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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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, a copy of which is attached hereto and hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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Dated: November 15, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 15, 2024, he caused to be served by electronic mail, a true and correct copy of the following instruments entitled Notice of Filing and Respondent's Reply in Support of Its Motion for Summary Judgment to:

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

s/ Samuel Henderson
Samuel Henderson
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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

RESPONDENT'S REPLY IN SUPPORT OF ITS 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, pursuant to 35 Ill. Adm. Code Section 101.516, and hereby replies in support of its Motion for Summary Judgment of October 1, 2024 ("Agency MSJ" or "Motion"), and in opposition to Petitioner's Response of October 31, 2024 ("Pet'r Resp." or "Response"), as follows.

I. Introduction

As detailed in the Agency MSJ and summarized more briefly below, Petitioner's alternative source demonstration (ASD) submittal was inadequate as a matter of law under 35 Ill. Adm. Code 845.650(e) ("the ASD rule"). For that reason, there is no genuine issue of material fact that Illinois EPA was justified in its nonconcurrence. Petitioner's arguments to the contrary cast issues of law as issues of fact, and should therefore be rejected.

II. The Question Before the Board is One of Law

"The interpretation of a statute . . . is a matter of law and thus presents a matter that is appropriate for summary judgment." *Hooker v. Ret. Bd. of the Firemen's Annuity & Benefit Fund of Chi.*, 2013 IL 114811, ¶ 15. The appropriateness of summary judgment is also a matter of law.

Id. Thus, neither Petitioner's efforts to recast the interpretation of the ASD rule as a question of fact, nor its arguments over *whether* these disputes are issues of law, can create a genuine issue of material fact. The material facts are not in dispute: the Agency Record undisputedly reflects the record before the Agency at the time of the decision, on which the Board's review must be based. And as detailed in this Reply, there is no factual dispute that, as a matter of law, the content of Petitioner's ASD submittal, as contained in that record, fell short of what the ASD rule requires.

A. Summary judgment does not alter Petitioner's underlying burden.

Petitioner suggests that Illinois EPA may be confusing the relevant burdens in this case. Pet'r Resp. at 3. At the same time, Petitioner seeks to shift its own burdens onto Illinois EPA. *See, e.g.*, Pet'r Resp. at 7 n.3 (contending that Illinois EPA "incorrectly attempts [to] frame burden of proof . . . as applying to IPGC's ASD").

The following are the burdens at issue:

- First, as a submitter of an ASD, Petitioner bore the burden of demonstrating to Illinois EPA that the requirements of the ASD rule were met. *See* 35 Ill. Adm. Code 845.650(e). In so doing, Petitioner had to provide enough evidence to rebut the natural presumption that if a monitoring well that was designed and sited to detect contamination from a CCR surface impoundment detects contamination, the contamination probably came from the impoundment. *See* Agency MSJ at 10 n.1, 17, 18.[1]
- Second, as the appellant before the Board, Petitioner bears the burden of showing that Illinois EPA erred and Petitioner was entitled to a concurrence. 35 Ill. Adm. Code 105.112(a).

[1] Petitioner's Response does not appear to contest this point.

- Third, as the movant for summary judgment, Illinois EPA bears the burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *Adames v. Sheahan*, 233 Ill.2d 276, 295 (2009). Illinois EPA must moreover show that its right to judgment is "clear and free from doubt." *Id.* at 296.

All these burdens are evaluated on the record before the Agency at the time of the decision. 35 Ill. Adm. Code 105.214(a). And in a *de novo* review, by definition, the same burden applies before the Agency and on appeal, so Petitioner's two burdens are effectively the same.[2] Thus, putting it all together, to prevail in its motion, Illinois EPA must show that, based on the Agency Record, there is no genuine issue of material fact that Petitioner failed to carry its burden of showing that the ASD submittal met the requirements of the ASD rule.

Petitioner argues that Illinois EPA's "recitation of the [summary judgment] standard is too shallow" because it failed to also note that evaluations of witness credibility or evidence weight are out of place at summary judgment. Pet'r Resp. at 2. But this principle, although valid, is not relevant in a review based solely on the Agency Record, containing Petitioner's ASD submittal, where such evaluations would seldom have a place *either* at hearing or on summary judgment. Bearing this out, Petitioner's cited authorities on this point all relate to trial court proceedings rather than Board matters. *See* Pet'r Resp. at 3.

Petitioner lays great emphasis on the summary judgment standard, arguing that "IEPA's Motion is not based on undisputed material facts" and "inappropriately calls on the Board, at this summary judgment stage, to weigh the evidence." Pet'r Resp. at 3. Yet Petitioner's Response does

[2] As it did in its Motion, for brevity's sake Illinois EPA applies the *de novo* standard here, without prejudice to its arguments that a different standard is appropriate. *See* Agency MSJ at 6-7.

not dispute the *material* facts in this case—the content of the Agency Record—and thus makes no argument against summary judgment.

Petitioner also argues that summary judgment is improper because the short timeline for issuing an ASD decision means that the appeal is when the parties can put on their full evidence. Pet'r Resp. at 5, *citing ESG Watts, Inc. v. Pollution Control Board*, 286 Ill. App. 3d 325, 331 (3d Dist. 1997). Here Petitioner appears to confuse the *de novo* standard of review with a trial *de novo* in which new evidence can be presented. Petitioner's confusion may stem from the fact that the version of Part 105 in force until 2001, and thus at the time of *ESG Watts*, provided for a "*de novo* hearing" at which evidence outside the Agency Record could be presented on disputed issues of fact. *See City of Quincy v. IEPA*, PCB No. 08-86 (June 17, 2010), slip op. at 39 (discussing this history). In contrast, the Board Rules of today require the Board *not* to consider any evidence outside the Agency Record. 35 Ill. Adm. Code 105.214(a). Because the relevant facts are all in the Agency Record and there is no dispute about the record's accuracy, this case is ideally suited for summary judgment.

Petitioner's contentions that the legal opinions in the Agency MSJ are invalid because unsupported by affidavits or expert testimony (*see, e.g.*, 18 n.15, 20 n.18) thus miss the mark. Rather, summary judgment is appropriate *because* Illinois EPA's arguments rest on the undisputed content of the Agency Record, rather than expert opinions outside the record.

Petitioner recites a litany of cases in which summary judgment was denied or overturned due to conflicting expert testimony. Pet'r Resp. at 16. But the cases Petitioner cites all relate to disputes of material *facts*, and are thus inapposite here where the relevant facts, namely the content of the Agency Record, are undisputed. *See, e.g., Rock v. Pickleman*, 214 Ill. App. 3d 368, 377 (1991) (holding expert testimony on standard of care "would have adequately established

reasonability on a key issue of fact") (cited in Pet'r Resp. at 16). In contrast, expert testimony is not competent on issues of law. *See, e.g., Pietrzak v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 284 Ill. App. 3d 244, 252 (1996) ("language interpretation is a question of law for the court so that expert linguistic testimony may be disallowed"); *Korte & Luitjohan Contractors, Inc. v. Erie Ins. Exch.*, 2022 IL App (5th) 210254, ¶ 25 (insurance policy interpretation is a "question of law for the court" on which expert testimony is improper).

Petitioner contends nonetheless that "any difference of opinion" regarding the "facts, evidence and conclusions" in the ASD is an "issue[] of material fact." Pet'r Resp. at 15. This innovative argument converts the legal question of whether the ASD submittal and Illinois EPA's nonconcurrence met the ASD rule's requirements into a factual question on which only qualified experts may opine. Taking Petitioner's argument at face value, it would seemingly eliminate summary judgment practice not only in ASD appeals but in virtually all appeals of Agency action before the Board. After all, if Petitioner's and Illinois EPA's positions are each supported by their respective experts, by Petitioner's argument there will always be a genuine issue of material fact. This argument is surprising, as Petitioner recently filed its own motion for summary judgment, and also incorrect, because the material facts in this case are undisputed.

B. Regulatory interpretation is not an issue of fact.

The interpretation of a regulation is a question of law. *Haage v. Zavala*, 2021 IL 125918, ¶ 41. Petitioner's position on this question of law has been hard to pin down. After more than a hundred pages of summary judgment briefing in this case, building on thousands of pages of materials inside and outside the Agency Record, the reader is still left guessing as to what Petitioner thinks the ASD rule means. In fact—now that Petitioner seems to have abandoned the statutory construction arguments on which its submittals, Petition, and own motion for summary

judgment relied, and now waves those issues away as irrelevant (Pet'r Resp. at 8)—the reader is somehow left with even *less* of an idea of what Petitioner's position is than at the start of this proceeding. In its public comment, Petitioner argued the ASD rule did not require it to "identify, sample or analyze an alternative source." R. at R001788.[3] Yet now it claims that it has done so all along. Pet'r Resp. at 18-20.

Petitioner now tries a new tack, relying on its expert's opinion on the proper approach to environmental forensics. Pet'r Resp. at 17-18. *Based on that expert's report* rather than any legal authority, Petitioner argues that the reason "845.650(e) does not lay out more specific criteria" is that "[a]n alternative source demonstration requires independent professional judgment to determine what data and analytical techniques should be used in the assessment." Pet'r Resp. at 17, citing Hahn Report. This also seems to be what Petitioner means with its astonishing statement that the ASD rule is "written to provide discretion to the qualified professional." Pet'r Resp. at 10. Apparently Petitioner's position is now that the ASD rule means whatever Petitioner's expert says it means.

But Petitioner's innovative approach contradicts not only established law on statutory interpretation, but also the purpose of the ASD rule itself. The ASD rule is concerned with protecting the public health and environment of Illinois from the known hazards of CCR surface impoundments. *See* 415 ILCS 5/22.59 (2022); *see also* Agency MSJ at 38-43. It is hard to imagine a reading more remote from that purpose than the one Petitioner now presents, which would make the impoundment owner and its consultants the arbiters of ASD adequacy. Petitioner's position

[3] Without prejudice to the arguments to the contrary in its Motion, *see* Agency MSJ at 33-35, for brevity's sake Illinois EPA will presume in this Reply that the comment letter and the incorporations by reference therein are properly before the Board.

that the interpretation and application of the ASD rule is reserved to experts is not only unsupported by the rule's text and context but is directly contradicted by them, and therefore must be rejected.

C. Compliance with formalities is not a demonstration.

Petitioner argues that the presence of a professional engineer (P.E.) certification on the ASD submittal is enough to defeat summary judgment. Pet'r Resp. at 15-16. But P.E. certification is simply a minimum requirement for an ASD submittal. *See* 35 Ill. Adm. Code 845.650(e). Petitioner's argument (Pet'r Resp. at 16) that the only requirements for an ASD are a P.E. stamp and a report ignores the reality that an ASD submitter must *demonstrate* both ASD elements. 35 Ill. Adm. Code 845.650(e).

Petitioner's argument is also surprising, because a nonconcurrence in an ASD means that Illinois EPA's experts disagreed with the ASD submitter's experts. If that disagreement were enough to establish a genuine issue of material fact, summary judgment would *never* be proper in an appeal of a nonconcurrence. Petitioner's abrupt change of heart on the propriety of summary judgment (less than a month after filing its own motion) cannot, in any event, change the reality that a P.E. certification that "the information in this report is accurate" (R. at R001608) does not convert the legal question of the submittal's adequacy into a question of fact. As discussed below, the ASD submittal simply did not make the demonstrations that the ASD rule requires.

III. There is no Genuine Issue of Material Fact that Petitioner's ASD Fell Short of the ASD Rule's Requirements.

As Illinois EPA's Motion sets forth and Petitioner apparently no longer disputes, the ASD rule requires an ASD submitter to demonstrate two distinct elements: (1) that "a source other than the CCR surface impoundment caused the contamination" and (2) that "the CCR surface impoundment did not contribute to the contamination." 35 Ill. Adm. Code 845.650(e). As detailed in the Motion and briefly reviewed below, Petitioner's ASD submittal did not make either of these

required demonstrations. Neither the content of the ASD submittal itself, nor any reasonable inference that could be drawn from it, could carry Petitioner's burden on either of the ASD elements.

A. Waving toward a possible source does not satisfy the first ASD element.

Petitioner argues that it satisfied the first ASD element because the ASD submittal "identifies naturally occurring chloride from underlying bedrock" as the source. Pet'r Resp. at 18. Petitioner further contends Illinois EPA's statement that "the professionals responsible for the ASD do not claim that the submittal demonstrated that a specific alternative source caused the contamination" is a "blatant mischaracterization." Pet'r Resp. at 19, citing R. at R001617. Yet the very page Petitioner cites contains statements that the chloride exceedance is "not due to the PAP but is from a source other than the CCR unit" and "was not due to the PAP . . . . [t]herefore, assessment of corrective measures is not required." R. at R001617. In this context the intervening reference to bedrock chloride as "a likely source" (backed up only by three overtly speculative points, *see* Agency MSJ at 13-20) cannot reasonably be read to claim that Petitioner had identified the alternative source and *demonstrated it to have caused* the exceedance, as the first ASD element requires.[4] Nor indeed does any reasonable inference from the content of the ASD submittal suggest

[4] Petitioner contends that the ASD submittal "used best available evidence to conclude it was the 'likely' alternate source. Meaning it was more probable than not." Pet'r Resp. at 20. But as the common locution "more likely than not" makes clear, "likely" by itself does not necessarily entail greater than 50% probability. *See* Merriam-Webster Thesaurus, *available at* https://www.merriam-webster.com/thesaurus/likely (listing "possible" as a synonym of "likely"). In context—especially given that all three of the supporting data points set forth only speculative possibilities—it is more likely that Petitioner's experts intended "likely" in its ordinary meaning as a synonym of "possible." "A likely source" is thus one among multiple possible sources. In any event, the problem is not that Petitioner's experts used the wrong words to conclude that this particular ASD requirement was met—the problem is that the requirement was *not* met. Hence Petitioner's arguments up to this point that the ASD rule did not require it to make this showing at all. *See, e.g.,* Pet'r MSJ at 2 (arguing that an interpretation of the rule that would uphold Illinois EPA's requirement of such a showing would be "absurd, unreasonable, inconvenient, or unjust").

that such a demonstration was made. Rather, Petitioner's experts correctly identified bedrock groundwater as one *possible* source. Naming a possible alternative source is not enough to carry Petitioner's burden on this element.

Petitioner argues that "IEPA … points to no evidence contradicting statements made by IPGC's QPEs and expert indicating that this was the best available information to identify the alternative source of chloride." Pet'r Resp. at 23. But the ASD rule does not evince any intention to allow an ASD submitter to presume that "the alternative source" must exist and then put forward "the best available information" to support that conclusion. If the available information isn't good enough to prove the conclusion to a preponderance of the evidence, that doesn't mean the submitter is entitled to a concurrence—it means it is not. From its inception the ASD rule has been intended as a limited exception for which some impoundment owners *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.

All three of Petitioner's data points that purport to support the first element are speculative. Agency MSJ at 17. Petitioner argues, however, that whether the evidence it presented is "speculative" is a matter of "clearly disputed facts." Pet'r Resp. at 20. Revealingly, Petitioner does not argue that it *made* the required non-speculative showing—only that its experts said it did. Pet'r Resp. at 20. Yet no amount of expert testimony, irrespective of its weight, can change what Petitioner submitted: a bare series of three speculative points unsupported by any substantial analysis. R. at R001617.

In claiming that these points are not speculative, despite none of them making a claim of causation and one of them even being phrased in terms of "could" and "potential," Petitioner is in the odd position of saying that Illinois EPA was wrong to take Petitioner's experts at their word.

But Petitioner cannot create a genuine issue of material fact simply by disagreeing with itself. And Petitioner's efforts to defend these three points individually fare no better, as detailed below.

1. The existence of chloride levels ranging from 100 mg/L to 5,000 mg/L in bedrock groundwater established only a speculative possibility of causation.

The ASD submittal's first point (that high levels of chloride exist in Jasper County bedrock groundwater) for the first ASD element is not site-specific, and amounts to speculation that levels of chloride that *might* be higher than the concentration in APW15 *might* exist in natural groundwater near APW15. *See* R. at R001617, Agency MSJ at 13-14. It also misstates the cited source, as Petitioner seems now to concede.

Petitioner's arguments on this point have been somewhat mercurial. After first claiming that chloride levels in Jasper County Pennsylvanian bedrock groundwater range from 100 to 5,000 mg/L (R. at R001617), and then that these concentrations are anyway more than 1,000 mg/L (Hahn Report at 16), Petitioner now takes a close look at the authority it has been relying on and concedes that the two measured concentrations in Jasper County, whatever they are, "may be somewhat less" than 1,000 mg/L—but breaks out a ruler and magnifying glass to insist that they must still be higher than the concentration in APW15. Pet'r Resp. at 22. Petitioner also replaces its original claim that "[c]oncentrations of chloride in groundwater collected from the Pennsylvanian shale in Jasper County range from 100 to 5,000 milligrams per liter" (R. at R001613, 1617, *see also* Petition Ex. D at 10) with a new contention that *actually* the concentrations do not vary significantly at all. Pet'r Resp. at 21. Petitioner's new contention still rests on speculation (given the lack of evidence of a pathway from bedrock to APW15), and in any event was not before the Agency at the time of the nonconcurrence decision and is therefore irrelevant to this appeal.

Setting aside everything outside the Agency Record, Petitioner's first data point simply does not make it any more likely than not that this chloride-enriched bedrock groundwater

somewhere in Jasper County (where *according to the ASD submittal* such chloride concentrations vary from 100 to 5,000 mg/L) caused the contamination. Such a conclusion is therefore speculative, and Illinois EPA rightly disregarded it. *See* Agency MSJ at 14.

2. The existence of a single remote salt spring demonstrates only a speculative possibility of upwelling near APW15.

Regarding the ASD submittal's second point in support of the first ASD element (R. at R001617), Petitioner contends that "[t]he relevant information, as provided in the ASD, is the existence of the saline spring mapped 10 miles from the PAP adjacent to the Clay City Anticline." Pet'r Resp. at 23. This assertion that a salt spring's existence at a distance of exactly 10 miles is relevant to conditions at the PAP comes just after Petitioner objected to the idea that the "exact distance of the Clay City Anticline from the PAP" has any relevance to the case. Pet'r Resp. at 22. But in any event Petitioner has provided no reason, then or now, to believe that this salt spring is likely to have any bearing on groundwater flow ten miles away at the PAP. Drawing every reasonable inference in Petitioner's favor, this evidence shows at most that such upwelling is *possible* in the region. A circle with a 10-mile radius covers approximately 314 square miles. A single example of upwelling being known within such a large area does not suggest that a second example is especially likely to have occurred right under Petitioner's monitoring well. Petitioner's argument in support of its first data point—that the levels of chloride in bedrock in the Panno article are "indicative of chloride in bedrock *throughout* southern Illinois" (Pet'r Resp. at 21, emphasis in original) —only heightens the problem, since the relevant area would be that much larger. Thus, this point of evidence likewise rests solely on a speculative possibility and Illinois EPA rightly disregarded it. *See* Agency MSJ at 14-15.

3. Petitioner's possible chloride migration pathway was expressly speculative.

The third data point in Petitioner's ASD submittal on the first ASD element describes only a "potential" pathway that "could" explain the exceedance in APW15. R. at R001617. [5] For this reason alone Illinois EPA was justified in disregarding it. Agency MSJ at 16.

Petitioner argues that Illinois EPA was mistaken to suggest that the drawing that Petitioner presented to Illinois EPA for its operating permit application (and incorporated by reference in its public comment, *see* R. at R001787) portrays at least 25 feet of till between the APW15 screen and bedrock. Resp. at 25. On review, Petitioner is correct to challenge this statement. In fact there is slightly less than 25 feet between the APW15 screen and *the bottom of the drawing*, which does not portray *any* bedrock under APW15 at all. R. at R000776. It was indeed irresponsible to speculate that the distance is 25 feet; perhaps it is 50. At any rate, it is unclear how this would create a genuine issue of material fact. [6] This "potential pathway" was presented to Illinois EPA in the ASD submittal in expressly speculative terms, and Illinois EPA was therefore justified as a matter of law in rejecting it.

[5] Highlighting the issue here, Petitioner *also* argues that APW15 was correctly sited because there was a "potential contaminant pathway" from the PAP through the alleged 60 feet of till in the Upper Confining Unit. Resp. at 27. Certainly, both pathways are possible, as Petitioner's use of the same words for both of them shows. But Petitioner presented no evidence that would suggest—nor did its ASD even purport to show—that an upward pathway from bedrock is more likely than a downward pathway from the PAP, let alone more likely than not to be the sole pathway.

[6] Petitioner objects to Illinois EPA's puzzlement over why a single-well chloride exceedance would be "anomalous." Resp. at 25. Petitioner seems to be arguing with itself again, as it was Petitioner who made the characterization in the first place. *See* Agency MSJ at 16, citing Petition at ¶ 42. Given Petitioner's objection, apparently the parties now agree that there is nothing anomalous about a single-well exceedance that would necessarily call for an alternative source.

B. Petitioner also failed to meet the second ASD element.

The second element of an ASD submittal under the Board Rules is a demonstration that "the CCR surface impoundment did not contribute to the contamination." 35 Ill. Adm. Code 845.650(e). In its ASD submittal, Petitioner presented three lines of evidence in support of the second ASD element. But none of these were sufficient to establish that the PAP did not contribute to the exceedance in APW15. *See* Agency MSJ at 20-26. Petitioner's arguments now seek to shift its burden without ever having carried it.

Regarding the first line of evidence, that a thick layer of the Vandalia Till Member of the Glasford Formation would prevent any contamination from reaching APW15 (R. at R001612, 1615), Petitioner dismisses the possibility that contaminants could travel from the PAP to APW15 through joints or sand lenses in this till layer as "unsupported" or "theoretical." Pet'r Resp. at 27. But this concern is neither unsupported nor theoretical. *See* Agency MSJ at 19 n.4 (discussing the role of joints and sand lenses in the Vandalia Till in the failure of the unlined Earthline landfill in Wilsonville, a matter of record before the Board). Moreover, Petitioner is now arguing with itself again, since it justifies its siting of APW15 based on a potential contaminant pathway from the PAP (Pet'r Resp. at 27) while still defending its statement in the ASD submittal that no such pathway existed. Pet'r Resp. at 14, R. at R001615.

Petitioner's remaining two lines of evidence (that APW15 groundwater lacks the boron and sulfate signature of PAP porewater, and that concentrations of chloride are lower in PAP porewater than APW15 groundwater (R. at R001615)) both rely on porewater evidence. Setting aside all the problems with porewater sampling in general and Petitioner's data in particular (Agency MSJ at 22-24), Petitioner's porewater data was unrepresentative because it came solely from wells that are all at the "northern end" of the PAP. Pet'r Resp. Ex. A at 4; *see also* R. at

R001621 (map). APW15 in contrast "is located at the southern edge of the PAP approximately 5,000 feet from the nearest porewater well." *Id.* Petitioner's expert's report indicates that there is likely to be a considerable difference in waste composition between the shallower and deeper parts of the PAP (Hahn Report at 8)—which in this case are precisely the northern and southern parts of the PAP, where the porewater wells and APW15 are respectively located. Agency MSJ at 21. No matter how valid Petitioner's assertion may be that it would be technically infeasible to place porewater wells closer to APW15 (Pet'r Resp. at 29), this does not make the existing wells any more representative.

The assumptions about boron, sulfate, and chloride concentrations in the PAP on which Petitioner's second and third lines of evidence (R. at R001615-1616) relied were based on porewater data taken from the far edge of the PAP—and not from the lowest part of the impoundment as Petitioner's expert stated is necessary. Agency MSJ at 21 citing Hahn Report at 8. Even setting that testimony aside since it is outside the Agency Record, Petitioner never provided any evidence to indicate that these samples are representative of the entire PAP. Agency MSJ at 21-22. Petitioner's second and third lines of evidence were thus insufficient to show that the PAP did not contribute to the contamination in APW15.

None of these lines of evidence are adequate to show that the PAP did not contribute to the exceedance in APW15, and thus Petitioner did not carry its burden on this element either. Petitioner's efforts to conjure up a fact issue notwithstanding, Petitioner's failure to carry its burden on the ASD elements doesn't mean a hearing is needed. It just means Petitioner has failed as a matter of law to meet the requirements of the ASD rule. Therefore, summary judgment in favor of Illinois EPA is proper.

C. Petitioner's claims of unfairness fail because the rule has been clear all along.

Petitioner makes various arguments about fundamental fairness, due process, and not having received the notice it was due. Pet'r Resp. at 6, 7, 11, 12, 14. Petitioner argues for example that it would be "fundamentally unfair" (Pet'r Resp. at 7, 11) to uphold the data gaps in Illinois EPA's nonconcurrence letter because they impose new requirements of which it was not on notice. But as explained in Illinois EPA's Motion (at 25), the data gaps do not impose *new* requirements—they simply explain how Petitioner could have met the existing requirements of the ASD rule. And far from being fundamentally unfair, Illinois EPA's insistence that both Petitioner and Illinois EPA follow the ASD rule fulfills 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 Div. of Nat'l Steel Co. v. Ill. Pollution Control Bd.*, 155 Ill. 2d 149, 182 (1993).

Petitioner also argues that "[b]ecause IPGC's substantive rights are at stake, it is entitled to due process." Pet'r Resp. at 6. Petitioner does not explain what "substantive rights" are at stake. Nor does Petitioner explain why the Constitutional guarantee of due process applies, or whether its claim is procedural or substantive. Assuming that Petitioner is attempting to make a procedural due process argument, the following authority addresses the question:

> It is fundamental that the constitutional guarantees of procedural due process only become operative where there is an actual or threatened impairment or deprivation of life, liberty or property. Therefore, the starting point in any procedural due process analysis is a determination of whether one of these protectable interests is present, for if there is not, no process is due. The United States Supreme Court has held that to have a property interest in a benefit, a person clearly must have more than an abstract need

> or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

C.Capp's LLC v. Jaffe, 2014 IL App (1st) 132696, ¶¶ 25-26 (cleaned up). In *Capp's*, the court rejected the argument that due process required "fundamental fairness" in hearings on granting a video game terminal operator's license, because the applicant did not have a property interest in a license it had not received. *Id.* at ¶ 27. Likewise here, the ASD rule does not give Petitioner a "legitimate claim of entitlement" to a concurrence it did not receive. The outcome should therefore also be the same. Petitioner has no Constitutionally protected property interest at stake in this proceeding. Petitioner therefore has only the procedural rights that the Board Rules grant it.

Petitioner also argues more specifically that the Board's review should be limited to the data gaps identified in Illinois EPA's nonconcurrence letter. *See, e.g.*, Pet'r Resp. at 7. But because there is only one regulation at issue in this case, the cases Petitioner cites for its claim that Illinois EPA is limited to the grounds stated in its nonconcurrence letter are readily distinguishable. In the permit appeal *Centralia Environmental Services, Inc. v. IEPA*, PCB 89-170, slip op. at 7 (May 10, 1990) (Pet'r Resp. at 7 and 11), the Board stated that fundamental fairness requires that the applicant be given notice of "the statutory and regulatory bases for the Agency's permit denial." Likewise in the UST reimbursement appeal *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142, slip op. at 5-6 (Dec. 20, 1990) (Pet'r Resp. at 7), the Board concluded that the same rationale applied as in a permit appeal because the applicant was required to "demonstrate that it is in compliance with the Act and regulations." *Id.* at 6. In both of these cases, the statute or regulation at issue required the applicant to prove it had not violated or would not violate any Illinois environmental law or regulation (an open-ended negative), and also set forth specific required content for Illinois EPA's denial. In that context, where the range of potential grounds for

denial was nearly unbounded *and* the bases for denial had to be spelled out, fairness indeed required the Board to limit its review to *the statutes and regulations* set forth in the denial. In contrast, here, the ASD rule does not require the nonconcurrence to have any content at all other than a statement of nonconcurrence, and the only regulation that the submitter must show compliance with is the ASD rule itself, which is only two sentences long. Thus, none of the concerns that motivated the Board's decisions in *Centralia* or *Pulitzer* are applicable here.

To the extent that Petitioner's fairness arguments are actually directed at the data gaps and the requirement to obtain data that would (according to Petitioner) be impossible to gather within 60 days (Pet'r Resp. at 10 n.6), Petitioner has simply been caught by the consequences of its own actions. Having failed to collect data required for its CCR permit applications (Agency MSJ at 29-31), as Petitioner does not appear to dispute,[7] the fact that this data it was required to collect *already* would take too long to collect *now* can scarcely be laid at Illinois EPA's doorstep. Illinois EPA rightly held Petitioner to its burden to demonstrate that it is qualified for the ASD exception.

IV. Petitioner's remaining arguments do not address the shortcomings in Petitioner's ASD.

Petitioner's remaining arguments do not address the shortcomings in its ASD submittal, and instead seek to misrepresent the data gaps, introduce evidence outside the Agency Record, and distort the policy background of the ASD rule. Because none of these arguments can establish a genuine issue of material fact, Illinois EPA is entitled to judgment as a matter of law.

[7] Petitioner argues that any shortcoming in its operating permit application is "for [Illinois EPA's] review of IPGC's operating permit application and has no relevance to this proceeding." Pet'r Resp. at 27; *see also* Pet'r Resp. at 39 n.29. That may be true as far as the adequacy of the application itself is concerned, but the fact that Petitioner was already required to collect this data has considerable relevance for its claim that gathering the data within 60 days would be impossible.

A. Petitioner misrepresents the data gaps as imposing new requirements.

Petitioner argues that "the entirety of Illinois EPA's arguments" in support of the data gaps "are based on disputes of material fact" that would preclude summary judgment. Pet'r Resp. at 36. But contrary to Petitioner's assertions, and as discussed above, the data gaps did not impose any new requirements on Petitioner. They simply explained how Petitioner could have met the ASD rule's existing requirements. Illinois EPA found that Petitioner did not adequately demonstrate that the chloride exceedance in APW15 was caused by a particular source other than the Newton PAP and that the PAP did not contribute to the exceedance. Illinois EPA's only responsibility after that finding, per 35 Ill. Adm. Code 845.650(e)(4), was to provide a written response to the owner or operator either concurring or not concurring within 30 days after receiving the ASD, which it did. R. at R001965. Petitioner's arguments against the data gaps are therefore misguided.

Illinois EPA stands by its arguments on the substance of the data gaps. Agency MSJ at 25-33. Petitioner's arguments on this point (Pet'r Resp. at 36-42) rely primarily on evidence outside the Agency Record, and are immaterial in any event because—as explained in Illinois EPA's Response to Petitioner's MSJ—Petitioner would not be entitled to a concurrence even if it defeated all of the data gaps. It would still be Petitioner's burden to provide adequate data to support its ASD submittal so that Illinois EPA could concur with that submittal. Petitioner's objections cannot substitute for carrying that burden. Because Petitioner's specific arguments on the data gaps are immaterial to the question of law before the Board, Illinois EPA will not address them further in this Reply.

The data gaps were a courtesy to Petitioner, highlighting places where the demonstration fell short. The nonconcurrence letter begins: "The purpose of this correspondence is to notify you that the Illinois Environmental Protection Agency (Illinois EPA) does not concur with Newton

Primary Ash Pond Alternative Source Demonstration dated October 6, 2023." R. at R001965. That sentence alone satisfied Illinois EPA's obligations under Section 845.650(e)(4). But Illinois EPA went on to clarify the grounds for nonconcurrence. "The Illinois EPA does not concur due to the following data gaps . . ." *Id.* Nowhere did the Data Gaps claim to impose any new requirements on Petitioner.

B. Petitioner improperly relies on evidence outside the Agency Record.

Throughout its Response, Petitioner repeatedly relies on evidence introduced through its expert witness, Dr. Melinda Hahn. Dr. Hahn's various reports and affidavits are immaterial to the issues at hand because they were not before the Agency at the time of the decision and are therefore irrelevant to whether the ASD submittal was sufficient. Petitioner points to Illinois EPA's refusal to engage with the Hahn Report as self-evident of its correctness: "Illinois EPA has pointed to no scientific sources or testimony refuting Dr. Hahn." Pet'r Resp. at 48. But 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; discussed further in Illinois EPA's Response to Petitioner's MSJ at 23. It would make no sense for Illinois EPA to introduce further scientific sources, testimony, or facts, because the Board may only review those present in the Agency Record.

To be sure, a dispute among experts over a material fact can create a bar to summary judgment. *Nicholas v. City of Alton*, 107 Ill. App. 3d 404, 408 (5th Dist. 1982) (summary judgment improper where conflicting expert opinions demonstrated factual issues existed); *Sierra Club, et al., v. Midwest Generation LLC*, PCB 13-15, slip op. at 5 (Jan. 19, 2017) (in an enforcement action, expert testimony conflicting with plaintiffs' contentions precluded summary judgment for the plaintiffs). But even if this case proceeds to hearing, the hearing must be exclusively based on the Agency Record, of which Dr. Hahn's report and affidavits are not a part. *See* 35 Ill. Adm. Code

105.214(a). Moreover, Petitioner seems to have extrapolated the Board requirement that the "ASD must include a report that contains the factual or evidentiary basis for any conclusions and a certification of accuracy by a qualified professional engineer" to mean a qualified professional engineer can override the clear meaning of Section 845.650(e). However, a party opposing a motion for summary judgment must "present a factual basis which would arguably entitle [it] to a judgment." *Gauthier v. Westfall*, 266 Ill. App. 3d 213, 219 (2d Dist. 1994). And that factual basis must come from the Record as it was in front of the Agency at the time it made its decision. 35 Ill. Adm. Code 105.214(a). Thus, Dr. Hahn's submittals cannot create a genuine issue of material facts. This only leaves an issue of law, which is ripe for the Board to rule on at this stage.

Petitioner also improperly cites deposition testimony in its Response. *See* Pet'r Resp. at 13-14. As previously explained in Illinois EPA's Response in Opposition to Petitioner's Motion to Supplement the Record (July 15, 2024) (at 15-16) and Illinois EPA's Response to IPGC's Motion for Summary Judgment (Oct. 31, 2024) (at 22-23), Petitioner's arguments that rely on deposition testimony and any other material outside the Agency Record are improper. Petitioner did not seek to depose an Agency representative pursuant to Illinois Supreme Court Rule 206(a)(1), nor to depose the decisionmaker in this case. Ms. Hunt and Ms. Mullenax, two of the many Illinois EPA employees involved in this decision, were deposed long after the nonconcurrence was issued and the relevant considerations had left their minds. Their testimony was not part of the record before Illinois EPA when the nonconcurrence decision was made and is therefore irrelevant to the Board's review.

C. The Board can and should take notice of policy considerations including USEPA's Gavin ASD denial.

Petitioner argues that the Board should not take the USEPA alternative source denial for the Gavin Power Station in Ohio (Agency MSJ at 10 n.1, 37-38) into consideration.[8] Pet'r Resp. at 42-43. Based on the USEPA motion to dismiss in the district court appeal that Petitioner attaches to its Response as Exhibit D, Petitioner contends that "by USEPA's admission, the Gavin decision should not be relied upon for guidance or precedent." Pet'r Resp. at 43. The word "guidance" does not seem to appear in Petitioner's exhibit. Moreover, the argument in Illinois EPA's motion was not that this application of the distinct federal rules would somehow be a binding precedent on Illinois, but that given the statutory imperative to ensure that the Illinois rule is no less protective than the federal one, to the extent there is a close question, USEPA's denial of a similar ASD on similar facts should be taken into account. Agency MSJ at 37-39.

The USEPA motion to dismiss that Petitioner cites is concerned with the question of whether the Gavin alternative closure denial (of which the ASD denial was a part) constituted "final agency action" under the federal Administrative Procedure Act. Pet'r Resp. Ex. D at 3 (USEPA Motion to Dismiss, *Gavin Power, LLC v. U.S. Env't Prot. Agency*, Case No. 24-41 (S.D. Ohio, Oct. 16, 2024) (Docket No. 41)). The motion appears to turn on USEPA's argument that "the challenged Denial Order 'imposes no new legal obligations on Gavin.'" Pet'r Resp. Ex. D at 15, citing *Elec. Energy, Inc. v. EPA*, 106 F.4th 31, 46 (D.C. Cir. 2024). That is not a relevant question here, and in any event, there is no question that Illinois EPA's nonconcurrence likewise

[8] Illinois EPA inadvertently applied an incorrect signal in its citation of the Gavin denial in its Motion. *See* Agency MSJ at 10 n.1. As Petitioner notes (Resp. at 43), although the direct appeal to the D.C. Circuit was dismissed (*Electric Energy*, 106 F.4th 31), the case remains under appeal in district court. *Gavin Power, LLC v. U.S. Env't Prot. Agency*, Case No. 24-41 (S.D. Ohio).

did not impose any "new legal obligations" on Petitioner—Illinois EPA merely declined to *exempt* Petitioner from its corrective action obligations under 35 Ill. Adm. Code 845.650.

In any event, the Gavin denial is only one among numerous policy considerations that Illinois EPA raised. *See* Agency MSJ at 38-43. Of course, these policy considerations only apply if there is ambiguity in the ASD rule, which there is not. As the plain text of the rule makes clear, it was always intended that ASD submitters would be strictly held to their burden of demonstrating an alternative source, in order to protect the public health and environment of Illinois. *See* 415 ILCS 5/22.59(a) (2022). And the Gavin denial, which applied analogous federal provisions to analogous facts, further confirms that impoundment owner/operators must be held to their burden to provide sufficient site-specific evidence to show that an alternative source exists and caused the contamination. To the extent the Board finds a close question here, the Board should take notice of the Gavin denial in order to ensure that the Board Rules remain "at least as protective and comprehensive" as the federal regulations. *See* 415 ILCS 5/22.59(g)(1) (2022).

V. Conclusion

Petitioner's Response sidesteps the critical legal issues in this case, fails to address Petitioner's inability to meet either of the ASD elements, and attempts to paper over these gaps with misdirection and belated expert testimony. Petitioner cannot stuff the Board Record with irrelevant submittals and claim to have created factual issues. None of Petitioner's submittals and arguments, nor even the contradictions between them, are enough to create a genuine issue of material fact.

The sole question before the Board is whether, as a matter of law, Illinois EPA was justified in issuing the nonconcurrence when presented with the information in Petitioner's ASD submittal. Petitioner has not carried its burden in proving IEPA erred, or that it met both requirements of the

ASD rule. As set forth in the Agency MSJ and confirmed above, the undisputed facts, even when viewed in the light most favorable to Petitioner and with every reasonable inference drawn in Petitioner's favor, show that Petitioner's ASD submittal did not meet the requirements of the ASD rule. Petitioner's ASD submittal did not demonstrate that another source caused the contamination in APW15, nor did it demonstrate that the Newton PAP did not contribute to the contamination. Accordingly, there is no genuine issue of material fact that Petitioner failed to meet the requirements of the ASD rule. Illinois EPA's right to judgment as a matter of law is therefore clear and free from doubt. Illinois EPA therefore requests that the Board grant Illinois EPA's Motion for Summary Judgment and deny Petitioner's cross-motion.

Respectfully Submitted,

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