BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List (Via Electronic Filing)

PLEASE TAKE NOTICE that the undersigned filed today with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following RESPONDENT'S RESPONSE IN OPPOSITION TO ILLINOIS POWER GENERATING COMPANY'S MOTION FOR SUMMARY JUDGMENT, a copy of which is attached hereto and hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: /s/ Mallory Meade

Assistant Attorney General
Environmental Bureau
500 South Second Street
Springfield, Illinois 62706
(217) 299-8343
mallory.meade@ilag.gov
ARDC No. 6345981

Dated: October 31, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 31, 2024, she caused to be served, by electronic mail, a true and correct copy of the following instruments entitled Notice of Filing and Respondent's Response in Opposition to Illinois Power Generating Company's Motion for Summary Judgment to:

Joshua R. More
Bina Joshi
Samuel A. Rasche
ARENTFOX SCHIFF LLP
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
Joshua.More@afslaw.com
Bina.Joshi@afslaw.com
Sam.Rasche@afslaw.com

Carol Webb
Hearing Officer
Illinois Pollution Control Board
1021 North Grand Avenue East
P.O. Box 19274
Springfield, IL 62794-9274
carol.webb@illinois.gov

This email transmission contains 28 pages.

s/ Mallory Meade
Mallory Meade
Assistant Attorney General
Environmental Bureau
Mallory.Meade@ilag.gov

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

s/ Mallory Meade
Mallory Meade
Assistant Attorney General
Environmental Bureau

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S RESPONSE IN OPPOSITION TO ILLINOIS POWER GENERATING COMPANY'S MOTION FOR SUMMARY JUDGMENT

NOW COMES Respondent, the Illinois Environmental Protection Agency ("Illinois EPA") by and through its attorney, Kwame Raoul, Attorney General of the State of Illinois, and hereby responds in opposition to Petitioner Illinois Power Generating Company's Motion for Summary Judgment ("Petitioner's Motion" or "Pet'r MSJ"), as follows.

I. Petitioner Makes No Case For the Relief It Seeks.

In this proceeding, Petitioner has petitioned the Board for "remand to IEPA to issue a new final written response concurring with the Newton [alternative source demonstration (ASD)]." Pet. ¶62. Therefore, to be entitled to summary judgment, Petitioner must make the case to the Board that, as a matter of law, Illinois EPA was required to concur in its ASD submittal. Yet Petitioner's Motion makes no such case.

Instead, Petitioner devotes the whole Argument section of its Motion to attacking the three data gaps identified in Illinois EPA's nonconcurrence letter. Pet'r MSJ at 13–23. But even if the Board accepted every one of Petitioner's arguments, the Board Rules require Illinois EPA only to "concur[] or not concur[]" in the ASD submittal. 35 Ill. Adm. Code 845.650(e)(4). Therefore, even

if all three data gaps were stricken out, leaving only the statement that "Illinois EPA does not concur with the Newton Primary Ash Pond Alternative Source Demonstration (ASD) dated October 6, 2023" (R. at R001965), Illinois EPA's nonconcurrence would still be sufficient under the Board Rules. And it would still be Petitioner's burden to present sufficient evidence to overturn that nonconcurrence. *See* 35 Ill. Adm. Code 105.112(a) (providing that "the burden of proof shall be on the petitioner").

Not only has Petitioner failed to make its case in its Motion, Petitioner has not carried its burden at any stage in this process. Section 845.650(e) of the Board Rules ("the ASD rule") provides that "[t]he owner or operator of a [coal combustion residuals (CCR)] surface impoundment may . . . 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). Petitioner thus had two jobs: (1) demonstrate that an alternative source other than the Newton PAP caused the chloride exceedance in APW15, and (2) demonstrate that the Newton PAP did not contribute to that contamination.[1] Petitioner's ASD submittal failed at both. *See* Respondent's Motion for Summary Judgment ("Agency MSJ") at 11–25. Moreover, Petitioner did not even purport to accomplish the first.

[1] To be clear, the ASD rule provides for two types of ASD. In addition to the two-element type at issue here, an owner/operator may avail itself of a second type that requires it only to demonstrate "that the exceedance of the groundwater protection standard resulted from error in sampling, analysis, statistical evaluation, natural variation in groundwater quality, or a change in the potentiometric surface and groundwater flow direction." 35 Ill. Adm. Code 845.650(e). Although many of Petitioner's arguments would be consistent with the chloride exceedance in the APW15 monitoring well resulting from "natural variation in groundwater quality," Petitioner has consistently argued that Illinois EPA and the Board should evaluate its ASD submittal under the first type. *See, e.g.,* Pet. ¶60; R. at R001611 (ASD submittal referring to the requirements of the first type). And even if Petitioner's ASD submittal were evaluated under the second type, it would fail, because Petitioner has not presented any site-specific evidence of natural variation in groundwater quality that would explain the exceedance in APW15. *See* Agency MSJ at 12–15.

Agency MSJ at 11; *see also* R. at R001617 (ASD submittal claiming only to "demonstrate[e] that the chloride exceedance observed at APW15 . . . was not due to the [Primary Ash Pond (PAP)]").

II. Petitioner Misinterprets the ASD Rule and Misapplies Rules of Interpretation.

Because Petitioner does not make any affirmative case for summary judgment and only attacks Illinois EPA's rationale for nonconcurrence, it is not entirely clear from Petitioner's Motion what Petitioner contends that the ASD rule required *Petitioner* to do in order to merit a concurrence from Illinois EPA. Petitioner seems, however, to be continuing with the convenient single-element interpretation of the ASD rule it has followed since the original ASD submittal, under which a demonstration that the Newton PAP did not contribute to the contamination in APW15 is also sufficient to show that this contamination was caused by *some* other source, which Petitioner is not required to identify. *See, e.g.,* Pet'r MSJ at 15, 19 (arguing that no characterization, sampling, or analysis of the alternative source is required); *see also* Agency MSJ at 39–41 (discussing Petitioner's reliance on this interpretation). As detailed below, this single-element interpretation of the ASD rule is not only incorrect, but directly contradicted by the principles of interpretation on which Petitioner's Motion relies.

Petitioner's attacks on Illinois EPA's data gaps invoke various respected principles of statutory construction, from the plain meaning rule (Pet'r MSJ at 14) to the principle of avoiding absurd results (Pet'r MSJ at 19). But the data gaps presented in the nonconcurrence are not *interpretations* of the ASD rule that would apply to all cases. Rather, these data gaps *explain* how Petitioner's particular ASD submittal fell short of the demonstration the rule requires. Bearing this out, in two other ASD nonconcurrences that Petitioner is currently appealing before the Board (PCB 24-55 and PCB 24-56), Illinois EPA identified different data gaps based on the particular information necessary to support the respective ASD submittal. *See, e.g.,* Nonconcurrence Letter,

Exhibit A to Illinois Power Generating Company's Petition for Review (PCB 24-56) (Feb. 20, 2024), *available at* https://pcb.illinois.gov/documents/dsweb/Get/Document-109744, at 28 (requiring further information on a hydrogeological divide on which Petitioner's ASD submittal in that case relied).

Petitioner's statutory construction arguments thus miss the mark, as do its arguments that *e.g.* "no . . . provision in Part 845 mandates the collection of the information in the 'Data Gaps'" (Pet'r MSJ at 17) or that Part 845 "does not . . . reference a need to collect or develop *any particular* information in support of an alternative source demonstration" (Pet'r MSJ at 15) (emphasis in original). Illinois EPA never said that this particular information is required in every case, only that it was needed in this particular case.[2] Thus, in using statutory construction principles to attack Illinois EPA's nonconcurrence, Petitioner takes aim at the wrong target. Nor are the specific principles Petitioner invokes any help to Petitioner.

A. The ASD rule's plain language requires Petitioner to prove both ASD elements.

As Petitioner observes, "[t]he most reliable indicator of legislative or regulatory intent is the language of the statute or regulation, given its plain and ordinary meaning." Pet'r MSJ at 14.

[2] Petitioner's arguments on this point bear a striking resemblance to arguments the District of Columbia Circuit rejected in a recent case to which Petitioner was a party. *See Elec. Energy, Inc. v. EPA*, 106 F.4th 31, 35 (D.C. Cir. 2024) (rejecting arguments that the court had jurisdiction to review decisions applying federal CCR regulations under RCRA's provision for direct appellate review of legislative rulemaking by USEPA, because the appealed decisions "straightforwardly apply" the rule rather than amending it). The court was "unpersuaded" by the parties' arguments that by denying an alternative closure deadline USEPA had "announced a rule of any sort," even an interpretive one, because the denial was a "classic fact-specific adjudication." *Elec. Energy*, 106 F.4th at 45. "Unlike rulemaking, which typically announces generally applicable legal principles and governs only the future, adjudication involves case-specific determinations that immediately bind parties by retroactively applying law to their past actions." *Id.* (internal quotations omitted.) The legal questions before the D.C. Circuit were distinct from those here, but the same principle holds: *applying* a general rule to a particular case should not be confused with either rulemaking or interpretation.

Petitioner's arguments imply that it was not required to identify an alternative source or prove that this particular source caused the contamination at issue, and that that merely by filing a report that meets the formal requirements of the ASD rule, i.e. signed by the required experts and presenting some purported evidence in support of its conclusion, it has done all that is required for its ASD submittal. *See* Pet'r MSJ at 15 (listing the formal requirements for a submittal). The language of the ASD rule, given its plain and ordinary meaning, contradicts both of these positions, for the following reasons.

First, by its plain and ordinary meaning, the ASD rule requires Petitioner to demonstrate *two* distinct elements: "that a source other than the CCR surface impoundment caused the contamination" and that "the CCR surface impoundment did not contribute to the contamination." 35 Ill. Adm. Code 845.650(e). Thus, in this case, Petitioner had to demonstrate (1) that some particular source other than the Newton PAP actually caused the chloride exceedance in APW15, and also (2) that the Newton PAP did not contribute to the exceedance.

Second, the ASD rule requires Petitioner to *demonstrate* those two elements. "Demonstrate" and "prove" are synonyms, and neither one is accomplished simply by complying with formal requirements.[3] The ASD rule requires an ASD submitter to prove each ASD element to the applicable legal standard—which for purposes of this appeal is certainly no less than the ordinary standard in the civil courts of Illinois and before the Board, namely preponderance of the evidence. *See, e.g., Aqua Illinois v. Illinois EPA*, PCB 23-12 (Dec. 15, 2022), slip op. at 8 (observing that "[t]he standard of review in a permit appeal is the preponderance of the evidence").

[3] Merriam-Webster for example respectively defines the relevant senses of "demonstrate" and "demonstration" as "to prove or make clear by reasoning or evidence" and "conclusive evidence: proof." *Available at* https://www.merriam-webster.com/dictionary/demonstrate and https://www.merriam-webster.com/dictionary/demonstration.

B. Petitioner's reading of the ASD rule violates settled interpretive principles.

An unambiguous regulation or statute must be applied as written. *Office of the State Fire Marshal v. Ill. Pollution Control Bd.*, 2022 IL App (1st) 210507, ¶33. The ASD rule's plain meaning is clear, and a rule "is not ambiguous simply because the parties disagree as to its meaning." *Id*.

Petitioner's confusion over the meaning of the ASD rule appears to arise from the requirement for a submitter to demonstrate that "*a* source other than the CCR surface impoundment caused the contamination." *See* 35 Ill. Adm. Code 845.650(e) (emphasis added). As discussed above (page 3), Petitioner appears to read this as requiring it only to show that the source was not the impoundment and was therefore something else, but not demonstrate what that "something else" is. *See, e.g.,* Petitioner's public comment, R. at R001788 (arguing that "identification . . . of that alternative source is not . . . necessary to determine that a source other than the Newton PAP caused the chloride exceedance").

Petitioner's reading is untenable, however, even by the text of the regulation alone. The indefinite article "a" is commonly used to introduce a specific entity that is new to the reader. Once the new entity has been introduced, the definite article "the" is used.[4] Other examples of this common usage are present in the ASD rule itself, which opens by introducing "*a* CCR surface impoundment" and "*a* demonstration" and refers to them subsequently as "*the* CCR surface impoundment" and "*the* ASD." 35 Ill. Adm. Code 845.650(e) (emphasis added). Just as "a CCR surface impoundment" refers to a particular impoundment, "a source" refers to a particular source.

[4] *See, e.g.,* Voice of America, *Everyday Grammar: Using the Right Article* (Mar. 10, 2016), *available at* https://learningenglish.voanews.com/a/using-right-article-everyday-grammar/2819461.html (describing the switch from "a" to "the" as "a shift from new to already familiar information" that "occurs between the first and second mention").

And indeed, the requirement to demonstrate that the alternative source caused the contamination would be nonsensical if the source was not required to be a particular, identifiable source.

Moreover, even if the rule was ambiguous, settled rules of interpretation would put a swift end to any confusion. First, statutes and regulations must be "construed so that no part is rendered meaningless or superfluous." *People v. Lloyd*, 2013 IL 113510, ¶25. Petitioner's reading violates this rule against surplusage, because—conveniently for Petitioner—it renders the first ASD element superfluous. Any submitter that shows that its impoundment did not contribute to an exceedance has necessarily shown that *something* else caused the exceedance, just as Petitioner claims here. Second, by thus effectively striking out the first ASD element,[5] Petitioner's reading would also contravene the principle (discussed below, page 10) that regulations may not be amended by interpretation. Accordingly, even if the ASD rule were ambiguous, Petitioner's reading would still be untenable under settled interpretive principles.

C. The principle of avoiding absurd results does not help Petitioner.

Petitioner argues that "an interpretation of Part 845 that upholds the Denial would result in an impermissible 'absurd, unreasonable, inconvenient, or unjust' interpretation of Part 845." Pet'r MSJ at 2. As Petitioner's own choice of words makes clear, however, this time-honored principle of avoiding inconvenient results guides the interpretation of rules, not their application. A rule that

[5] Petitioner's interpretation appears to sweep even more broadly than that. It would render meaningless not only the first ASD element, but also the ASD rule's distinction between two types of ASDs: a first type that requires the two elements discussed here, and a second type in which the submitter need only demonstrate "that the exceedance of the groundwater protection standard resulted from error in sampling, analysis, statistical evaluation, natural variation in groundwater quality, or a change in the potentiometric surface and groundwater flow direction." 35 Ill. Adm. Code 845.650(e). If it was enough for a submitter to demonstrate that its impoundment was not the source of an exceedance, there would be no reason for the submitter to go to the extra bother of demonstrating that the exceedance arose specifically from, *e.g.*, "natural variation in groundwater quality." And indeed Petitioner chose not to go to that extra bother here, as discussed in footnote 1 above.

could never be *applied* to inconvenience anyone would scarcely be a rule at all. And once the data gaps are freed from Petitioner's confusing characterization of them as an "interpretation of Part 845" and recognized as simply a case-specific application of the ASD rule, it is apparent that Illinois EPA's action in listing specific information that would have allowed Petitioner to meet the ASD rule's requirements in its particular case was not "absurd, unreasonable, inconvenient, or unjust" by any stretch. Quite the contrary—providing such an explanation was thoughtful, reasonable, accommodating, and fair to Petitioner.

Moreover, the five cases Petitioner cites for this principle (Pet'r MSJ at 19–20) do not help its case. To begin with, none of these cases held that a regulation or statute should be construed to avoid consequences that are absurd, unreasonable, unjust, or inconvenient *for an individual party*. Rather, they were all concerned with outcomes that would be problematic for the purposes of the law itself.

Of the cases Petitioner cites, the closest to Petitioner's argument might be *Bank of N.Y. Mellon v. Laskowski*, 2018 IL 121995. In *Mellon*, the Court rejected a literal reading of the Illinois Mortgage Foreclosure Law under which the deadline to quash service of process would have continued to run after a case was dismissed with prejudice, because that result would have been "at once absurd, inconvenient, and unjust." *Id.* at ¶18. If the statute had been applied literally, there would have been no apparent way for any party it affected to comply. *Id.* But *Mellon* does not help Petitioner, because the impossibility of quashing service of process in a dismissed case is not comparable to the merely alleged *impracticability* of Petitioner collecting the required data (much of which it was already required to collect for its operating and construction permit applications, whether it did so or not, as discussed below and in Agency MSJ at 29–31). Other ASD submittals may not require the particular data that was needed here, and other ASD submitters may already

have it on hand, so the *Mellon* court's concern over requiring parties to do the impossible has no bearing here.

Petitioner's other four cases help it even less:

- In *Midwest Sanitary Serv. v. Sandberg*, 2022 IL 127327, the Court recited the doctrine of absurdity avoidance but did not apply it.
- In both *People v. Wilhelm*, 346 Ill. App. 3d 206 (2nd Dist. 2004) (rejecting a literal reading of a breathalyzer regulation under which the breathalyzer mouthpiece itself would have been a "foreign substance" invalidating the test), and *Village of Fox River Grove v. Ill. Pollution Control Bd.*, 299 Ill. App. 3d 869 (2nd Dist. 1998) (upholding the Board's interpretation of population equivalents under the NPDES rules as based on design capacity rather than actual throughput), the court only reached the question of absurd results after first determining that the regulation was ambiguous (which Petitioner has not argued here). In both cases the court was only concerned with avoiding results that would frustrate the regulation's purpose. *See Wilhelm*, 346 Ill. App. 3d at 209; *Fox River Grove*, 299 Ill. App. 3d at 880.
- In *McMahan v. Industrial Comm'n*, 183 Ill. 2d 499, 514 (1998), the Court upheld an award of attorney's fees to a worker's compensation plaintiff from an employer who had refused to pay medical expenses, because such a refusal was "as contrary to the purposes of the Workers' Compensation Act as an employer's refusal to compensate the employee for lost earnings." A literal reading of the statute would have barred recovery of such fees, but the court rejected that result as contrary to the statute's purpose. *Id.*

McMahan, Wilhelm, and *Fox River Grove* are all distinguishable here because the authorizing statute for Part 845 required the Board to "describe the process and standards for

identifying a *specific alternative* source of groundwater pollution." 415 ILCS 5/22.59(g)(11) (2022) (emphasis added). Given such a plain statement of intent, these cases cannot support Petitioner's position that it should not have to make such an identification. Nor, in any event, has Petitioner made any argument that such a requirement would be contrary to the "overarching purpose" of the Environmental Protection Act and the Board Rules, namely "to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." *Midwest Generation, LLC v. Ill. Pollution Control Bd.*, 2024 IL App (4th) 210304, ¶182, quoting *Granite City Division of National Steel Co. v. Ill. Pollution Control Bd.*, 155 Ill. 2d 149, 182 (1993). Accordingly, none of these cases can support Petitioner's position.

This principle of avoiding absurd results isn't just unhelpful to Petitioner—once it has been returned to its upright position, it is fatal to Petitioner's argument. An ASD rule that did not require an ASD submitter to *demonstrate* that a particular alternative source caused the contamination at issue would fail to protect the public health and environment of Illinois and would be less protective than the federal rules, and would therefore be contrary to the statutory requirements of Part 845. *See* 415 ILCS 5/22.59 (2022); *see also* Agency Motion at 36, 37, 40 (discussing these requirements). Thus, under *McMahan,* even if the ASD rule's plain language supported Petitioner's interpretation (which it does not), the Board would still be required to reject that interpretation as absurd.

D. Illinois EPA's nonconcurrence did not "unlawfully amend" Part 845.

Petitioner argues that upholding Illinois EPA's nonconcurrence in this case would unlawfully amend the Board Rules through interpretation:

> The Board has explained it is "powerless to accept . . . interpretation" of Board rules that contradicts the plain meaning of the text, and to ignore the

> plain meaning of the rules is to "in effect, amend them through construction rather than the usual rulemaking procedures." *Central Illinois Public Service Co. (Meredosia Unit 3) v. IEPA*, PCB 86-147, slip op. at 6 (March 19, 1987). The plain language of Part 845 does not require collection of the information identified in the "Data Gaps," and thus, IPGC cannot be expected to comply with data "requirements" that are not clear from the plain language of the regulations.

Pet'r MSJ at 14; *see also* Pet'r MSJ at 24 (arguing that requiring characterization of the alternative source "would result in unlawfully amending Part 845"). As explained above, the plain language of the regulations does not support Petitioner's position, and Illinois EPA's case-specific list of data gaps cannot reasonably be construed as amending the ASD rule, so this argument fails from the outset.

Moreover, the authority Petitioner cites does not support its view. The quote from *Meredosia Unit 3* on which Petitioner relies is a blockquote from an earlier appellate decision. *See* PCB 86-147 (Mar. 19, 1987), slip op. at 6–7 (quoting *Continental Grain Co. v. Pollution Control Bd.*, 131 Ill. App. 3d 838, 840 (5th Dist. 1985)). But whether Petitioner intended to rely on *Continental Grain* or *Meredosia Unit 3*, this authority shears off the last leg on which Petitioner's statutory construction arguments might stand, for the following reasons.

In *Continental Grain*, the Board held that East St. Louis Township was erroneously excluded from the definition of a major metropolitan area in Part 201 of the Board Rules (which led the township to be improperly exempted from an air pollution standard), and the Board therefore construed the rule to include the township. 131 Ill. App. 3d at 839–840. The appellate court reversed, because by its plain meaning the rule excluded the township and the Board could not amend the rule by interpretation even when the error was clear. *Id*. at 840. In *Meredosia Unit 3*, the Board ruled against a petitioner's objection to a permit condition that made the petitioner subject to standards that the petitioner argued the Board had intended to abolish, because under

Continental Grain, "[e]ven if the Board were to have concluded that those rules did not express the Board's intent, the Board would be powerless to accept [the petitioner's] interpretation." PCB 86-147 (Mar. 19, 1987), slip op. at 6.

Accordingly, even if Petitioner could persuade the Board that the literal requirements of the ASD rule are contrary to the Board's intent, under both *Continental Grain* and *Meredosia Unit 3* the Board would be powerless to alter those requirements. Nor could the Board entertain the amendatory reading of the rule that Petitioner appears to favor, as discussed above (footnote 5). Thus, like the other principles of statutory construction Petitioner invokes, the rule against amendment by interpretation actually opposes Petitioner's position.

III. Petitioner Misinterprets the Data Gaps Identified in Illinois EPA's Nonconcurrence.

Illinois EPA identified three "Data Gaps" on which Petitioner failed to provide sufficient evidence to demonstrate that a source besides the Newton PAP was responsible for the chloride exceedance in APW15. R. at R001965. First, that "[s]ource characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with SW-846" ("Data Gap 1"). Second, "[h]ydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and presented with hydrogeologic characterization of bedrock unit" ("Data Gap 2"). 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").

As the name suggests, the three "Data Gaps" that Illinois EPA identified in its nonconcurrence (and to which Petitioner devotes it entire Argument section, *see* Pet'r MSJ at 13–23) are simply the places Petitioner's data did not adequately support Petitioner's conclusions. As discussed above, the ASD rule required Petitioner to demonstrate to Illinois EPA that the chloride exceedance in monitoring well APW15 was caused by a particular source other than the Newton PAP and also that the PAP did not contribute to the exceedance. 35 Ill. Adm. Code 845.650(e).

Petitioner proposed a possible alternative explanation for the exceedance (R. at R001611–1617), but as Illinois EPA explained (R. at R001965), in these three particular ways it failed to provide the necessary information to support its explanation.

A. Part 845 requires Illinois EPA to have the information identified in the Data Gaps in order to concur in the ASD.

Petitioner claims that "the plain language of Part 845 does not require IPGC to have collected the information described in 'Data Gap 1,' 'Data Gap 2,' or 'Data Gap 3,' during the 60-day period to prepare an ASD or prior to that period," and therefore Petitioner should not have been required to collect the missing data. Pet'r MSJ at 13. This argument reveals a fundamental misunderstanding of the purpose of the ASD process and how it functions.

The first of the two elements of an ASD submittal under the ASD rule is a demonstration that "a source other than the CCR surface impoundment caused the contamination." 35 Ill. Adm. Code 845.650(e). As the authorizing statute makes clear, an owner or operator seeking to avail itself of the ASD exception must "identify[] a specific alternative source of groundwater pollution." 415 ILCS 5/22.59(g)(11) (2022). Data Gaps 2 and 3, which require Petitioner to suitably characterize the alternative source, are directed to this requirement.

The second element of an ASD submittal under the ASD rule is a demonstration that "the CCR impoundment did not contribute to the contamination." 35 Ill. Adm. Code 845.650(e). When a monitoring well is designed specifically to detect contamination flowing from a CCR surface impoundment, it raises a reasonable presumption that groundwater protection standard exceedances in that well are at least partly caused by the impoundment. *See* Agency MSJ at 10 n.1, 18. A successful ASD submittal must rebut this presumption. Data Gap 1, which requires Petitioner to provide further information on the constituents of the waste in the CCR impoundment, is directed to this requirement.

CCR impoundments are dangerous. The reason owners and operators must pinpoint the proposed alternative cause of contamination with particularity is so that Illinois EPA can protect public health and the environment of Illinois from the substantial dangers CCR impoundments create. *See* 415 ILCS 5/22.59(a) (2022). The ASD process was constructed specifically to determine the source of contamination at CCR impoundments for rapid remediation. By leaving the Data Gaps unfilled, Petitioner left out critical pieces that Illinois EPA needed to complete the ASD puzzle. The missing data introduced doubt as to the true source of the contamination and left Illinois EPA incapable of concurring in Petitioner's ASD.

B. Data Gap 1 identified sampling information that Illinois EPA rightly required in order to confirm that the PAP did not contribute to the chloride contamination in APW15.

Petitioner attacks Data Gap 1 by claiming that "the plain language of the Part 845 regulations makes no reference to 'total solids sampling' or a requirement to conduct 'total solids sampling.'" Pet'r MSJ at 17. But source characterization of the CCR in the Newton PAP is necessary to meet the second ASD element, a demonstration that "the CCR impoundment did not contribute to the contamination." 35 Ill. Adm. Code 845.650(e). To show that the PAP did not contribute to the chloride contamination in APW15, Petitioner was required to fully characterize the PAP, which necessarily required total solids sampling. Additionally, Chapter 1 of SW-846 provides, "[g]iven the significant decisions to be made based on environmental data, it is critical that the data are of sufficient quantity and quality for their intended use and can support decisionmaking based on sound science." Supp. R. at R002219.[6] Because Petitioner failed to

[6] Petitioner argues that SW-846 is "a guidance document and not a legal authority." Pet'r MSJ at 18 n.8. Regardless of the exact nature of its authority, however, this USEPA guidance on the data needed for appropriate environmental decisionmaking is entitled at the very least to considerable persuasive weight.

provide data "of sufficient quantity and quality for their intended use," Illinois EPA simply did not have the information needed to issue a concurrence in line with SW-846 and the Board Rules.

Site-specific data is key to evaluating an ASD, because without it, it is impossible to say with certainty what is causing the contamination at a site. And the data must be representative, which is a mandatory data quality indicator under SW-846. Supp. R. at R002225. SW-846 defines representativeness as "a measure of the degree to which data accurately represent a characteristic of a population, a parameter variation at a sampling point, a process condition, or an environmental condition." Supp. R. at R002225. Any sampling done in accordance with SW-846, then, must be site-specific and include assurances that the data accurately represents the CCR in question. Petitioner was already required to collect and provide such data. *See* 35 Ill. Adm. Code 845.230(d)(2)(C) (requiring that operating permit applications contain "analysis of the chemical constituents of all waste streams, chemical additives, and sorbent materials entering or contained in the CCR surface impoundment"). This data is necessary to evaluate the second ASD element, namely whether the impoundment contributed to the contamination. Here, because Petitioner failed to conduct representative waste characterization of the PAP pursuant to the Board Rules, it did not have the necessary data to make the required demonstration under the second element, and Illinois EPA therefore reasonably declined to concur in Petitioner's ASD submittal.

Petitioner contends that SW-846 is inapplicable to the ASD process. "[T]he Board has explained that 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.'" Pet'r MSJ at 17, citing *In the Matter of: SDWA Update, USEPA Amendments* (January 1, 2013 through June 30, 2013), R14-8, slip op. at 24-25 (Jan. 23, 2014) (emphasis added, footnote omitted). But, in addition to the

incorporation by reference in Section 845.150, Section 845.640(j) makes SW-846 applicable to "[a]ll groundwater samples taken under this Subpart", which relevantly includes Section 845.650, of which the ASD rule is a part. *See* Agency MSJ at 26. Section 845.650 is concerned with groundwater monitoring, and even if a sample itself is not of groundwater, it needs to be analyzed by commensurable methods in order to adequately support a conclusion regarding a groundwater contamination source. Thus, Illinois EPA reasonably required all sampling conducted for the ASD to be analyzed using SW-846 methodology.

In sum, Petitioner was required to use SW-846 methodology when collecting and analyzing data for its ASD submittal. Its failure to do so left Illinois EPA missing crucial information and with doubts regarding the quality of submitted data which left it unable to concur with the ASD.

Finally, Petitioner argues that Data Gap 1 "is an absurdity because there is no SW846 sampling methodology for chloride." Pet'r MSJ at 21. But as with Petitioner's Motion as a whole, even if Illinois EPA were to concede this argument,[7] it would do Petitioner no good. Petitioner did not include *any* solids sampling data from the Newton PAP in its submittal. R. at R001616, R001636–1639. Instead, Petitioner relied solely on porewater from a handful of wells at a single corner of the PAP remote from APW15 (R. at R001621), which Petitioner had analyzed by non-peer-reviewed methods and for which Petitioner did not even provide the sampling logs, chains of custody, etc. until shortly before the motions for summary judgment in this case were due. *See* Agency MSJ at 23, 23 n.7, citing Hahn Report at 1898–1901, 1929. Even if Illinois EPA were to

[7] Petitioner's argument does not, in fact, appear to be correct except perhaps in some very narrow sense. SW-846 methods can be and are used for evaluating chloride in CCR solids, such as Method 9056A, "Determination of Inorganic Ions by Ion Chromatography," *available at* https://www.epa.gov/sites/default/files/2015-12/documents/9056a.pdf (providing for "the sequential determination of chloride . . . anions in aqueous samples, such as . . . the collection solutions from the bomb combustion of solid waste samples").

accept porewater data for these purposes and also to accept the methods Petitioner used, such incomplete data from unrepresentative samples could not have been enough to meet Petitioner's burden of rebutting the presumption that the chloride contamination in APW15 came from the PAP. Petitioner's argument on this point seeks again to reverse that burden, contrary to the ASD rule itself (which places the burden of demonstrating both elements firmly on the ASD submitter, *see* 35 Ill. Adm. Code 845.650(e)) and the Board Rules generally (which place the burden on the petitioner in appeals of final agency actions, *see* 35 Ill. Adm. Code 105.112(a)).

C. Data Gaps 2 and 3 identified missing information crucial to Illinois EPA's ASD determination.

Petitioner again argues Part 845's plain language does not support Data Gaps 2 and 3:

> Nowhere in the plain language of Part 845 is there a data collection requirement for "hydraulic conductivities from laboratory or in-situ testing" to be collected, analyzed and presented with a "hydrogeologic characterization of" an alternate source. Nor is there a requirement for a characterization of an alternate source that includes "sample and analysis in accordance with 35 IAC 845.640."

Pet'r MSJ at 21. And again, Petitioner's argument misses the point. The purpose of the ASD submittal process is to determine the source of contamination in a CCR impoundment groundwater monitoring well with the goal of rapid remediation in line with Illinois EPA's mission to protect public health and the environment. *See* 415 ILCS 5/22.59(a) (2022). Additionally, the missing information identified by Data Gaps 2 and 3 is critical both to Petitioner's arguments and to Illinois EPA's ability to issue a concurrence.

For example, Petitioner's ASD submittal relies heavily on hydraulic conductivity arguments. "Line of Evidence #1" in the Newton ASD submittal is that "the PAP is separated from the UA at APW15 by a thick layer of low permeability glacial till." R. at R001615. Likewise, the ASD submittal's second and third data points supporting bedrock groundwater as the chloride

source rest on hydraulic conductivity. R. at R001617. The hydrogeologic characteristics and hydraulic conductivity of the bedrock under the PAP are thus at the heart of Petitioner's arguments. Without this data, vital information needed to evaluate Petitioner's entire argument in support of the alternative source was missing. And, again, the ASD rule requires a demonstration that "a source other than the CCR surface impoundment caused the contamination." 35 Ill. Adm. Code 845.650(e). Without proof, there can be no demonstration; that is why Illinois EPA needed the information laid out in Data Gaps 2 and 3 before it could concur in a purported demonstration based so heavily on hydraulic conductivity and hydrogeology.

Illinois EPA could not reasonably concur with an ASD submittal that did not adequately demonstrate that a source other than the CCR surface impoundment caused the contamination.

IV. Petitioner Misinterprets the Purpose of the ASD Rule and this Proceeding.

Petitioner raises a number of arguments that do not appear to be grounded on any particular regulation, statute, or legal principle: that it did not receive "fair notice" (Pet'r MSJ at 20–21), that Illinois EPA is unfairly changing its tune from the rulemaking proceeding in which Part 845 was adopted (Pet'r MSJ at 18–19), and that various evidence developed through discovery is relevant to the Board's determination (Pet'r MSJ at 21–23). None of these have any apparent bearing on the merits of this appeal, and as discussed below, they all are *without* merit and betray a fundamental misunderstanding of the purpose of the limited ASD exception.

A. Part 845 must be understood and applied in light of its purpose and context.

As discussed above, Petitioner's repeated insistence that it was not required to identify or characterize the alternative source has no foundation in the ASD rule's text. But even if there were some ambiguity in the text, and even if textual principles alone could not resolve that ambiguity, the context in which the ASD rule was adopted would still resolve that ambiguity against Petitioner.

Related statutes and regulations must be read together as an integrated whole. *Office of the State Fire Marshal*, 2022 IL App (1st) 210507, ¶34. The statute that authorized the Board's Part 845 rulemaking limited ASDs to "identifying a specific alternative source of groundwater pollution" when the impoundment owner believed the impoundment was not the cause. 415 ILCS 5/22.59(g)(11) (2022). And other provisions require that the Board's rulemaking protect public health and the environment from the hazards created by coal ash impoundments, and be at least as protective as the corresponding federal rules. 415 ILCS 5/22.59(a), (g)(1) (2022). Construing the ASD exception strictly and holding ASD submitters to their burden is therefore wholly in line with regulatory and legislative intent.

Likewise, Section 22.59 is intended to be "liberally construed in favor of protecting the environment," and in enacting Part 845 it was accordingly within the Board's authority to be more protective than the statute required. *Midwest Generation, LLC v. Ill. Pollution Control Bd.*, 2024 IL App (4th) 210304, ¶¶214, 216 (citing 415 ILCS 5/22.59(a) (2022)). By the same token it would be problematic at best to construe the ASD rule as *less* protective than the statute required. The ASD rule's context is therefore as fatal to Petitioner's arguments as the text itself.

B. Petitioner had ample notice that it was required to collect the information in the Data Gaps.

Petitioner contends that Illinois EPA did not provide sufficient notice to collect the data Petitioner needed for a successful ASD submittal. *See* Pet'r MSJ at 20 ("interpreting Part 845 as requiring IPGC to provide the information in the 'Data Gaps' with its ASD . . . would require IPGC to have complied with data 'requirements' of which it had no notice and with which it would be unfair or impossible to comply"); Pet'r MSJ at 21 (arguing that the only way Petitioner "could have included the information from 'Data Gap 1' in the ASD is if it had started collecting that information well before the detection of the chloride exceedance in APW15," and that "absent fair

notice, an owner or operator should not have to collect particular data in support of an ASD prior to the detection of a GWPS exceedance indicating an ASD may be necessary"); Pet'r MSJ at 22 ("[c]onducting a characterization of the bedrock surrounding the PAP, including sampling and analysis, would take approximately 20-30 weeks").

Other provisions of Part 845 require the owners of CCR surface impoundments to collect comprehensive information including: waste properties, site geology and hydrology, and background concentrations of potential groundwater contaminants. And the missing information the Data Gaps identify is all required under Part 845 as part of the CCR impoundment permitting process. *See, e.g.,* 35 Ill. Adm. Code 845.610(b)(1)(A) (requiring hydrogeologic site characterization for existing impoundments), 845.620 (detailing requirements for hydrogeologic site characterization including identification of potential migration pathways, chemical and physical characterization of geologic layers to a minimum depth of 100 feet, and "[a]ny other information requested by the Agency that is relevant to the hydrogeologic site characterization"), and 845.630 (requiring a groundwater monitoring system to, among other things, "[a]ccurately represent the quality of background groundwater that has not been affected by leakage from a CCR surface impoundment"). If Petitioner had properly gathered this data as the Board Rules require, it likely would not have needed to make this appeal, because Illinois EPA would have had the information necessary to evaluate the ASD in the first place.

Petitioner then falls into hyperbole, arguing that a requirement to characterize the alternative source "would conceivably have required IPGC to forecast any and all potential alternative sources that might impact its groundwater samples and to complete a physical characterization of each of those sources before even knowing there has been an exceedance." Pet'r MSJ at 23. Of course, the ASD process is an optional exception to the corrective action

requirements of Section 845.650, so the ASD rule never *required* Petitioner to do anything. Moreover, if Petitioner had followed permitting requirements, as every similarly situated CCR impoundment owner must, Petitioner would have had most if not all of the information required by Illinois EPA. But Petitioner's failure to gather this data during the permitting process left Petitioner unable to provide that data in its ASD submittal.

C. Illinois EPA's interpretation of the ASD rule has not changed.

Petitioner argues that "IEPA is changing its previous interpretation regarding the scope of Part 845 and the requirements of ASDs" by "suggesting that Part 845 requires characterization of an alternative source." Pet'r MSJ at 18. In support, Petitioner quotes from an Illinois EPA post-hearing comment in the rulemaking proceeding in which Part 845 was adopted. Pet'r MSJ at 19 (citing Petitioner's Ex. D). Petitioner's point here is not entirely clear—even if Illinois EPA's comment had rejected the idea of requiring an ASD submitter to identify the alternative source (which it did not), that comment could not change the rule's meaning. As Petitioner rightly observes, "any prior interpretations made by the Agency are not binding on the Board" (Pet'r MSJ at 11) and neither the Agency nor the Board can amend the text of a Board Rule by interpretation (Pet'r MSJ at 14).

In any event, although Illinois EPA's comment indeed opposed a proposal under which an ASD would become part of the impoundment's permit and the impoundment owner/operator would be required to both identify *and mitigate* the alternative source, the comment only spoke to the first and last points (permitting and mitigation). Pet'r MSJ, Ex. D at 73–74. Illinois EPA's

silence on the suggestion that an ASD submitter must identify the alternative source is unsurprising, because the rule already required that.[8]

Moreover, Petitioner's understanding of the rule does not appear to have been widely shared at the time. For example, in pre-filed questions before the Board, a similarly situated company summarized its understanding of the rule as follows: "If an ASD is completed *that successfully demonstrates another source*, then there is no release from the regulated unit and there is no need for initiating a nature and extent characterization under this rule." Midwest Generation, LLC's Questions for Illinois Environmental Protection Agency, R20-19 (June 23, 2020), *available at* https://pcb.illinois.gov/documents/dsweb/Get/Document-102465, at 12 (emphasis added). Thus, other affected companies understood that to reach the ASD rule's safe harbor they would have to "successfully demonstrate another source." This requirement should not have come as a surprise to Petitioner either.

D. Petitioner improperly resorts to information outside the Agency Record.

Petitioner's Motion relies heavily on improper usage of deposition testimony and discovery responses, and belated technical submittals. *See, e.g.,* Pet'r MSJ at 20–23. For example,

> IEPA witnesses involved in and responsible for review of the ASD and issuance of IEPA's Denial agreed that it would take 21-42 weeks of time to

[8] The testimony Illinois EPA was responding to makes this even clearer. The witness advocated that the ASD provision be re-drafted to, among other things "require an affirmative demonstration of the location of the alternative source and the extent of the source's impacts to water quality." *See* Pre-Filed Testimony of Mark Hutson, PCB R20-19 (Aug. 27, 2020), *available at* https://pcb.illinois.gov/documents/dsweb/Get/Document-102854. At issue in this rejected proposal, thus, was not whether the alternative source must be identified and proven to be responsible for the contamination, but whether it must be affirmatively located and mitigated. Indeed, the Illinois EPA comment goes on to say that "[t]he 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*." Pet'r MSJ, Ex. D at 74 (emphasis added). Moreover, this statement of the rule's overall purpose of ensuring that the impoundment is not responsible cannot be read to negate either ASD element, because *both* elements support that purpose. *See* Agency MSJ at 35–36 (detailing policy background of ASD rule).

> collect the information identified in "Data Gap 1" as interpretated by IEPA. Hunt Deposition at 81:20-82:2; Deposition of Heather Mullenax at 46:20-47:1 (May 28, 2024) (attached as Document 4 to PCB 2024-043, Illinois Power Generating Company v. Illinois Environmental Protection Agency, August 1, 2024 Expert Report of Mindy Hahn) ("Mullenax Deposition"); Exhibit A.

Pet'r MSJ at 20–21.

But in an appeal of a final agency action, the Board's review is "based exclusively on the Agency record before the Agency at the time the . . . decision was issued." 35 Ill. Adm. Code 105.412. To prevail, Petitioner must therefore show that the record before Illinois EPA when it issued the nonconcurrence decision showed that Petitioner's ASD submittal entitled it to a concurrence. Therefore, deposition testimony, an expert report that was not before the Illinois EPA at the time the nonconcurrence was issued, and other information elicited through discovery that Petitioner repeatedly references in its arguments are totally irrelevant to the decision before the Board and cannot be considered. Though Petitioner attempts to confuse the issues by introducing information into the Board's record that was not before Illinois EPA when the decision regarding the Newton ASD was made, the Board may only consider the information contained in the Agency Record.

And even if the depositions were relevant to the Board's considerations, Petitioner deposed both Lauren Hunt and Heather Mullenax in their individual capacities, months after the nonconcurrence decision was made and long after the relevant considerations left their minds. Ms. Hunt and Ms. Mullenax could not speak on behalf of Illinois EPA, no matter that they were present and involved in the ASD decision-making process. If Petitioner had wanted someone to speak on Illinois EPA's behalf, Petitioner could have availed itself of Supreme Court Rule 206(a)(1), which would have required Illinois EPA to designate a representative for deposition. But Petitioner failed

to do so, leaving Ms. Hunt and Ms. Mullenax to speak for themselves. Petitioner's arguments that rely on this testimony, and any other material outside the Agency Record, should therefore be disregarded.

E. Petitioner was not entitled to a concurrence.

Finally, as the Board observed in adopting Part 845, the ASD process is an optional exception for which an owner/operator *might* qualify. *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, R20-19 (Feb. 4, 2021), slip op. at 81. Illinois EPA is not at fault for Petitioner's failure to collect data already required by the CCR permitting process and necessary for a successful ASD, which left Petitioner unable to take advantage of the narrow exception that the ASD process offers. Illinois EPA thus acted correctly in requiring Petitioner to show that it qualified for the ASD exception, rather than treating the ASD as something to which Petitioner was automatically entitled.

An ASD is not a simple box-checking exercise. The ASD rule is written in broad terms, allowing for the wide range of circumstances that might arise at CCR impoundments and sources that might exist, and therefore does not closely specify either the particular evidence required for an ASD or the grounds on which Illinois EPA might elect to concur or not concur in the ASD. For that reason, as the Agency has argued in its Motion, the appropriate standard for the Board's review is abuse of discretion. *See* Agency MSJ at 6–7. Some situations may require more specificity in identifying the alternative source, others less. Indeed, in this case, nothing in Illinois EPA's nonconcurrence suggests that Illinois EPA expected Petitioner to locate the *exact* crack in the bedrock through which Petitioner contended that the chloride-rich groundwater had flowed—only to provide sufficient site-specific evidence to show that such a pathway actually exists at the site (and also that the PAP did not contribute to the contamination). As detailed above and in the

Agency MSJ (at 25–35), under the circumstances of this ASD, the information Illinois EPA identified in the Data Gaps was necessary in order to satisfy the rule's requirements. But even if the Board were to conclude that the ASD rule did not categorically require this data in this particular case, requiring such data would be well within Illinois EPA's reasonable discretion.

V. Conclusion

In its Motion, Petitioner aims the wrong weapon at the wrong target for the wrong reasons—and misses. First, Petitioner's Motion fails because even if Illinois EPA were to concede every argument Petitioner makes against the data gaps listed in Illinois EPA's nonconcurrence, there would still be no basis for summary judgment in Petitioner's favor. Second, Petitioner's arguments rely on an untenable reading of the ASD rule that the rule's text does not support. Third, Petitioner's arguments against Illinois EPA's data gaps are unavailing, because each gap correctly identifies information that would be necessary under the circumstances for Petitioner to make the required demonstration. And finally, Petitioner's arguments are further refuted by the context and purpose of the ASD rule, a limited exception tightly constrained by the imperative to protect the public health and environment of Illinois from the hazards of CCR surface impoundments.

Petitioner may try to shift the blame onto the Illinois EPA for its failures, but the goalposts have not moved. The missing information identified in the data gaps is required of all similarly situated CCR impoundment owners when submitting permit applications for existing impoundments. Petitioner was on notice that this data was required by Illinois EPA; the failure to collect this information in a timely manner is no one's fault but Petitioner's. Petitioner's ASD submittal failed because it fell short of satisfying the elements set forth in the ASD rule. Illinois EPA's data gaps simply detail certain specific ways the ASD submittal fell short. There is no genuine issue of material fact that the submittal failed to meet the minimum ASD requirements. Therefore, Illinois EPA acted correctly as a matter of law in not concurring with the ASD submittal.

For all these reasons, Respondent, the Illinois Environmental Protection Agency, requests that the Board deny Petitioner Illinois Power Generating Company's Motion for Summary Judgment.

Respectfully Submitted,

PEOPLE OF THE STATE OF ILLINOIS
ex rel. KWAME RAOUL, Attorney General
of the State of Illinois

MATTHEW J. DUNN, Chief
Environmental Enforcement/Asbestos
Litigation Division

BY: /s/Samuel J. Henderson
/s/Mallory Meade

Samuel J. Henderson
ARDC # 6336028
Mallory Meade
ARDC # 6345981
Assistant Attorneys General
Environmental Bureau
Illinois Attorney General's Office
500 South Second Street
Springfield, IL 62701
Ph: (217) 720-9820
samuel.henderson@ilag.gov
mallory.meade@ilag.gov

DATED: October 31, 2024