substances, and volume of drummed materials were considered.
- Performed research and analysis of remedial activities and associated costs to determine compliance with the NCP for cost recovery matters for a number of sites.

PUBLICATIONS AND PRESENTATIONS

1993
Stochastic Models of Particle Deposition in Porous Media
Paper presented at the 1993 Midwest Regional Conference on Environmental Chemistry, University of Notre Dame
Authors: Hahn, M.W., and C. F. O'Melia

1994
Deposition and Reentrainment of Particles in Porous Media
Poster presented at the 1994 Gordon Research Conference on Environmental Science, Water, New Hampshire
Authors: Hahn, M.W., D. Abadzic, and C. R. O'Melia

1994
Colloid Transport in Groundwaters: Filtration of Fine Particles at Low Filtration Rates
Presented at the 1994 ASCE National Conference, Boulder, Colorado
Authors: Hahn, M.W., D. Abadzic, and C. R. O'Melia

1995
Deposition and Reentrainment of Brownian Particles under Unfavorable Chemical Conditions
Presented at the 1995 ACE National Conference, Environmental Chemistry Division
Authors: Hahn, M.W., D. Abadzic, and C. R. O'Melia

1995
Deposition and Reentrainment of Brownian Particles under Unfavorable Chemical Conditions
Doctoral Dissertation, Johns Hopkins University
Author: Hahn, M.W.

1997
Some Effects of Particles Size in Separation Processes Involving Colloids
Wat. Sci. Tech. Vol. 36, No. 4 pp. 119–126
Authors: O'Melia, C.R., M.W. Hahn, and C. Chen

1997
Literature Review 1997: Storage, Disposal, Remediation, and Closure
Water Environment Research, Vol. 69, No. 4, pp 6389-719
Authors: Millano E.F. and M.W. Hahn

1998
The Statistics of Small Data Sets
Accepted for publication, Superfund Risk Assessment in Soil Contamination Studies: Third Volume, ASTM STP 1338, K.B. Hoddinott Ed., American Society for Testing and Materials
Authors: Ball, R.O., and M.W. Hahn

1998
RBCA Compliance for Small Data Sets
Battelle Conference Proceedings, Remediation of Chlorinated and Recalcitrant Compounds: Risk, Resource and Regulatory Issues

The First International Conference on Remediation of Chlorinated and Recalcitrant Compounds, Monterey, California, pp. 73-78
Authors: Hahn, M.W., A.E. Sevcik, and R.O.Ball

1998
Contaminant Plume and using 3D Geostatistics
Battelle Conference Proceedings, Remediation of Chlorinated and Recalcitrant Compounds: Risk, Resource and Regulatory Issues
The First International Conference on Remediation of Chlorinated and Recalcitrant Compounds, Monterey, California, pp. 85-90
Authors: Ball, R.O., M.W. Hahn, and A.E. Sevcik1998

RBCA Closure at DNAPL Sites
Battelle Conference Proceedings, Remediation of Chlorinated and Recalcitrant Compounds: Risk, Resource and Regulatory Issues
The First International Conference on Remediation of Chlorinated and Recalcitrant Compounds, Monterey, California, pp.181-186
Authors: Sheahan, J.W., R.O. Ball, and M.W. Hahn

2004
Deposition and Reentrainment of Brownian Particles in Porous Media under Unfavorable Chemical Conditions: Some Concepts and Applications
Environmental Science & Technology, Vol. 38, pp 210-220
Authors: Hahn, M.W. and C.R. O'Melia

2010
Making the Case for Causation in Toxic Tort Cases: Superfund Rules Don't Apply
Environmental Law Reporter, News & Analysis, July 2010, pp. 10638-10641
Authors: More, J.R. and M.W. Hahn

EXHIBIT B

DECLARATION OF BRIAN G. HENNINGS

I, Brian Hennings, declare and state as follows:

1. I am a Licensed Professional Geologist and serve as a Project Officer and Managing Hydrogeologist at Ramboll Americas Engineering Solutions, Inc. (“Ramboll”). My CV is attached to this Declaration as Attachment 1.

2. Ramboll installed and has conducted monitoring of the porewater wells, identified as XPW01, XPW02, XPW03, and XPW04, at the Newton Power Plant Primary Ash Pond (“PAP”).

3. The porewater wells at the PAP were installed in the best accessible locations for characterizing porewater and potential leachate from the PAP. Characteristics of CCR surface impoundments necessarily impact the locations where porewater sampling wells may be installed.

4. Attached are Figures NEW AP 1 and NEW AP 2 (Attachment 2), which were prepared by me or under my direction. Figure NEW AP 1 illustrates the depositional history of CCR within the pond and combines available information from aerial photographs and the topography of the land surface prior to construction of the pond. Initially, five locations were identified for collection of CCR materials and installation of porewater monitoring wells. Figure NEW AP 1 includes the rationale for the location selections. Proposed location XPW05 on the figure could not be completed due to recent sluicing activity in the area which made the CCR materials too soft to work on. This, and other access restrictions present in 2022 when the work was completed are provided on Figure NEW AP-2.

5. Other limitations that prevent access on the ash pond are illustrated on Figure NEW AP-2 including: active sluice areas, low lying vegetation areas (which limit visual observation of conditions), elevations below 540 feet (i.e., areas that were within 1-foot of the surface water elevation of the ash pond), and limited access areas (areas located between sluice areas or other restrictions).

6. Based on the access limitations during investigation, the total accessible area of the PAP was estimated to be 45.4 acres. The four porewater wells that could be safely completed are spatially distributed throughout the 45.4 acres, and were completed in the areas identified on Figure NEW AP 1 to capture variability observed within the CCR unit materials.

7. For these reasons the porewater analyses from these locations represent the best available characterization of the porewater in the PAP.

8. The information on these slides was previously provided to the Illinois Environmental Protection Agency (“IEPA”) during a May 23, 2024 meeting. I was in attendance at that meeting along with colleagues from Ramboll, representatives from Illinois Power

Generating Company (IPGC), representatives from IEPA, and attorneys representing IPRG and IEPA were also present either in person or virtually.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 31, 2024

Brian G. Hennings

ATTACHMENT 1

Curriculum Vitae of Brian Hennings

BRIAN G HENNINGS, PG

Project Officer

Mr. Hennings has extensive experience as a hydrogeologist for site investigation and remediation activities at sites with soil, groundwater, and sediment contaminated with petroleum products, chlorinated organics, coal gasification byproducts, metals, and polychlorinated biphenyls (PCBs). Experience with hydrogeologic field and model investigations at power plants, utility and industrial waste management sites, manufactured gas plant (MGP) sites, fractured bedrock systems, rivers, and wetlands. Involved with research projects for the Electric Power Research Institute (EPRI) at power plants and Coal Combustion Product (CCP) management sites. Modeling experience includes applying analytical and numerical groundwater flow and transport models developed by the U.S. Geological Survey (USGS) and EPRI. CCP experience pre-dates the 2015 CCR Rule.

Consulting activities include portfolio and project management, expert services, data analysis, reporting, and field services including well installation, soil vapor, aquifer testing, and sample collection of rock, soil, groundwater, and river sediments.

PROJECTS

COAL COMBUSTION RESIDUALS (CCR)

Independent Power Production Client, Corrective Measures Assessments (CMA), Various Locations (IL, OH), Hydrogeologist – Responsible for CMA required by 40 CFR Part 257, Subpart D (CCR Rule) for six unlined surface impoundments, including reviewing existing and relevant project information, identifying data gaps, developing defensible evaluation criteria, performing screening level and detailed alternative analyses and preparing CMA Reports to document the evaluation process, results, and remedy selection process.

Independent Power Production Client, Coal Ash Impoundment Closure, Project Hydrogeologist – Evaluated closure alternatives for six inactive impoundments containing coal ash located in IL. Performed groundwater modeling (MODFLOW and MT3DMS) to simulate flow and transport of inorganic contaminants released from the impoundments and collaborated with engineers to simulate remedial alternatives in support of closure.

EPRI, Technical Update, Lead Hydrogeologist – Collected paired low-flow and no-purge groundwater samples in cooperation with EPRI. Compared results to determine if no-purge sampling yields a viable alternative to low-flow sampling in cases where excessive drawdown occurs during sampling.

SPECIAL COMPETENCIES

- Hydrogeologic investigations at utility and industrial sites including both organic and inorganic wastes using a wide variety of sampling techniques
- Program management of client sites within a portfolio or multi-site program supporting compliance with state and federal CCR regulations
- Groundwater flow and transport modeling
- Investigation of fluvial environments
- Hydrogeologic characterization of wetlands
- Aquifer testing and data analysis
- Treatment system O&M
- Soil Vapor Investigations
- Fractured bedrock and potable water systems
- Data management, data interpretation/presentation

TOTAL YEARS OF EXPERIENCE

21

EDUCATION

MS, Geology
BS, Geology

PROFESSIONAL LICENSES

Professional Geologist, FL, IL, MO, WI

Utility Client, Coal Ash Impoundment Closure, Venice, IL, Project Hydrogeologist – Evaluated closure alternatives for a 60-acre coal ash impoundment adjacent to a flood control levy along the Mississippi River. Performed groundwater modeling (MODFLOW and MT3DMS) to simulate flow and transport of inorganic contaminants, including a geosynthetic cover and storm water management. Storm water at this site is managed on the cover using 5,000-gallons per minute (gpm) pumping stations due to site constraints.

Utility Client, Coal Ash Landfill Groundwater Barrier, MI, Project Hydrogeologist – Evaluated and supported design of a 5,000-ft long, 100-ft deep, soil-bentonite groundwater cutoff wall and associated groundwater extraction system for hydraulic gradient control at a coal ash landfill in Lansing, MI. Performed groundwater modeling (MODFLOW and MT3DMS) to simulate flow and transport of inorganic contaminants released from the landfill and to simulate placement of the remedial alternative.

EPRI, Leachate, Groundwater, and CCR Study, Project Hydrogeologist - Leachate, groundwater and CCR sampling at power plants and storage facilities in many states including: WI, IL, IN, MI, MN, MO, NB, ND, OH, WV, MD, NC, SC, and TX in cooperation with EPRI. Responsible for collecting flue gas desulfurization, leachate, groundwater, and soil samples from ash landfills, holding ponds of various construction, leachate collection systems, and outfall structures. Samples required preservation techniques for metal speciation and low-level mercury analysis. Managed solid and liquid sample database for tracking sample attributes, shipping, and receiving.

Utility Client, Site Characterization, Project Hydrogeologist – Assessment investigation of CCRs, soil, and groundwater at a coal-fired power plant in cooperation with EPRI. Developed and implemented sampling and analysis plans, aquifer testing, data interpretation, and reporting.

Utility Client, MI, Site Characterization, Project Hydrogeologist – Hydrogeologic and contaminant assessment of a major fly ash disposal facility in MI. Completed groundwater and sediment investigation to evaluate potential contaminant migration from the impoundments into Lake Huron. Sampling included surface water, pore-water, and upwelling groundwater from various locations and depths within the near-shore environment, with focus on the groundwater-surface water interface (GSI).

PUBLICATIONS/PRESENTATIONS (MORE AVAILABLE UPON REQUEST)

Keller, Nate, Brian Hennings, Nikki Pagano, Meng Wang, and Rachel Banoff. 2020 **Data Intelligence - How Big Data Analytics Can Increase Practitioners' Understanding of Coal Combustion Residual Sites.** USWAG CCR Workshop, 2020.

Hennings, B., Luke G., Walczak, J., 2019 **Groundwater Corrective Action Assessment Using Fate and Transport Modeling**. World of Coal Ash Conference (WOCA), May 2019, St. Louis, MO.

Walczak, J., Wang, M., Hennings, B., 2017 **Evaluating Impoundment Closure Scenarios using Fate and Transport Modeling**. World of Coal Ash Conference (WOCA), May 2017, Lexington, KY.

Hennings, B.G., Dombrowski, F., **Groundwater Relief System, Two Rivers MGP Site in Two Rivers Wisconsin**. MGP Symposium: October 16 – 18, 2017.

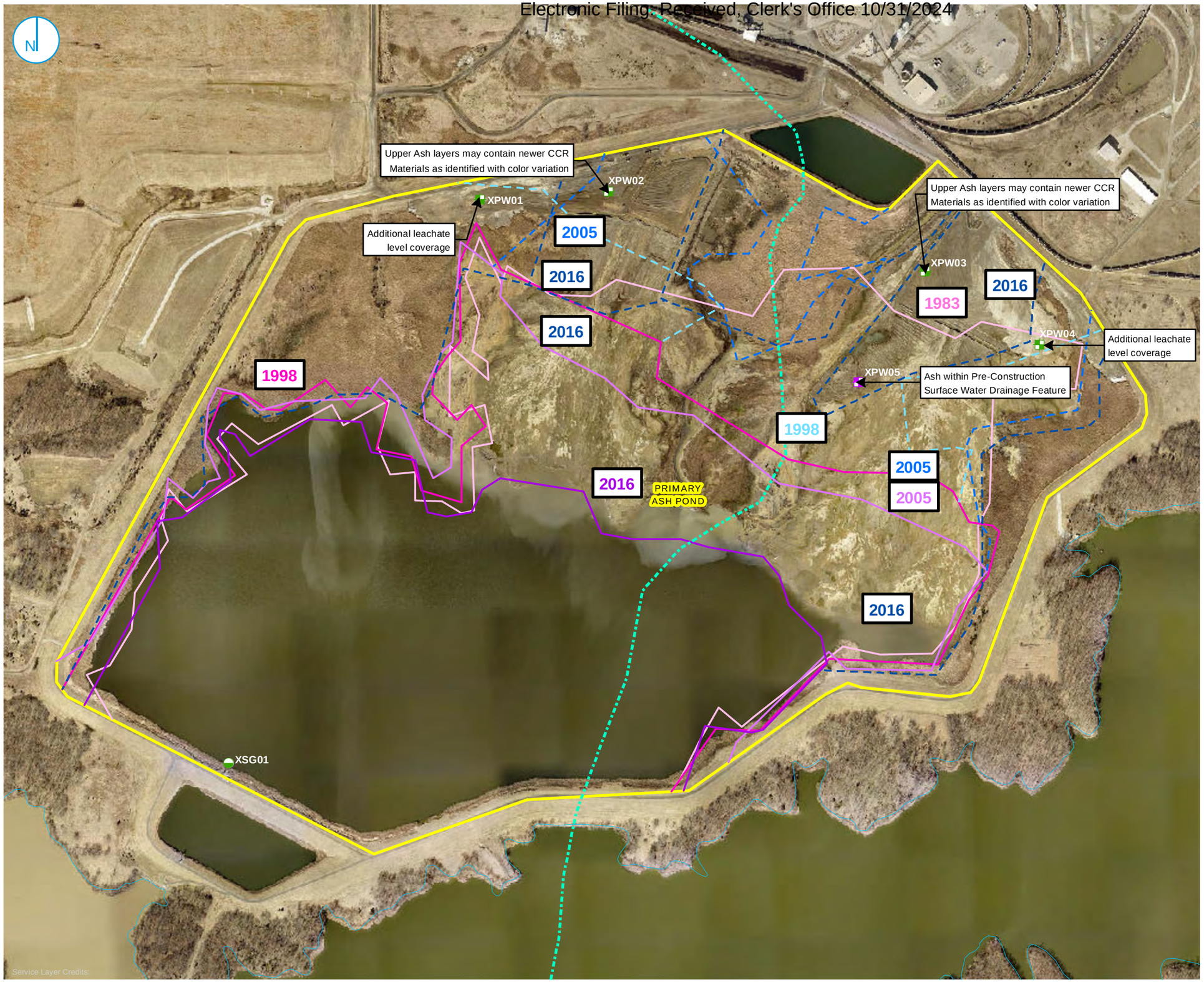
B. Hennings, M. Wang, B. Hensel, **Comparison of Paired No-Purge and Low-Flow Groundwater Samples**. EPRI, Paulo Alto, CA: 2017. 3002010953.

W. Roy, B. Hensel, B. Hennings, **Gross Alpha and Gross Beta Measurements in Coal Combustion Product Leachate**. EPRI, Paulo Alto, CA: 2008. 1015546

B. Hensel, B. Hennings, D. Wallschlager, J. London, C. Ferrarello, J Talbott, **Characterization of Field Leachates at Coal Combustion Product Management Sites: Arsenic, Selenium, Chromium, and Mercury Speciation**. EPRI, Paulo Alto, CA and U.S. Department of energy, Pittsburg, PA: 2006. 1012578

ATTACHMENT 2

Cigures NEW AP 1 and NEW AP 2



PORE WATER WELL

STAFF GAGE, CCR UNIT

PROPOSED LOCATION COULD NOT BE ACCESSED

APPROXIMATE LOCATION OF STREAM BASED ON 1953 TOPOGRAPHIC MAP (BASE OF STREAM ELEVATION DECREASES SOUTH TOWARD NEWTON LAKE)

APPROXIMATE LIMITS OF ASH BASED ON 1983 AERIAL

APPROXIMATE LIMITS OF ASH BASED ON 1998 AERIAL

APPROXIMATE LIMITS OF ASH BASED ON 2005 AERIAL

APPROXIMATE LIMITS OF ASH BASED ON 2016 AERIAL

APPROXIMATE LIMITS OF VARIANCE IN CCR MATERIAL COLORATION AS OBSERVED IN 1998 AERIAL

APPROXIMATE LIMITS OF VARIANCE IN CCR MATERIAL COLORATION AS OBSERVED IN 2005 AERIAL

APPROXIMATE LIMITS OF VARIANCE IN CCR MATERIAL COLORATION AS OBSERVED IN 2016 AERIAL

SURFACE WATER FEATURE

CCR MONITORED UNIT, SUBJECT SITE

0 275 550 Feet

CCR CHARACTERIZATION

NEWTON PRIMARY ASH POND (UNIT ID: 501)

NEWTON POWER STATION
NEWTON, ILLINOIS

FIGURE NEW AP - 1

RAMBOLL AMERICAS
ENGINEERING SOLUTIONS, INC.

RAMBOLL

Y:\Mapping\Projects\22\2285\MXD\845\Newton\2023\INTERACTIVE_Figure 1_Newton_CCR Characterization.mxd

PROJECT: 169000XXXX | DATED: 11/3/2023 | DESIGNER: GALARNMC

- PORE WATER WELL
- PROPOSED LOCATION COULD NOT BE COMPLETED
- 540 ELEVATION CONTOUR
- ACTIVE SLUICE AREA
- LIMITED ACCESS AREA
- LOW LYING VEGETATION AREA
- RECENT SLUICE AREA
- ELEVATION BELOW 540FT
- REGULATED UNIT (SUBJECT UNIT)
- SITE FEATURE

TOTAL AC. - 405.03
ACCESSIBLE AC. - 45.40
NUMBER OF SAMPLES - 8
ONE SAMPLE PER 5.68 AC.

0 275 550
Feet

2022 CONDITIONS

NEWTON POWER PLANT
NEWTON, ILLINOIS

FIGURE NEW AP - 2

RAMBOLL AMERICAS
ENGINEERING SOLUTIONS, INC.

RAMBOLL

Service Layer Credits:

Y:\Mapping\Projects\222285\MXD\Nature_and_Extent\NEW\CCR_Characterization\Figure 2_NEW 2022 Conditions_SampIntervals.mxd

PROJECT: 169000XXXX | DATED: 5/6/2024 | DESIGNER: GALARNMC

EXHIBIT C

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

APPEARANCES IN PERSON:

FOR THE PETITIONER:

MS. BINA JOSHI and
MR. SAMUEL RASCHE
Arentfox Schiff LLP
233 South Wacker Drive Suite 7100
Chicago, IL 60606
312-258-5500
Sam.Rasche@afslaw.com
Bina.Joshi@afslaw.com

FOR THE RESPONDENT:

MR. SAMUEL HENDERSON
MS. MALLORY MEADE
MS. REBECCA STRAUS
Assistant Attorneys General
Environmental Bureau
500 South Second Street
Springfield, IL 62706
samuel.henderson@ilag.gov
mallory.meade@ilag.gov

* * * *

A. Well, if in fact they are substantiated as facts by the laboratory reports documentation.
Q. Sitting here today, do you disagree with any of the information presented in the ASD?
A. I can't say whether or not I do.
Q. Can we break really quick? I want to check on time.
(The time is 5:13 p.m.)
(The time is 5:13 p.m.)
CONTINUED EXAMINATION BY
MS. JOSHI:
Q. I'd like to refer you to page ten of Exhibit 2, the top is R0001618.
Did you review this section of the ASD submittal?
A. No, I did not.
Q. Did you review any of the references listed in the reference section of this document, which is on this page and also the following page, just so you know?
A. No.
Q. Why did you not review any of these documents?
A. Again, I was leading the technical

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

APPEARANCES IN PERSON:

FOR THE PETITIONER:

MS. BINA JOSHI and
MR. SAMUEL RASCHE
Arentfox Schiff LLP
233 South Wacker Drive Suite 7100
Chicago, IL 60606
312-258-5500
Sam.Rasche@afslaw.com
Bina.Joshi@afslaw.com

FOR THE RESPONDENT:

MR. SAMUEL HENDERSON
MS. MALLORY MEADE
MR. CHARLES MATOESIAN
Assistant Attorneys General
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500 South Second Street
Springfield, IL 62706
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* * * *

A. Yes.
Q. All right. Did you review this page of the document?
A. Yes.
Q. Did you review any of the references listed in this document?
A. No.
Q. Did you search for any of the references listed in this document?
A. No, I did not.
Q. Did you ask Illinois Power for any of the documents listed in this reference section?
A. No. I didn't.
Q. But, let's just go down, let's say, to the fourth item from the bottom. Do you see that Ramboll Americas Engineering Solutions 2021 Hydrogeologic Site Characterization Report. Correct me if I'm wrong, but you have reviewed that document?
A. Yes, I have.
Q. Can I give you a moment to just review this list and let me know what it is that you have reviewed and haven't reviewed?
A. Yes. Okay.

EXHIBIT D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

GAVIN POWER, LLC, *Plaintiff,* v. U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL, *Defendants*.	No. 2:24-cv-41 Judge Michael H. Watson Magistrate Judge Elizabeth P. Deavers

MOTION TO DISMISS

Defendants, the United States Environmental Protection Agency and its Administrator, Michael S. Regan (collectively "EPA"), respectfully move to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). In support of the relief requested in this Motion, the attention of the Court is respectfully directed to the attached Memorandum in Support of this Motion submitted herewith.

Respectfully submitted,

TODD KIM
Assistant Attorney General

PERRY M. ROSEN
United States Department of Justice
Environment & Natural Resources Div.
Environmental Defense Section
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OF COUNSEL:

LAUREL CELESTE
U.S. Environmental Protection Agency
Office of General Counsel
William Jefferson Clinton Building
1200 Pennsylvania Ave., NW
Mail Code 2344A
Washington, D.C. 20460

DATE: Oct. 16, 2024

KENNETH L. PARKER
United States Attorney

JOHN STARK
Assistant United States Attorney
U.S. Attorney's Office for the Southern
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Counsel for Defendants

MEMORANDUM IN SUPPORT

INTRODUCTION

The Resource Conservation and Recovery Act ("RCRA") requires that the Environmental Protection Agency ("EPA") regulate the disposal of coal-combustion residuals ("CCR" or "coal ash"), a byproduct of coal-fired electricity production that contains carcinogens and neurotoxins. Plaintiff, Gavin Power, LLC ("Gavin"), operates a coal-fired power plant in Cheshire, Ohio, that includes three CCR-disposal units. The unit at issue, the Bottom Ash Pond ("BAP"), is an unlined impoundment. There is substantial risk of the hazardous constituents of CCR (e.g., arsenic) leaking from unlined impoundments into the soil and groundwater.

Due largely to this risk, in 2018, the D.C. Circuit Court of Appeals ("D.C. Circuit") invalidated an EPA regulation that had allowed unlined CCR impoundments to continue to operate until they leak. EPA responded with a rule requiring that unlined impoundments cease receiving waste and initiate the closure process by a fixed deadline. The default deadline was April 11, 2021, but a regulated party could ask EPA for a limited extension of that deadline for a specific CCR-disposal unit if, among other things, the applicant submitted a demonstration that the entirety of its facility (not just the specific unit for which it sought an extension) was in compliance with all of EPA's rules governing CCR disposal in impoundments and landfills.

Gavin asked EPA to extend the cease-receipt-of-waste deadline for its Bottom Ash Pond until May 4, 2023, to give Gavin additional time to close this impoundment while leaving CCR in the unit, i.e., closure with "waste-in-place." Because Gavin timely requested an extension, its deadline was tolled until, on November 28, 2022, EPA denied Gavin's request, explaining that Gavin had not demonstrated facility-wide compliance with the CCR-disposal regulations. Among other things, EPA explained that Gavin had failed to demonstrate that another CCR-

disposal unit at the Cheshire plant (the Fly Ash Reservoir) was in compliance with regulatory requirements; a demonstration expressly required to secure an extension.

When denying Gavin's request to extend the Bottom Ash Pond's cease-receipt-of-waste deadline, EPA set a new deadline of April 12, 2023, which was 135 days from the date of its decision and a mere 22 days before the extended deadline sought by Gavin. Ex. A ("Denial Order") at 94. Thus, although EPA ultimately denied its request, Gavin received 97% of the additional time it sought. And before April 12, 2023 even arrived, Gavin had abandoned the reason for seeking an extension (to properly close with CCR remaining in the unit, i.e., with waste-in-place), as Gavin reported that it had accelerated its process and had already closed the Bottom Ash Pond, doing so by removing all of the CCR in the unit ("clean closure"). Amended Complaint ("Am. Compl.") ¶¶ 60, 69.

Gavin challenged EPA's Denial Order in the D.C. Circuit in February 2023, but Gavin did not ask that court to stay the Denial Order. The D.C. Circuit thereafter held that it lacked statutory subject-matter jurisdiction over Gavin's suit because the order denying its request for a May 4, 2023, deadline imposed no new "regulation" or "requirement," but instead merely applied clear existing requirements for closing with waste-in-place. *Elec. Energy, Inc. v. EPA*, 106 F.4th 31, 44-47 (D.C. Cir. 2024).

In January 2024, nearly nine months after the cease-receipt-of-waste deadline for the Bottom Ash Pond had passed, and after Gavin had closed the Bottom Ash Pond by removing all CCR, Gavin sued in this Court to challenge EPA's Denial Order. This Court stayed proceedings pending disposition of Gavin's D.C. Circuit case. After that case was decided, Gavin amended its complaint. The amended complaint still challenges only the Denial Order, which prescribes a deadline for the Bottom Ash Pond of April 12 (as opposed to May 4), 2023.

This Court should dismiss the amended complaint. To prosecute a claim in federal court, a plaintiff must have both a cause of action and Article III standing to invoke that cause of action. The only cognizable cause of action that Gavin invokes is that of the Administrative Procedure Act ("APA"), which provides for judicial review of "final agency action." 5 U.S.C. § 704. That means there must be an "action"—not mere "findings" and "conclusions," *id.* § 706(2)—that not only "mark[s] the consummation of the agency's decisionmaking process" but also is "one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (cleaned up). The sole aspect of EPA's Denial Order that meets all those criteria is its prescription of a revised deadline for the Bottom Ash Pond to stop receiving waste and initiate closure. But the only injury Gavin alleges that is traceable to the deadline is costs that it allegedly would not have incurred had EPA prescribed a deadline 22 days later. That past injury cannot be redressed by the prospective relief requested in the amended complaint. Thus, insofar as EPA's order is final agency action, Gavin lacks Article III standing to challenge it.

Gavin alleges ongoing injury from the *reasons* EPA gave for denying an extension of the Bottom Ash Pond's cease-receipt-of-waste deadline—most prominently, EPA's finding that Gavin failed to demonstrate that the Fly Ash Reservoir had been closed in accordance with all existing regulatory requirements. According to Gavin, EPA's reasoning means that Gavin either must spend time and money curing the compliance issues that EPA identified, or face both the threat of enforcement action and reputational harm. The problem for Gavin is that reasoning alone is not "action"—much less "final" action—challengeable under the APA. Stripped of the final (but non-injurious) decision to prescribe a deadline for the Bottom Ash Pond, EPA simply has stated a position that Gavin failed to demonstrate that the entire Cheshire plant is in

compliance with RCRA regulations. While that statement of position may prompt Gavin to decide to come into (EPA's view of) compliance to avert potential enforcement action, it does not fix any rights or obligations, or carry legal consequences.

But even if the APA entitled Gavin to challenge EPA's position that the Cheshire plant is out of compliance with RCRA requirements, the doctrine of issue preclusion forecloses the bulk of Gavin's challenge. The D.C. Circuit entered a final judgment dismissing Gavin's petition for review of the Denial Order because the order did not impose a new regulation or requirement—a missing prerequisite to the court of appeals' statutory subject-matter jurisdiction. Gavin wants to relitigate that issue in this Court, as all five Counts of the Complaint are premised by and large on Gavin's belief that the requirements EPA found not to be satisfied at the Cheshire plant were newly announced, an argument the D.C. Circuit fully considered and soundly rejected. Gavin is foreclosed from making that same argument to a second court.

Finally, at the very least, the last two counts of Gavin's amended complaint—"waiver" and "estoppel"—fail to state a claim. Both are defenses, not affirmative claims that may be pleaded in a complaint. And even as defenses to some potential future enforcement action, Gavin has failed to plead the elements of such defenses. The government is not subject to waiver and estoppel on the same terms as private litigants, and Gavin does not allege affirmative misconduct or malicious intent, both of which would be necessary for the Court to entertain a waiver or estoppel defense.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

RCRA instructs EPA to promulgate regulations addressing the disposal of solid wastes, paying special attention to the contamination of groundwater. *E.g.*, 42 U.S.C. §§ 6901(b)(4),

6907(a)(2) (requiring EPA to provide for "protection of the quality of ground waters and surface waters from leachates" of solid wastes). Such contamination is of particular concern with regard to CCR, which contains carcinogens and neurotoxins that can lead to elevated probabilities of cancer in skin, liver, bladder, and lungs, as well as serious non-cancer infirmities. *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 421 (D.C. Cir. 2018) ("*USWAG*"). Accordingly, in 2015 EPA promulgated regulations codified at 40 C.F.R. Part 257, Subpart D, that govern CCR disposal and management. 80 Fed. Reg. 21,302 (Apr. 17, 2015) ("2015 Rule").

The 2015 Rule explains how to close an impoundment without removing the CCR, i.e., closure with waste-in-place. An operator cannot simply cover the impoundment and walk away, but instead must:

> (a) "control, minimize or eliminate, to the maximum extent feasible, [1] post-closure infiltration of liquids into the waste and [2] releases of CCR, leachate, or contaminated run-off to the ground or surface waters";
>
> (b) "[p]reclude the probability of future impoundment of water"; and
>
> (c) "prior to installing the final cover system," ensure that "[f]ree liquids" are "eliminated."

40 C.F.R. § 257.102(d)(1)(i)-(ii), (2)(i). ("Waste-in-Place Closure Requirements").

In 2018, the D.C. Circuit vacated provisions of the 2015 Rule that allowed unlined CCR impoundments to remain open unless and until a leak was discovered. The court explained that leaks could go undiscovered and that a leaking unit can result in "contaminants [moving] into the underlying soil and groundwater, threatening sources of drinking water … through harmful constituents that migrate through groundwater." *USWAG*, 901 F.3d at 422. The court found that EPA's failure to require closure of unlined impoundments violated RCRA's mandate to "develop standards that limit permissible waste '[a]t a minimum' to those with 'no reasonable probability of adverse effects on health or the environment from disposal of solid waste.'" *Id.* at 442

(quoting 42 U.S.C. § 6944(a)). Consistent with the D.C. Circuit's direction, EPA was directed to set a deadline for such impoundments to initiate closure. *See Waterkeeper All. v. EPA*, D.C. Cir. No. 18-1289, Doc. 1777351 (Mar. 13, 2019).

In 2020, EPA issued regulations setting a default deadline of April 11, 2021, for unlined surface impoundments containing CCR to cease receiving waste and initiate closure. 85 Fed. Reg. 53,516 (Aug. 28, 2020) ("2020 Rule"). A regulated entity could, however, apply to EPA for an extension of that deadline for a given unit if the entity submitted an adequate demonstration that the *entire facility* was in compliance with *all* applicable CCR-disposal regulations, including the Waste-in-Place Closure Requirements and requirements governing groundwater monitoring and sampling. 85 Fed. Reg. at 53,540/3-53,546; 40 C.F.R. § 257.103(f)(1)(iii)-(viii). Under these provisions, EPA cannot extend any cease-receipt-of-waste deadline for an unlined surface impoundment past October 15, 2023—or, if specified conditions are met, October 15, 2024. 40 C.F.R. § 257.103(f)(1)(vi).

B. Gavin's Extension Request for its Bottom Ash Pond

In 2020, Gavin applied to extend until May 4, 2023, the deadline to cease receipt of waste and initiate closure of the Bottom Ash Pond at its Cheshire plant. Am. Compl. ¶¶ 5-6. The timely application "toll[ed]" the Bottom Ash Pond's cease-receipt-of-waste deadline "until issuance of a decision" by EPA, which decision must prescribe a new deadline. 40 C.F.R. § 257.103(f)(iii)(2). Gavin did not apply to extend the cease-receipt-of-waste deadline for its Fly Ash Reservoir at the same plant. Am. Compl. ¶¶ 5, 58.

In January 2022, EPA proposed to deny Gavin an extension for the Bottom Ash Pond; on the same day, but in separate documents, EPA proposed to deny extension requests submitted by other entities and issued related documents ("January 2022 documents"). Am. Compl. ¶¶ 40, 58.

On November 18, 2022, EPA published notice in the Federal Register of a final decision denying Gavin's extension request for the Bottom Ash Pond and setting a new deadline of April 12, 2023. Ex. A (Denial Order). EPA gave several independent reasons for denying the request, among them that the 314-acre unlined Fly Ash Reservoir at the Cheshire plant had closed with CCR sitting in groundwater up to 64 feet deep, saturating up to 40% of the CCR in the unit. Ex. A at 13-45. EPA reasoned that Gavin had failed to demonstrate that it was in compliance with the Waste-in-Place Closure Requirements at the plant. *Id*. Separately, Gavin had also failed to demonstrate that the plant's monitoring and sampling were in compliance with various requirements of the 2015 Rule. *Id.* at 45-76. EPA's decision did not order Gavin to remedy, or threaten penalties for, the finding that Gavin did not demonstrate facility-wide compliance with EPA regulations. The decision merely prescribed a cease-receipt-of-waste deadline for the Bottom Ash Pond of April 12, 2023, which was 22 days before the deadline Gavin had sought in its 2020 extension application.

C. Gavin's D.C. Circuit Challenge to EPA's Denial Order

On February 16, 2023, approximately two months before the deadline for the Bottom Ash Pond to cease receipt of waste pursuant to EPA's Denial Order, Gavin petitioned the D.C. Circuit to review EPA's order. *Gavin Power LLC v. EPA*, D.C. Cir. No. 23-1038, Doc. 1986478. RCRA vests the D.C. Circuit with exclusive jurisdiction to review "action of the [EPA] Administrator in promulgating any regulation, or requirement" under the statute. 42 U.S.C. § 6976(a)(1). Gavin styled its petition as "protective," maintaining that the order was a "final agency action" subject to APA review in district court. *Id.* Nonetheless, Gavin (joined by other parties that had sought D.C. Circuit review of the Bottom Ash Pond extension Denial Order) filed a merits brief arguing that if the court were to hold that EPA's other actions on January 11,

2022, did not promulgate a regulation or requirement—as the D.C. Circuit ultimately did hold, *see Elec. Energy*, 106 F.4th at 40-44—then EPA's extension Denial Order for the Bottom Ash Pond promulgated a regulation or requirement, giving the D.C. Circuit jurisdiction. Ex. B (Gavin's Brief) at 5-6. Gavin's theory was that, in finding that Gavin failed to demonstrate the Cheshire plant was in compliance with the 2015 Rule at the time of its extension application, EPA had amended that Rule and its prior interpretations thereof.

The D.C. Circuit rejected Gavin's position and dismissed its petition for review, holding that EPA's Denial Order imposed no new "regulation" or "requirement" on Gavin. *Elec. Energy*, 106 F.4th at 45-47. The court held that "EPA regulations adopted long before 2022 [i.e., the 2015 Rule] independently established that unit operators could not close surface impoundments with coal residuals saturated in groundwater. EPA did not amend the existing regulations when it spelled that out in the final Gavin Denial." *Id.* at 45. Nor was the court "persuaded by [Gavin's] assertion that EPA announced, in the final Gavin Denial, an interpretation of the term 'infiltration' in 40 C.F.R. § 257.102(d)(1)(i) that conflicts with its prior description of the term 'infiltration. as 'applying 'only' to 'percolation' through the cap.'" "[T]hat description pre-dates the 2015 Rule, and nothing in the 2015 Rule itself suggests that EPA incorporated that understanding or expressly limited 'infiltration' in that manner." *Id.* By denying Gavin an extension of the cease-receipt-of-waste deadline for the Bottom Ash Pond, EPA "impose[d] no new legal obligations on Gavin," *id.* at 46; even the deadline the order prescribed is traceable to the 2020 Rule, *id.* at 47.

Gavin did not seek further review of the D.C. Circuit's judgment.

D. <u>The Present Suit Challenging EPA's Denial Order</u>

Gavin filed this suit in February 2024, while its D.C. Circuit suit remained pending, but

many months after the extended deadline that Gavin had requested to cease receipt of waste and initiate closure of the Bottom Ash Pond had lapsed. Gavin asserts that it "met EPA's deadline to initiate closure," Am. Compl. ¶ 69, citing a notice stating that the Bottom Ash Pond ceased receiving waste on April 7, 2023, *id.* ¶ 69 n.17.

Counts I-III of the amended complaint plead claims under the APA. Count I alleges that EPA unlawfully applied a "new 2022 Interpretation" of the 2015 Rule in finding that the Fly Ash Reservoir was closed improperly. *Id.* ¶ 84. Count II alleges that EPA applied "new requirements," thereby making a suite of "erroneous findings" in concluding that the Cheshire plant was not in compliance with the CCR-disposal regulations. *Id.* ¶ 88. Count III alleges that EPA failed to provide fair notice of an alleged "new 2022 Interpretation" of the 2015 Rule, which it applied to Gavin's facility. *Id.* ¶ 112. Count IV, entitled "Waiver," invokes no cause of action but alleges that EPA's inaction until 2022 "waived its right to determine … that the Fly Ash Reservoir closure, related documentation, or the [plant's] groundwater monitoring did not comply with the [2015] Rule." *Id.* ¶ 127. Count V, entitled "Estoppel," likewise invokes no cause of action but alleges that EPA "is estopped from challenging the adequacy of [the] Fly Ash Reservoir closure" or "compliance of the [plant's] groundwater monitoring network." *Id.* ¶¶ 142-43. Gavin seeks "a declaratory judgment, holding unlawful and setting aside EPA's unlawful, arbitrary, and capricious decisions as to the [Cheshire plant];" an order "[v]acating EPA's determinations in the [Denial Order] concerning regulatory compliance at the [plant];" and an order "enjoin[ing] EPA from enforcement action based on the vacated determinations." *Id.* at p. 42.

STANDARD FOR DECISION

This motion presents a facial challenge to this Court's subject-matter jurisdiction under

Rule 12(b)(1), as well as a challenge under Rule 12(b)(6) for Gavin's failure to state a claim. In evaluating both types of challenges, this Court must accept as true the complaint's well-pleaded factual allegations, *see L.C. v. United States*, 83 F.4th 534, 542 (6th Cir. 2023) (Rule 12(b)(1)); *Lindke v. Tomlinson*, 31 F.4th 487, 496 (6th Cir. 2022) (Rule 12(b)(6)), but the Court "need not accept legal conclusions or unwarranted factual inferences." *U.S. ex rel. Sheldon v. Kettering Health Network*, 816 F.3d 399, 409 (6th Cir. 2016) (citation omitted). The Court "may consider exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to [the] motion to dismiss, so long as they are referred to in the complaint and are central to the claims contained therein." *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016).

ARGUMENT

This Court should dismiss the amended complaint in full because Gavin fails to present any claim for which it both (1) has a cause of action to sue EPA and (2) alleges facts sufficient to support Article III jurisdiction. Apart from that fatal defect, each of Gavin's claims rests in whole or in part on one central premise—that EPA's Denial Order imposes legal consequences other than the deadline set for the Bottom Ash Pond—an argument expressly rejected by the D.C. Circuit, in litigation between the same parties that resulted in a final judgment. The doctrine of issue preclusion doctrine bars relitigation of that central premise. Last, and at the least, Counts IV and V of the amended complaint (Waiver and Estoppel) are not claims but defenses—and facially meritless ones, at that—thereby requiring their dismissal.

I. GAVIN FAILS TO CHALLENGE FINAL AGENCY ACTION THAT PRESENTS A JUSTICIABLE CONTROVERSY

As the Sixth Circuit has noted, "it is possible that a plaintiff can have a cause of action—a legally recognized mechanism of obtaining a remedy—and yet no Article III standing to assert that cause of action in federal court. Conversely, it is also possible to have a redressable, de

facto injury sufficient to confer Article III jurisdiction, and yet have no recognized cause of action to vindicate that interest." *Charlton-Perkins v. Univ. of Cincinnati*, 35 F.4th 1053, 1058 (6th Cir. 2022) (citation omitted). In this case, where Gavin's claim is based on final agency action, Gavin cites no redressable injury; and where Gavin alleges arguably sufficient injury, it is not traceable to a final agency action that is subject to challenge. Because Gavin cannot mix and match the two, its claims must be dismissed.

The APA authorizes courts to "hold unlawful and set aside agency action, findings, and conclusions," 5 U.S.C. § 706(2), but an APA cause of action is not triggered by mere findings and conclusions. Only a "final agency action for which there is no other adequate remedy in a court [is made] subject to judicial review." *Id.* § 704 (emphasis added). To be "final," an agency action must not only "mark the consummation of the agency's decisionmaking process" but also "be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178 (cleaned up). And, crucially for this case, finality is issue-specific—a single agency order may be "final" in one respect but not others. *See Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 638 (6th Cir. 2004).

The sole aspect of the challenged order that meets both finality criteria is EPA's prescription of a deadline (April 12, 2023), and corresponding denial of Gavin's requested deadline (May 4, 2023), for the Bottom Ash Pond to cease receiving waste and to initiate closure. EPA does not dispute that this specific aspect of the Denial Order—which had a direct, immediate, and binding effect on Gavin's conduct as to the Bottom Ash Pond—is final. And, if Gavin had articulated an Article III injury redressable by vacatur of that deadline (and, ultimately, EPA's prescription of a different deadline), this Court would have jurisdiction also to review the various "findings" and "conclusions" that underlay EPA's decision to deny Gavin an

extension. 5 U.S.C. § 706(2). But the only injury that the amended complaint links to the Bottom Ash Pond cease-receipt-of-waste deadline is one Gavin suffered before it filed suit: the "tremendous expense, operational challenge, and disruption" occasioned by the need to meet EPA's deadline. Am. Compl. ¶ 69. That wholly past injury is not redressable by the wholly prospective relief sought in the complaint—a declaratory judgment and an injunction. *See, e.g.*, *Los Angeles Cnty. v. Humphries*, 562 U.S. 29, 31 (2010) (describing both declaratory and injunctive relief as prospective). Because the amended complaint does not allege any injury that can be redressed by the types of relief sought in the amended complaint, Gavin has not met its burden at the pleading stage to allege standing to challenge the closure deadline.

The next question is whether Gavin is entitled to challenge "findings" and "conclusions" that underlay EPA's decision to deny the company's request for a deadline extension. 5 U.S.C. § 706(2). Gavin alleges present and ongoing injuries that it traces to the agency's findings that the Cheshire plant was out of compliance with various CCR-disposal regulations. Am. Compl. ¶¶ 19-21. Without conceding that these injuries (if proven) would confer standing, EPA submits that Gavin lacks a cause of action to challenge the bare agency findings and conclusions because they are not "final agency action." 5 U.S.C. § 704.

For starters, findings and conclusions are not "agency actions." The plain text of the APA differentiates findings and conclusions from agency action, *see* 5 U.S.C. § 706(2), and nothing in the list of items that the statute denominates as "agency action" (rules, orders, licenses, sanctions, relief, and the equivalent or denial thereof) encompasses unadorned findings and conclusions. *Id.* § 551(13); *see also id.* § 701(b)(2) (applying this definition to Section 704's cause of action). As most relevant here, an "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other

than rule making but including licensing." *Id.* § 551(6). EPA "final[ly] dispos[ed]" of the "matter" of the Bottom Ash Pond deadline by denying Gavin's application and setting another deadline; there was, however, no freestanding matter for EPA to decide concerning the Cheshire plant's regulatory compliance.

Even if EPA's findings and conclusions as to the plant's overall regulatory compliance—made in the course of resolving a different matter entirely—were "agency action," they were not "final" within the meaning of the APA cause of action because they did not determine "rights or obligations" or carry "legal consequences." *Bennett*, 520 U.S. at 178. The D.C. Circuit spoke to this point directly: the challenged Denial Order "imposes no new legal obligations on Gavin." *Elec. Energy*, 106 F.4th at 46.

To be sure, EPA has not backed away from the findings and conclusions in its Denial Order respecting the Cheshire plant's compliance with CCR regulations; and, if those findings and conclusions are correct (and proved to be so, in any future enforcement suit), then RCRA and EPA's regulations may authorize sanctions, like penalties. Gavin may dispute any fact EPA might present in any future enforcement proceeding, irrespective of any findings EPA may have made in concluding merely that Gavin had failed to meet its burden under the regulation of demonstrating that, at the time of its extension application for the Bottom Ash Pond, its facility was in compliance with all regulatory requirements. Gavin Denial Order, 4-5, 94.[1]

In setting out its position on the subject, EPA has not determined Gavin's rights, forced Gavin to act, committed to pursuing enforcement action, or lessened the government's burden of proof (or exposed Gavin to additional sanctions) in an enforcement suit. *Compare U.S. Army*

[1] As discussed *infra* at 16-17, Gavin may not re-litigate EPA's legal interpretation of what is required under the 2015 Rule, as that legal issue has been finally decided by the D.C. Circuit.

Corps of Eng'rs v. Hawkes Co., 578 U.S. 590, 599 & n.3 (2016) (deeming an affirmative determination of regulatory jurisdiction final insofar as it "deni[ed] … the safe harbor that negative [jurisdictional determinations] afford" and "b[ou]nd" agency in an enforcement proceeding), *with Air Brake Sys.*, 357 F.3d at 644 (deeming regulatory interpretation in agency opinion letter non-final and unreviewable because it did not have "direct, binding effect" or "legal consequences for [the recipient] by virtue of the deference courts might give to [the interpretation]"). No finding or conclusion in EPA's Denial Order "expose[s]" Gavin "to criminal or civil liability," "definitively determine[s] legal rights or obligations," or "bind[s] an agency or prevent[s] other government actors from pursuing a particular course of action." *Parsons v. U.S. Dep't of Justice*, 878 F.3d 162, 167 (6th Cir. 2017). "[R]eputational and personal harms … may be the practical consequences" when EPA states its position that a party is out of compliance with the law, "but they are not a direct or appreciable legal consequence" sufficient to render agency action "final." *Id.* at 170. Gavin thus lacks a cause of action to challenge EPA's findings and conclusions.

Even if Gavin possessed a cause of action, however, its amended complaint does not present a ripe controversy. A "claim[] must satisfy both the fitness and the hardship components of the [ripeness] inquiry" to be justiciable. *Airline Pros. Ass'n of the Int'l Brotherhood of Teamsters, Local Union No. 1224, AFL-CIO v. Airborne, Inc.*, 332 F.3d 983, 988 (6th Cir. 2003). This case satisfies neither prong.

In a pre-enforcement context, the fitness prong of the ripeness inquiry turns in substantial part on "whether the factual record is sufficiently developed to produce a fair adjudication of the merits." *Dealer Computer Servs., Inc. v. Dub Herring Ford*, 547 F.3d 558, 561 (6th Cir. 2008). While EPA considered all available information and conducted technical analyses in concluding

that Gavin had failed to demonstrate that the Cheshire plant complied with regulatory requirements as of 2022, additional fact-gathering and analyses would be required to initiate an enforcement suit. In part, this is because the burdens involved in each type of proceeding are markedly different: to obtain an extension of the deadline, Gavin was required to demonstrate that it was in compliance with all of part 257 at the time of its extension application. 40 C.FR. § 257.103(f)(1)(viii). In contrast, in an enforcement proceeding, EPA bears the burden of proving any alleged non-compliance. Moreover, in determining a RCRA penalty, a court normally considers factors like "the seriousness of the violation and any good faith efforts to comply," "the harm caused by the violation, any economic benefit derived from noncompliance, the violator's ability to pay, the government's conduct, and the clarity of the obligation involved." *United States v. Ekco Housewares, Inc.*, 62 F.3d 806, 814 (6th Cir. 1995). EPA did not consider a number of these factors in finding that Gavin failed to demonstrate that the Cheshire plant was in regulatory compliance, because they had no relevance to the only decision before the Agency at the time: whether to extend the Bottom Ash Pond's deadline. The additional factors pertinent to enforcement, which may require consideration of expert testimony, fall well outside the scope of the administrative record for the Denial Order.

The hardship prong of the ripeness inquiry asks whether the hardship to the parties from delaying judicial review outweighs the benefits of awaiting a more fleshed-out setting. Although Gavin alludes to costs of modifying the closure of the Fly Ash Reservoir, Am. Compl. ¶ 19, the amended complaint does not indicate that Gavin intends to perform that work if it does not obtain judicial review now. The only actual or imminent harms alleged are the "ongoing risk of civil penalties" and harm to Gavin's reputation. *Id.* ¶ 21. In any suit for enforcement that EPA might choose to file, Gavin will have a full and fair opportunity to dispute findings and

conclusions underlying a determination of liability, and should Gavin prevail, it will not be assessed a penalty. As for reputational injury, even assuming it sufficed to show standing (it does not in this case), "the size of the harm matters tremendously in determining whether a claim is ripe," *Airline Pros.*, 332 F.3d at 988 n.4. The amended complaint does not allege certain, great reputational harm from the Denial Order.

II. GAVIN'S CLAIMS ARE FORECLOSED BY ISSUE PRECLUSION

Under the issue-preclusion doctrine, "the determination of a question directly involved in one action is conclusive as to that question in a second action." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 147 (2015) (quotation omitted). The doctrine bars "relitigation of issues of fact or law actually litigated and decided in a prior action … even if decided as part of a different claim or cause of action." *Georgia-Pacific Consumer Prods. LP v. Four-U-Packaging, Inc.*, 701 F.3d 1093, 1098 (6th Cir. 2012). In litigation between Gavin and EPA, the D.C. Circuit decided the core issue animating Gavin's amended complaint here: whether legal conclusions that underlie EPA's Denial Order, in particular the agency's interpretations of the 2015 Rule, constitute new or modified regulatory requirements. *See Elec. Energy*, 106 F.4th at 35-45.

The D.C. Circuit had to "actually and necessarily determine[]" that issue to evaluate its own statutory subject-matter jurisdiction, *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994), which turned on whether the Denial Order "promulgat[ed] any regulation, or requirement," 42 U.S.C. § 6976(a)(1). While the D.C. Circuit ultimately held that it lacked jurisdiction, its judgment has issue-preclusive effect because, like any federal court, the D.C. Circuit was "a court of competent jurisdiction," *Black*, 15 F.3d at 582, to determine its own jurisdiction, *see Brownback v. King*, 592 U.S. 209, 218 (2021).

Raising essentially the same arguments it presents here, Gavin argued to the D.C. Circuit that EPA's Denial Order had imposed "new requirements" that departed from the 2015 Rule and its prior interpretations thereof. *Compare* Ex. B at 31-32 *with* Am. Compl. ¶¶ 80-84, 88-90, 107-13, 124-27, 138-43. The D.C. Circuit squarely rejected Gavin's arguments. The court explained that the legal underpinning of EPA's assessment of plantwide noncompliance with the 2015 Rule was not a novel and strained interpretation of the Rule, but rather the unavoidable construction of the regulatory language, standing on its own. *See* p. 8 *supra*; *Elec. Energy*, 106 F.4th at 40-43, 45. Regardless of how many causes of action Gavin raises, the central claim underlying each of them has been decided, in a suit challenging the exact same order involving the same parties, and Gavin is barred from relitigating that claim here.[2]

III. WAIVER AND ESTOPPEL ARE NOT CAUSES OF ACTION, NOR ARE THEY ACTIONABLE AGAINST THE UNITED STATES ON THE FACTS ALLEGED

If nothing else, the Court should dismiss Count IV ("Waiver") and Count V ("Estoppel"). Waiver and estoppel are affirmative defenses enumerated in Federal Rule of Civil Procedure 8(c)(1). They are not claims upon which relief can be granted. *See Dobrowski v. Jay Dee Contractors, Inc.*, 571 F.3d 551, 554 n.1 (6th Cir. 2009) ("[E]quitable estoppel is not a cause of action but a judicial doctrine that bars the assertion of a claim or defense."); 28 Am. Jur. 2d Estoppel & Waiver § 183 ("Waiver is not a cause of action because it cannot create liability in

[2] To the extent any remnant of Gavin's claims is not precluded, Gavin has not alleged standing to move forward with that remnant. For example, the amended complaint does not allege injury flowing from EPA's findings and conclusions as to groundwater monitoring at the Cheshire plant. Indeed, to secure an extension for closure of the Bottom Ash Pond, Gavin had to demonstrate that it was following *all* regulatory requirements and, as outlined above, the D.C. Circuit has already found that Gavin failed to demonstrate that it was in compliance with the Waste-in-Place Closure requirements. There is, therefore, no basis for this Court to address other findings that EPA made, such as those related to the adequacy of Gavin's groundwater monitoring, as it cannot possibly alter the Denial Order being challenged in this case and Gavin is thereby not injured by such findings.

and of itself, and a cause of action cannot be based on a waiver."); *Infinity Roofing & Siding, Inc. v. Allstate Ins. Co.*, No. 21-cv-889, 2022 WL 19005152 at *1 (W.D. Mich. Dec. 12, 2022) ("[W]aiver and estoppel are not causes of action that may be asserted in a complaint."). This alone requires dismissal of Counts IV and V.

Even if waiver or estoppel could be asserted as a claim, Gavin's allegations fail to state an actionable claim. As to waiver, other than Paragraph 124, the amended complaint does not allege affirmative waiver but only that the government slept on its rights. That amounts to a laches defense, to which "the United States is not … subject … in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940).

Paragraph 124 cites EPA's "affirmative[] represent[ation]" that the 2015 Rule "does not require clean closure of any unit." Am. Compl. ¶ 124. That statement was and remains true today. As EPA explained, an entity may close an impoundment by leaving CCR in the unit, but it still must comply with the Waste-in-Place requirements in doing so. Ex. A at 28-30. Gavin inferred that "closure in place for the Fly Ash Reservoir would be a permissible closure method under the CCR Rule," Am. Compl. ¶ 124, allowing it to ignore all of the provisions establishing how closure-in-place must be accomplished. But that inference is wholly unwarranted, as the Waste-in-Place Closure Requirements apply to any closure that leaves CCR in a unit. *See supra*, at 4; *Elec. Energy*, 106 F.4th at 36. Gavin's waiver claim/defense is legally insufficient.

As to estoppel, the United States "may not be estopped on the same terms as any other litigant." *Premo v. United States*, 599 F.3d 540, 547 (6th Cir. 2010). The "[p]laintiff must show some affirmative misconduct," meaning "an act by the government that either intentionally or recklessly misleads the claimant." *Id.* (cleaned up). Gavin supports its estoppel "claim" with the same allegations it advances to support waiver, asserting that EPA failed to act sooner to inform

Gavin that its FAR facility might not be in compliance with regulatory requirements.

But EPA inaction is, by definition, not "affirmative misconduct." *See United States v. City of Toledo*, 867 F. Supp. 603, 607-08 (N.D. Ohio 1994). And EPA's representation about clean closure (recited this time in Paragraph 139) should not have been misleading to anyone who read the 2015 Rule. In any event, even if EPA's representation misled Gavin, "reliance on misinformation provided by a government employee does not provide a basis for an estoppel." *Fuller v. United States*, 475 F.Supp.3d 762, 767 (S.D. Ohio 2020). Estoppel will not lie "where '[t]he government was not attempting to trick' the party asserting estoppel . . . [or was] not acting with malicious intent." *Kerger v. United States*, 609 F.Supp.3d 562, 577 (N.D. Ohio 2022) (quotations omitted). There is no allegation of trickery or malicious intent by EPA in the amended complaint. Gavin's estoppel claim/defense is legally insufficient.

CONCLUSION

For the foregoing reasons, this action should be dismissed.

Respectfully submitted this 16th day of October, 2024,

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