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 **REPLY IN SUPPORT OF IPGC'S MOTION FOR SUMMARY JUDGMENT**; and a **CERTIFICATE OF SERVICE**, copies of which are herewith served upon you.

/s/ *Samuel A. Rasche*
Dated: November 15, 2024

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 15th day of November, 2024:

I have electronically served a true and correct copy of the attached Reply in Support of IPGC'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 37.

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

/s/ Samuel A. Rasche
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REPLY IN SUPPORT OF ILLINOIS POWER GENERATING COMPANY'S MOTION FOR SUMMAR JUDGMENT

Petitioner Illinois Power Generating Company ("IPGC" or "Petitioner") files this Reply in support of its Motion for Summary Judgment ("Reply"), pursuant to 35 Ill. Adm. Code § 101.516 and Hearing Officer's Order in this matter dated June 17, 2024.

In support of this Reply, IPGC states as follows:

I. INTRODUCTION

On October 1, 2023 IPGC filed a Motion for Summary Judgement ("Motion") explaining that it is entitled to summary judgment as a matter of law because the Illinois Environmental Protection Agency's ("IEPA" or the "Agency") November 7, 2023 denial ("Denial") of IPGC's alternative source demonstration ("ASD") for the Newton Power Plant ("Newton") Primary Ash Pond ("PAP") is not supported by a plain reading of 35 Ill. Adm. Code Part 845 ("Part 845"), and upholding the denial would lead to impermissible "absurd, unreasonable, inconvenient, or unjust" results.

IEPA's Response to IPGC's Motion for Summary Judgment ("Response") is a smoke and mirrors attempt to distract from the issues at the center of the Motion. First, IEPA's Response misconstrues the scope of this appeal and the burden of proof. IPGC's appeal is a challenge to *IEPA's Denial* of the ASD. The case law is clear: the Denial frames the scope of appeal. *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142, slip op. at 5-6 (Dec. 20, 1990). IPGC's burden of proof is to show by a preponderance of the evidence that the Agency's reasons for Denial do not warrant affirmation. *Cassens and Sons, Inc. v. IEPA*, PCB 01-102, slip op. at 10 (Nov. 18, 2004).

Second, IEPA's Response misconstrues the basis of IPGC's Motion. No part of IPGC's Motion is based upon whether its ASD must have identified an alternative source. Indeed, it is an undisputed fact that IPGC's ASD identified the bedrock underlying well APW15 as the source of the chloride exceedance. The issues at the center of the Motion are whether the three "Data Gaps" IEPA provided as the bases for its denial are inappropriate as a matter of law. The Denial states that IEPA "does not concur [with the ASD] due to the following data gaps:" D. 32 at R001965.

1. "Source characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with SW846" ("Data Gap 1").
2. "Hydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and presented with hydrogeologic characterization of bedrock unit" ("Data Gap 2").
3. "Characterization to include sample and analysis in accordance with 35 IAC 845.640 of alternative source must be provided with ASD" ("Data Gap 3").

The Denial provides no additional reasons or bases for IEPA's decision. As explained in IPGC's October 31, 2024, response to IEPA's October 1 Motion in this proceeding, there are various

factual reasons as to why IEPA's Denial was inappropriate, including because the identified "Data Gaps" are irrelevant and unnecessary to support the ASD. As IPGC's Motion states, however, putting those issues to the side, the Denial is also not appropriate as a matter of law and IEPA provides no evidence refuting that a Denial based on each of the Data Gaps would result lead to absurd, unreasonable, inconvenient or unjust results.

The Board should grant IPGC's Motion.

II. IEPA Mischaracterizes the Scope of this Appeal and IPGC's Burden of Proof

A. IEPA misunderstands the scope of this proceeding; IEPA's denial letter governs its scope.

IEPA misrepresents IPGC's Motion and incorrectly states (without legal support) that "Petitioner must make the case to the Board that, as a matter of law, Illinois EPA was required to concur in its ASD submittal." Response at 1. However, it is well settled that, in review of final Agency decisions before the Board, the "Agency's denial letter frames the issues on appeal." *Aqua Illinois v. Illinois EPA,* PCB 23-12, slip op. at 8 (Dec. 15, 2022) (*citing ESG Watts, Inc.* v. PCB, 286 Ill.App.3d 325 (3rd Dist. 1997). IEPA appears to believe that a nonconcurrence under 845.650(e) is an exception and that it is entitled to re-examine any and all issues related to the Newton ASD at this review stage. IEPA does not and cannot support this belief.

IEPA cites to *Aqua Illinois* to support its proposition that to prevail before the Board on appeal IPGC must "prove each ASD element to the applicable legal standard[.]" Motion at 5 (*citing* PCB 23-12, slip op. at 8 (Dec. 15, 2022)). But IEPA confuses IPGC's burden when submitting the ASD with IPGC's burden at summary judgment and hearing *in this appeal*. The Board in *Aqua Illinois* made clear that the *denial letter* frames the issues on appeal and that the burden of proof on appeal is "to demonstrate that the reasons for denial detailed by the Agency *in its denial letter* are inadequate . . .." PCB 23-12, slip op. at 8 (Dec. 15, 2022) (emphasis added). Thus, the Board

in *Aqua* did not inspect the full scope of the permit submittal and evaluate each individual element, but instead only considered the issues raised by the Agency in its denial letter. *Id.* at 8-9.

IEPA reasons that, because 845.650(e) does not enumerate specific elements that must be in a nonconcurrence, "even if all three data gaps were stricken out, leaving only the statement that 'Illinois EPA does not concur with the [Newton ASD],' Illinois EPA's nonconcurrence would still be sufficient under the Board Rules." IEPA Response at 1-2. First, this argument is irrelevant because IEPA's denial letter for the ASD does, in fact, express the reasons the Agency did not concur with the ASD, though it may now regret or wish to change those reasons. R. 32. This argument also flies in the face of settled Illinois law. The Board and Illinois courts have long and consistently held that the denial letter of a requested authorization must frame the issues on appeal because "[p]rinciples of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases" for IEPA's decision. *See, e.g.*, *Centralia Env't Servs., Inc. v. IEPA*, PCB 89-170, slip op. at 7 (May 10, 1990); *Pulitzer Cmty. Newspapers, Inc. v. IEPA*, PCB 90-142, slip op. at 6-7 (Dec. 20, 1990) (barring IEPA from asserting on appeal new bases for denial not disclosed in the denial letter). 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." *Cassens and Sons, Inc. v. IEPA*, PCB 01-102, slip op. at 10 (Nov. 18, 2004). It would be impossible for *any* petitioner to craft an appeal of an IEPA decision without notice of IEPA's bases for its decision.

Thus, IEPA's position that its review of an ASD is entirely discretionary, and that it need not provide *any* basis for its decision when issuing a nonconcurrence, is fundamentally at odds with the Board's Part 105 rules and text and purpose of 845.650(e) which provide owners and operators a right of review before the Board: IEPA's interpretation would render the right to appeal

meaningless. The purpose of an appeal is to provide petitioners the opportunity "to challenge the reasons given by the Agency for [the denial] by means of cross-examination and the receipt of testimony to test the validity of the information [relied on by the Agency]." *Estate of Gerald D. Slightom v. IEPA*, PCB 11-25, slip op. at 15 (Nov. 1, 2012) (*citing Alton Packaging Corp. v. PCB*, 162 Ill.App.3d 731, 738 (5th Dist. 1987)); *John C Justice v. IEPA*, PCB 95-112, slip op. at 8 (March 21, 1996). A petitioner cannot "challenge the reasons given" unless the Agency first gives a reason.

Indeed, IEPA's interpretation of the 845.650(e) would allow the Agency to summarily issue a nonconcurrence without conducting any review of an ASD whatsoever, forcing the owner or operator to appeal to the Board, at which point IEPA could retroactively develop justifications for its denial. Petitioners meanwhile would be forced to guess at IEPA's bases for denial until, at the earliest, a motion for summary judgment before the Board. IEPA cannot infer this absurd result simply because the rules do not spell out the exact elements that it must include in its denial.[1]

[1] IPGC notes that, far from being a slippery slope, this is essentially what IEPA seeks to do in the current appeal. IEPA staff responsible for reviewing the Newton ASD and drafting the denial letter admitted they conducted only a cursory review of the ASD and that they did not review a *single one* of the scientific references cited by the ASD. Deposition of Lauren Hunt at 127:14-21 (May 28, 2024) ("Hunt Deposition"); Deposition of Heather Mullenax at 74:5-10 (May 28, 2024) ("Mullenax Deposition") (The Hunt and Mullenax Depositions are attached as Document 3 and 4, respectively, to PCB 24-43, August 1, 2024, Expert Report of Mindy Hahn, and relevant excerpts are attached to this Reply as Exhibit A). IEPA confirmed that these were the *only two* employees that directly reviewed the Newton ASD. PCB 24-43, Respondent's Answers to Petitioner Illinois Power Generating Company's First Set of Interrogatories (May 23, 2024) (attached as Exhibit A to IPGC's Motion). IEPA's review of the record was so perfunctory that IPGC's groundwater monitoring submission (that was submitted to IEPA and cited to and/or excerpted from throughout the ASD, Comment Letter, and Petition), *through which IPGC reported to IEPA the very exceedance that gave rise to the ASD*, was not even included in the Agency's administrative record, and IEPA has defended its position that this document was not "before it" during its review. PCB 24-43, Agency's Response to Petitioner's Motion to Supplement Record at 19-20 (July 15, 2024). IEPA, meanwhile, continues to attempt to move the target on why it issued its denial. *See*, Respondent's Motion for Summary Judgment at 10-24 (October 1, 2024) *and* IPGC's Response to IEPA's Motion for Summary Judgement at 11-15 (October 31, 2024).

B. IPGC's Motion asks the Board to rule on whether IEPA's Denial is appropriate as a matter of law, an appropriate scope of relief for the appeal of a final Agency decision.

Thus, contrary to IEPA's suggestion, this proceeding does not involve reexamination of the entirety of the Newton ASD, but rather is an examination of whether IEPA's bases for denying the ASD are "insufficient to warrant affirmation." PCB 01-102, slip op. at 10 (Nov. 18, 2004). IPGC's Motion for Summary Judgment appropriately asks the Board to determine that IEPA's Denial was improper as a matter of law because the Denial the data requirements IEPA seeks for the alternative source demonstration do not exist under the plain reading of the law and because requiring such data "would result in absurd, unreasonable, inconvenient, or unjust consequences."[2] Motion at 23.

IPGC notes that Board relief to petitioners appealing a final agency decision typically falls into one of two categories: (1) remand with instructions for the Agency to reverse its decision or (2) remand with instructions for the Agency to reconsider a decision in light of the Board's decision on the appeal.

In some instances, where the Agency has issued a denial on an improper basis, the Board has remanded with instructions for the Agency to reverse its decision. *See, e.g., Saline County Landfill Inc. v. IEPA*, PCB 04-117, slip op. at 16 (May 6, 2004) ("because the sole denial reason was the failure to include proof of local siting approval, the permit must be issued. The Board will remand the case to the Agency for issuance of the permit."); *Emerald Performance Materials, L.L.C. v. IEPA*, PCB 04-102, slip op. at 19 (Oct. 15, 2009) (remanding for re-issuance of CAAPP permit without condition improperly included based on improper premise of applicability of 35

[2] Should the Board deny IPGC's Motion, IPGC is prepared to proceed to hearing on the issue of whether the Agency's stated reasons were sufficient to support its Denial.

Ill. Adm. Code 214.301 to Emerald's MBT-C process and condensers); *Ill. Power Co. v. IEPA*, PCB 97-36, slip op. at 15 (Jan. 23, 1997) ("since the only reason the Agency's based its denial was due to Illinois Power's lack of local siting approval, the Board finds that there are no genuine issues of material fact remaining and that Illinois Power is entitled to judgment under the law.").

Elsewhere, where the Board found a denial letter inadequate but lacked sufficient information to order a reversal of the Agency's decision, it has remanded back to the Agency on a *specific basis* for re-review in light of the Board's decision. *See, e.g., Pulitzer Cmty. Newspapers, Inc. v. IEPA*, PCB 90-142 at 6 (Dec. 20, 1990) (ruling in favor of petitioner and remanding for further consideration because the Agency had not made a determination regarding the reasonableness of costs, as required under Statute); *KCBX Terminals Co. v. IEPA*, PCB 14-110, slip op. at 46–57 (June 19, 2014) (Sept. 4, 2014) (remanding application to the Agency for "additional consideration of the information in the application" consistent with the Board's order and applicable laws); *Calvary Temple Church v. IEPA*, PCB 90-3, slip op. at 7 (Apr. 26, 1990) (finding cursory denial inadequate and remanding to Agency for fulsome technical review).

Plainly, the Board has discretion to grant summary judgment for IPGC in this proceeding based on a finding that IEPA's Denial was inadequate as a matter of law.

III. IEPA's Response Does Not Rebut IPGC's Arguments that Requiring Data Gaps 1-3 Would Lead to Absurd, Unreasonable, Inconvenient or Unjust Results

As an initial matter, IEPA does not dispute that the Data Gaps are not required under the plain letter of the law. IEPA's Response does not raise any argument indicating a legal requirement that any of the three "Data Gaps" be included in a Part 845 alternative source demonstration. IEPA does raise the irrelevant argument that 845.650(e) requires identification of an alternative source. But failure to identify an alternative source was not identified as a basis for IEPA's denial and IPGC's Motion does not rest on whether an alternative source must be identified. Indeed, the ASD

identifies the bedrock underlying APW15 as the specific source of the chloride exceedance in that well. The issue at the heart of the Motion is whether, as a matter of law, it is appropriate for IEPA to base its denial on Data Gaps 1-3.

The alternative source demonstration requirements in Part 845 do not set out any specific data requirements that must be included in a demonstration. Thus, the rule necessarily requires the application of judgement in determining what facts and evidence to include and consider and how those facts and that evidence inform a conclusion. However, IEPA's reasons for denial should be reasonable and of a nature where it would be possible for an owner or operator to have complied and achieved an approval. Allowing IEPA to base a denial on absurdities, impracticalities and, in the case of Data Gap 1, an impossibility, is untenable.

As explained below, IEPA's Response does not provide a legal or evidentiary basis upon which to deny IPGC's Motion.

A. The Case Law on Absurd, Unreasonable, Inconvenient or Unjust Results is Applicable Here; IEPA Does Not Distinguish these Cases.

IEPA seeks to waive away the argument that its Denial represents an absurd and unjust reading of the rules by suggesting (without support) that "the time-honored principle of avoiding inconvenient results guides the *interpretation* of rules, not their *application*." Response at 7 (emphasis added). *Id.* at 8. It is unclear how IEPA's distinction between interpretation and application can be a meaningful one in this context, since the "results" of a rule's interpretation can only be absurd, unreasonable, inconvenient or unjust in the context of the *application* of that rule.

IEPA does not dispute that it would have been impossible for IPGC to develop the information outlined in the Denial letter prior to the deadline for submitting an ASD. IEPA

nevertheless appears to believe that its Denial is permissible because the absurd and unjust results apparent in this specific instance may not apply in every situation.[3] But Illinois courts do not share IEPA's absolutist view of this legal doctrine. *See People ex rel. Cmty. High Sch. Dist. No. 231 v. Hupe*, 2 Ill. 2d 434, 447–48 (1954) ("While the bonded indebtedness of all high school districts may not be such as to produce the result in this case . . . we may take judicial notice that the petitioner district is not alone in the situation it finds itself and that the absurd consequences produced by a literal construction of section 19-33 would have a statewide effect . . .").[4]

IEPA next seeks to avoid discussing the consequences of its interpretation by raising superficial distinctions between the facts of the specific cases articulating the rule against absurd results cited in IPGC's Motion. Response at 8-10.[5] IEPA first suggests that *Bank of N.Y. Mellon v. Laskowski*, 2018 IL 121995, cannot apply here because the proposed reading of the statute at issue in that case would have resulted in an impossibility. Response at 8. Setting aside that IPGC has presented evidence that IEPA's interpretation of Section 845.650(e) does in fact impose impossible requirements, a result can easily be "absurd" or "inconvenient" without being impossible. The

[3] *See* Response at 8 ("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*.") (emphasis in original).

[4] Additionally, the idea that there are or may be other similarly situated owners or operators to IPGC is not a hypothetical one. IEPA has issued other denials on similar bases. See, e.g. Petitions for Review in PCB 24-45 (Dec. 22, 2023), PCB 24-48 (Jan. 12, 2024), and PCB 24-55 (Feb. 20, 2024) (challenging IEPA denials predicated upon the same or substantially similar "Data Gaps").

[5] IEPA also "distinguishes" *Midwest Sanitary Serv. v. Sandberg*, 2022 IL 127327 by asserting that the Court "recited the doctrine of absurdity avoidance but did not apply it." Response at 9. IPGC chose this citation do demonstrate the rule against absurd results is a basic tenet of statutory interpretation currently used by the highest court in the state. Regardless, the Court in *Midwest Sanitary Serv.* cited to multiple cases in which the doctrine was in fact applied. *See e.g., In re Mary Ann P.*, 202 Ill. 2d 393, 406, 781 N.E.2d 237, 245 (2002) (interpretation which would allow a jury to substitute a medical treatment different from the one recommended by testifying physicians would be absurd).

court in *Bank of N.Y. Mellon* did not hold otherwise, and the case law makes clear that impossibility is not needed for the rule against absurd results to apply. *See, e.g., People v. Acevedo*, 275 Ill. App. 3d 420, 426 (1995) (holding it would be inconvenient and absurd to require a financial impact statement already on file with the clerk to be re-filed at every sentencing hearing); *In re Mary Ann P.*, 202 Ill. 2d 393, 406 (2002) (rejecting as absurd interpretation which would allow a jury to substitute a medical treatment different from the one recommended by testifying physicians).

IEPA attempts to distinguish *People v. Wilhelm*, 346 Ill. App. 3d 206 (2004) and *Village of Fox River Grove v. Ill. Pollution Control Bd.*, 299 Ill. App. 3d 869 (1998) on the basis that the court first found ambiguity in the relevant statutes. Response at 9. But this distinction is irrelevant, as the rule against absurdity is an exception to the usual rule that courts must adhere to the plain language of a statute. *See, Bank of N.Y. Mellon*, 2018 IL 121995, ¶ 12 ("[W]here a plain or literal reading of a statute renders [absurd, inconvenient, or unjust] results, the literal reading should yield."). Thus, regardless of whether a statute or rule is ambiguous, the Board "may always consider the consequences of construing the law one way or another and may always consider whether a particular interpretation of the statute will lead to absurd, inconvenient, or unjust results." *People v. Brown*, 2020 IL 124100, ¶ 30.

IEPA's analysis of *McMahan v. Industrial Comm'n*, 183 Ill.2d 499 (1998), is simply incomplete. IEPA suggests the court there ruled based on the stated purpose of the applicable statute, not on the rule against absurdity. Response at 9. But IEPA is conflating two separate bases the court articulated to support its conclusion. *After* concluding that a literal reading would be contrary to the statutory purpose, the court continued: "Further supporting our conclusion is the

principle that no statute should be construed in a manner which will lead to consequences which are absurd, inconvenient, or unjust." 183 Ill.2d at 513-14.[6]

IEPA next appeals to the plain language of the authorizing statute, which required Board to "describe the processes and standards for identifying a specific alternative source of groundwater pollution." Response at 9-10 (*quoting* 415 ILCS 5/22.59(g)(11)). It implies that Petitioner's argument should not stand (IPGC assumes for Data Gaps 2 and 3) considering this language. To begin with, IEPA misconstrues the ASD and IPGC's motion for summary judgment – the ASD *did* identify a specific alternative source and IPGC's Motion is not dependent upon an argument that it was not required to do so. R. 12 at R001613, 1617. Regardless, however, as explained above, the rule against absurd results is an *exception* to the plain meaning rule.

IEPA finally provides the conclusory statement that IPGC's position would be contrary to the purpose of the authorizing statute because it "would fail to protect the public health and environment of Illinois and would be less protective than the federal rules." Response at 10. Yet, IEPA does not provide any argument or explanation for this conclusory statement. Significantly, IPGC's argument is not predicated on the idea that *any* denial of an alternative source demonstration by the Agency cannot stand or that an alternative source demonstration need not

[6] IEPA also fails at distinguishing case law regarding reading requirements into the plain meaning of the law. First, IEPA's assertion that "the quote from *Meredosia Unit 3* on which Petitioner relies is a blockquote from an earlier appellate decision" (Response at 10-11) is false and misleading. IPGC quoted the Board's own language and reasoning, and the block quote IEPA refers to comes afterwards as additional support for the Board's conclusion. PCB 86-147, slip op. at 6 (March 19, 1987). Further, the *Meredosia Unit 3* opinion supports IPGC's position. That case involved interpreting a regulation which referenced the requirements of another rule (Rule 204). *Id*. at 3-5. Petitioner argued that the Board had intended to refer only to a specific subsection of Rule 204, but the Board held that, because the regulatory text plainly referenced the entire rule, it could not read in the specificity that Petitioner requested. *Id*. at 6-7. This caselaw contradicts any suggestion by IEPA that the "Data Gap" information is required as a matter of law, as it is inappropriate to read in a legal requirement to use specific information, procedures and methods when into a rule which contains no such specificity.

include "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." Rather, its argument is that the "Data Gaps" upon which IEPA bases its Denial would yield absurd, unreasonable, inconvenient or unjust results rendering the Denial unlawful.

B. The Response does not dispute that a Denial based on the "Data Gaps" would lead to absurd, unreasonable, inconvenient or unjust consequences.

Data Gap 1

IEPA claims "Data Gap 1" is "necessary to evaluate the second ASD element, namely whether the impoundment contributed to the contamination" and then suggests that IPGC "failed to conduct representative waste characterization of the PAP pursuant to the Boards Rules." Response at 15. Rather, the "Data Gap" asserts that source characterization "must include total solids sampling in accordance with SW846."[7] R. 32 at R001965. Tellingly, IEPA does not point to any plain language requirement in Part 845 for an alternative source demonstration to "include total solids sampling in accordance with SW846" and, as IPGC has explained, requiring the ASD to include "total solids sampling in accordance with SW846" would lead to absurd, unreasonable, inconvenient and unjust results. As explained below, IEPA provides no argument or evidence to refute IPGC's arguments on Data Gap 1.

IPGC's Motion explained that conducting total solids sampling of CCR at the PAP for

[7] This is among IEPA's many attempts to mischaracterize its Denial and IPGC's Motion. The issue of what type of characterization is helpful to demonstrate a CCR surface impoundment's impact or lack of impact to groundwater is one of fact, subject to differing expert opinions. See IPGC's Response to IEPA's Motion for Summary Judgment at 36-39. The ASD included site-specific porewater sampling data (among other evidence) to determine whether the PAP may have contributed to the chloride exceedance in APW15. However, IEPA's Denial is based, in part, on the specifics of "Data Gap 1" - that total solids sampling characterization in accordance with SW846 was required. IPGC has presented evidence that such information is irrelevant from a factual standpoint, but in its Motion for Summary Judgement the issue is whether, from a legal standpoint, it may serve as a basis for Denial.

chloride (or chlorine) would have been an impossibility because there is no SW846 total solids sampling methodology for chloride (or chlorine). Motion at 21-22. IEPA's Response provides no evidence of an SW846 total solids sampling methodology that includes chlorine or chloride – because there is none. Perhaps acknowledging their lack of rebuttal for this argument, IEPA delegates its response to this undisputed fact to a footnote. Response at 16, n. 7. There, IEPA attempts to gloss over this defect in its Denial by opining, without support, that the Petitioner's argument is correct in only a "very narrow sense." Response at *Id.* IEPA then cites to Method 9056A,[8] a SW846 method for determination of chloride in an *aqueous* (i.e. water) sample. This only further supports IPGC's argument. The method IEPA points to is not a "total solids sampling" method. It relates to analysis of an aqueous sample. This is not what IEPA has asked for in Data Gap 1. On its face, this "Data Gap" is related to *total solids sampling* not aqueous sampling. PCB 24-43, August 1, 2024, Expert Report of Mindy Hahn ("Hahn Report") at 18. The IEPA employee who authored this Data Gap further explained it means sampling of the solids located within the PAP, not aqueous samples. Hunt Deposition at 74:1-7. There is no SW846 method that allows for total solids sampling for chloride/chlorine and IEPA provides no evidence disputing this fact.

In a common theme in this proceeding, IEPA then tries to change its tune, suggesting IPGC's argument should fail because IPGC did not include *any* total solids sampling data from Newton in its submittal. Response at 16. From a factual perspective, this unsupported statement is incorrect. IPGC did collect and provide IEPA with total solids sampling data from the PAP for the metals regulated under 845.600 (for which there are SW846 total solids sampling methodologies).

[8] Method 9056A available at https://www.epa.gov/sites/default/files/2015-12/documents/9056a.pdf

R. 10 at R000738.

Perhaps knowing IEPA cannot make an argument for requiring chloride total solids sampling data pursuant to SW846 with a straight face, IEPA then attempts to take issue with the porewater data IPGC included in support of its ASD. As IPGC, the United States Environmental Protection Agency ("USEPA"), and other scientific resources, have explained, porewater sampling is the most trusted and accurate methodology to determine what contaminants may be leaching from a CCR surface impoundment. *See* Hahn Report at 6-9, 19-20. Regardless, here, this issue is *not relevant* and is an attempt by IEPA to distract from the issue at hand. IPGC's porewater data is not the subject of IEPA's Denial or "Data Gap 1."

IEPA further does not dispute that it would be impossible to collect the information in "Data Gap 1" within the 60 days an owner or operator has to prepare an alternative source demonstration. Instead, IEPA suggests IPGC should have included the "Data Gap 1" information with its ASD and was provided "notice" regarding the need for that information in an alternative source demonstration because "Petitioner was already required to collect and provide such data" under 35 Ill. Adm. Code 845.230(d)(2)(C). Response at 16. However, 35 Ill. Adm. Code 845.230(d)(2)(C), which relates to operating permit application requirements, provides that an initial operating permit for an existing or inactive CCR surface impoundment must contain "[a]n analysis of the chemical constituents of all waste streams, chemical additives and sorbent materials entering or contained in the CCR surface impoundment." 35 Ill. Adm. Code 845.230(d)(2)(C). Noticeably absent from a plain reading of this provision is a requirement for "total solids sampling in accordance with SW846" of a CCR surface impoundment. Also absent is any suggestion that this data must be included in an alternative source demonstration. Further, given that there is no SW846 total solids sampling methodology that includes chloride, IEPA seems to be arguing that

IPGC had "notice" to do the impossible. As noted above, if IEPA's "Data Gap 1" is based on its search for total solids sampling in accordance with SW846 for constituents *other* than chloride, no data gap exists because IPGC did provide such data in its operating permit application (which is incorporated by reference into its ASD).[9] R. 10 at R000738; R. 12 at R001618.

Data Gaps 2 and 3

With respect to Data Gaps 2 and 3, IEPA raises arguments that are indicative of a factual dispute. See Response at 17-18 (claiming that the information in these Data Gaps is needed to evaluate "Petitioner's argument in support of the [bedrock] alternate source"). Putting that issue aside, however, IEPA does not rebut the absurd, unreasonable, inconvenient and unjust results of upholding a denial on the basis of Data Gaps 2 and 3.

IEPA does not dispute that the information it seeks in Data Gaps 2 and 3 could not have been collected within the 60-day period for compiling an alternative source demonstration. Instead, the Agency accuses IPGC of hyperbole for suggesting that allowing IEPA's Data Gaps 2 and 3 would require an owner or operator, like IPGC, to forecast any and all potential alternative sources before detecting an exceedance. Response at 20. However, the Agency does not argue or provide evidence that IPGC's assertion is incorrect. Nor does it explain why or how it is not absurd,

[9] IEPA continues to grasp at an argument that Part 845 somehow contains a legal requirement that *all* sampling used in support of an alternative source demonstration be conducted using an SW-846 methodology. As IPGC has explained, does not. *See* IPGC Response to IEPA Motion for Summary Judgment at 36. The Agency now suggests that 845.640(j)'s incorporation of SW-846 for *groundwater samples* somehow applies to all samples (including solids samples) that because "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." Response at 15-16. IPGC does not dispute that a sample should be analyzed using the best applicable scientific methodology. But any suggestion that 845.650(j) contains a legal requirement that applies to every type of sample considered for an alternative source demonstration, including solids samples, is plainly incorrect on the face of the regulation. Section 845.650(j) applies to "groundwater samples." A solids sample is not a groundwater sample.

unreasonable, inconvenient and unjust to require an owner or operator to collect data regarding a potential alternative source before the owner or operator knows there is an exceedance or that the alternative source may be the reason for that exceedance.

Accepting that there is no way an owner or operator could gather the information in Data Gaps 2 and 3 during the period for compiling an alternative source demonstration, IEPA tries to argue that IPGC should have collected this information as part of the CCR surface impoundment permitting process, citing provisions in other sections of Part 845. Response at 20. This argument does not pass muster. First, none of the citations support IEPA's contention that the information must have been collected under a permitting requirement. Second, IEPA points to no requirement that this information must be collected for consideration or inclusion in an alternative source demonstration.[10] Specifically, the Agency cites to provisions related to the hydrogeologic site characterization an owner or operator of a CCR surface impoundment is required to include in its operating permit application (35 Ill. Adm. Code 845.610(b)(1)(A), 845.620).[11] However, no part of the hydrogeologic site characterization provisions require an owner or operator to determine the hydraulic conductivity of and conduct direct sampling and analysis of every potential alternative source. This is evident from the plain language of 35 Ill. Adm. Code 845.610(b)(1)(A) and 845.620. The closest support for IEPA's argument is a requirement in 845.620(b)(16) that the hydrogeological characterization include "hydraulic conductivities" for "the geologic layers

[10] As the parties have noted, IEPA has yet to issue an operating permit for the PAP. Any issues related to data required for an operating permit should be dealt with in the context of the permitting process.

[11] IEPA also confusingly and irrelevantly throws in a citation to 35 Ill. Adm. Code 845.630, referencing a portion of the 845.630 requirements regarding where and how background wells should be positioned for a CCR surface impoundment's groundwater monitoring system. This provision has nothing to do with physically characterizing an alternative source including through collecting its hydraulic conductivity data or sampling and analyzing that alternative source.

identified as migration pathways and geologic layers that limit migration." However, the bedrock is neither of these things, nor does IEPA contend that it is. R. 10 at R000711-724. None of the cited provisions include a requirement for sampling and analysis of potential alternative sources. IEPA references a requirement in 845.620(b) that requires an owner or operator to include in a hydrogeologic site characterization "[a]ny other information requested by the Agency that is relevant to the hydrogeologic site characterization." Assuming the information IEPA seeks in "Data Gaps 1 and 2" is relevant to the hydrogeologic site characterization, the Agency's first request for this information came *after* IPGC submitted the ASD. None of this would have made it reasonable for IPGC to have this information prior to the start of its ASD process.

IV. Expert Report and Deposition Testimony are Properly Within the Scope of Evidence that May be Offered

Contrary to IEPA's assertions, it is not improper for the Board to consider deposition testimony, expert reports, and other proofs and information obtained through discovery in an appeal of a final agency action. In fact, the Board routinely considers these types of information in appeals of final agency decisions, even if not part of the record before the Agency. *See e.g. Jack Pease dba Glacier Lake Extraction v. IEPA*, PCB 95-118, slip op. at 18–19 (July 20, 1995) (considering expert testimony); *John C Justice v. IEPA*, PCB 95-112, slip op. at 9–10 (Mar. 21, 1996) (considering expert testimony); *City of Quincy v. IEPA*, PCB 08-86, slip op. at 29 (June 17, 2010) (considering affidavit "though outside of the record and post-decisional"); *KCBX Terminals Co. v. IEPA*, PCB 14-110, slip op. at 54–55 (June 19, 2014) (allowing consideration of expert testimony); see also *IEPA v. Ill. Pollution Control Bd. and Waste Mgmt., Inc.*, 138 Ill. App. 3d 550, 552 (1985) (the Board hearing "includes consideration of the record before the [Agency] together with receipt of testimony and other proofs under the panoply of safeguards normally associated with a due process hearing").

This is because the petitioner must be able "to challenge the reasons given by the Agency for [the denial] by means of cross-examination and the receipt of testimony to test the validity of the information [relied on by the Agency]." *Est. of Gerald D. Slightom v. IEPA*, PCB 11-25, slip op. at 15 (Nov. 1, 2012) (citing *Alton Packaging Corp. v. Pollution Control Bd.*, 162 Ill. App. 3d 731, 738 (5th Dist. 1987)); *John C Justice v. IEPA*, PCB 95-112, slip op. at 8 (Mar. 21, 1996).

Here, the depositions and expert reports that the Agency contests are properly considered because they directly relate to cross examining the reasons given by the Agency for denial of the ASD and test the validity of the information the Agency relied upon for that denial. As the example cited by the Agency demonstrates, the depositions and expert testimony refute the validity of the "Data Gaps" identified by IEPA in its denial letter, which is what frames the proceeding.

V. IEPA Is Not Entitled to Absolute Discretion in Reviewing an ASD

As IEPA points out, Part 845 "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." Response at 24. IEPA argues, without legal support, that this entitles their decision to be reviewed under an abuse of discretion standard. IEPA's assertion goes against settled law. *Emerald Performance Materials, L.L.C. v. IEPA*, PCB 04-102, slip op. at 18 (Oct. 15, 2009); *Atkinson Landfill Co. v. IEPA*, PCB 13-008, slip op. at 8 (June 20, 2013); *see also* IPGC Response to IEPA Motion for Summary Judgement at 4-6. It also opens a slippery slope for IEPA to deny an alternative source demonstration for any reason, achievable or unachievable, absurd or not.

IEPA further suggests the impossibility of collecting data or inability to collect data within the period for obtaining an ASD should not be a hinderance to IEPA basing an alternative source demonstration denial on the lack of that information. Response at 24. IEPA suggests that, if obtaining the information IEPA seeks is not possible during the period for preparing an alternative

source demonstration, then IPGC (and other similarly situated owners and operators) need not submit an alternative source demonstration. This is surprisingly thoughtless and reckless. IEPA's approach suggests that it would have an owner or operator will develop a corrective action to stop contamination from a CCR surface impoundment that does not exist. USEPA, IEPA and the Board knew that a CCR surface impoundment groundwater monitoring network may be impacted by sources other than CCR surface impoundments and that the CCR surface impoundment may not be contributing to groundwater exceedances. That is why section 845.650(e) exists in the first place.

VI. CONCLUSION

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

Respectfully submitted,

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EXHIBIT A

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:

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NEW EXHIBITS MARKED

DISCOVERY DEPOSITION

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

alternative source of some kind.

And then for number two, hydraulic conductivities from the laboratory or in-situ testing. We felt that there needed to be better characterization of the bedrock unit, that's fracture flow. If you're -- yeah; bedrock wells can not be installed in just solid rock. And not have a hydraulic conductivity and be used to say that there is nothing going on without substantial bedrock characterization showing there is not actual -- the secondary flow path, which is the primary flow path really of fracture flow. And those have to be captured. Does that make sense? Am I making sense?

Q. Let's talk about this. Let's take a step back and talk about them one at a time, all right?

So, for number one, it says source characterization of CCR at the Primary Ash Pond must include total solid sampling in accordance with SW846, right?

A. Yes.

Q. Okay. First off, what do you mean by source characterization in accordance with SW846?

A. Okay. So, SW846 has methods for testing or analyzing a solid sample. It's incorporated by reference in 845. We're saying source characterization of the CCR must be total solids based on what is required in 230, what's required for the corrective action modeling for closure modeling, which is FATE and transport. For transport modeling calculations, you're going to need that source characterization or the waste characterization as it's stated in 845.230.

Q. Okay. So --

A. Go ahead.

Q. I was just going to ask a follow-up question there. So 845.230, that relates to what goes into your operating permit application, right?

A. Correct.

Q. And you're saying that that's useful information for sort of the life of the unit?

A. Correct.

Q. As it's closing and maybe needs to undergo corrective action?

A. Yes.

Q. How is it specifically helpful for

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

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DEPOSITION OF HEATHER MULLENAX
May 28, 2024
9:00 AM
133 S. Fourth Street
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Reported In Person By:

Deann K. Parkinson: CSR 84-002089

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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.