BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To:

Illinois Pollution Control Board
60 E Van Buren St, Ste. 630
Chicago, IL 60605
Don Brown
don.brown@illinois.gov
Carol Webb
carol.webb@illinois.gov

Office of the Attorney General
500 South Second Street
Springfield, IL 62706
Mallory Meade
mallory.meade@ilag.gov
Samuel Henderson
samuel.henderson@ilag.gov

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the attached **RESPONSE TO COMMENTS OF SIERRA CLUB, EARTHJUSTICE, and PRAIRIE RIVERS NETWORK**; and a **CERTIFICATE OF SERVICE**, copies of which are herewith served upon you.

/s/ *Samuel A. Rasche*
Dated: January 10, 2025

Joshua R. More
Bina Joshi
Samuel A. Rasche
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Joshua.More@afslaw.com
Bina.Joshi@afslaw.com
Sam.Rasche@afslaw.com
Attorneys for Illinois Power Generating Company

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 10th day of January, 2025:

I have electronically served a true and correct copy of the attached Response to Comments of Sierra Club, Earthjustice, and Prairie Rivers Network by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

Illinois Pollution Control Board
60 E Van Buren St, Ste. 630
Chicago, IL 60605
Don Brown
don.brown@illinois.gov
Carol Webb
carol.webb@illinois.gov

Office of the Attorney General
500 South Second Street
Springfield, IL 62706
Mallory Meade
mallory.meade@ilag.gov
Samuel Henderson
samuel.henderson@ilag.gov

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

The number of pages in the e-mail transmission is 24.

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

/s/ Samuel A. Rasche
Samuel A. Rasche

Dated: January 10, 2025

ARENTFOX SCHIFF LLP
Joshua R. More
Bina Joshi
Samuel A. Rasche
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Joshua.More@afslaw.com
Bina.Joshi@afslaw.com
Sam.Rasche@afslaw.com

Attorneys for Illinois Power Generating Company

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

ILLINOIS POWER GENERATING COMPANY'S RESPONSE TO COMMENTS OF SIERRA CLUB, EARTHJUSTICE, AND PRAIRIE RIVERS NETWORK

On November 21, 2024, Sierra Club, Earth Justice, and Prairie Rivers Network (the "Commentors") filed comments in this proceeding (the "Comments"). P.C.#1. Here, Illinois Power Resources Generating ("IPGC") responds to those Comments.

I. Under Commentors' First Argument, an ASD Cannot Be Triggered Without an Operating Permit with a Groundwater Monitoring Plan; Should the Board Agree the Proper Recourse is Dismissal for Lack of Jurisdiction

Commentors argue that the Illinois Environmental Protection Agency ("IEPA" or the "Agency") cannot concur with an alternative source demonstration ("ASD") until a CCR surface impoundment has an operating permit with an approved Part 845 groundwater monitoring program. P.C.#1 at 1-5. They state that under Part 845, there must be a "detected exceedance," an approved method for "proper sampling, analysis, and statistical evaluation of groundwater," and an approved groundwater monitoring well system before IEPA may approve an ASD and none of these elements can exist without an approved groundwater monitoring program ("GMP"). P.C.#1 at 2-3.

As explained below, the logical conclusion of Commentors' argument is not just that IEPA cannot concur with an ASD, it is that an ASD itself cannot be triggered until an approved GMP is in place. Thus, there can be no ASD, and IEPA cannot concur or not concur with that ASD, until an operating permit with a GMP is in place. Commentors explain "[a]n approved groundwater monitoring program is [] an *essential prerequisite for any exceedance, which is the trigger for an ASD*." P.C.#1 at 3 (emphasis in original). Under their argument, an approved GMP with a final groundwater monitoring well system and a final sampling and analysis program for a CCR surface impoundment, including the process for statistical evaluation, is required to determine whether an exceedance of the Groundwater Protection Standards in 35 Ill. Adm. Code 845.600(a) ("GWPS") has occurred. Resultingly, without an approved GMP there can be no GWPS exceedance. Without a GWPS exceedance there can be no trigger for the ASD provisions in 35 Ill. Adm. Code 845.650(e).

The Comment leapfrogs to the conclusion that IEPA cannot approve an ASD without an approved GMP. In fact, the direct result of the argument in the Comment is that a final GWPS exceedance cannot occur and any corresponding provisions in Section 845.650 triggered by a GWPS exceedance (including the ASD provisions in 845.650(e)) cannot apply until there is a final operating permit. Should the Board agree with Commentors' argument, there is no properly issued ASD decision over which the Board has jurisdiction and the proper recourse is for the Board to dismiss this ASD appeal for lack of jurisdiction.

A. Background

On August 1, 2022, prior to issuing any Part 845 operating permits, IEPA issued several Violation Notices ("VNs") to owners/operators of CCR surface impoundments alleging a failure to conduct groundwater monitoring consistent with 35 Ill. Adm. Code 845.650(a) (requiring

monitoring for Part 845.600 constituents) and a failure to complete the steps in 845.650(d) (requiring additional steps in the event monitoring confirms an exceedance of the GWPS). At the time, operating permit applications were pending before IEPA, as they remain as of the date of this filing. In response to the VNs, IPGC and its sister companies (together, the "Companies") explained to IEPA that a GWPS exceedance could not occur until the Agency issued an operating permit with an approved GMP. However, the Companies have, since the promulgation of Part 845, sought to work amicably and cooperatively with IEPA in the implementation of Part 845. Accordingly, in the spirit of cooperation, the Companies agreed to monitor for "exceedances" at the CCR surface impoundments and engage in corresponding actions under 845.650 based on the *proposed* GMPs submitted with the Companies' operating permit applications until IEPA issued Part 845 operating permits for the CCR surface impoundments. The Newton Primary Ash Pond ("PAP") was not one of the units that was the subject of a VN.[1] However, given IEPA's position, and again, in the spirit of working cooperatively with the Agency, the Companies proceeded with the same process of implementation for all their CCR surface impoundments.

Therefore, as explained in IPGC's summary judgment briefing, monitoring of the Newton PAP is currently being conducted under a *proposed* GMP, "exceedances" have been determined based on that *proposed* GMP, and additional actions under 35 Ill. Adm. Code 845.650(d) and (e) have been taken upon determining whether an exceedance has occurred under that *proposal*. *See* R. 10 at R001242-1263 (proposed GMP); Groundwater Monitoring Data and Detected Exceedances, Quarter 2, 2023, Primary Ash Pond, Newton Power Plant.[2]

[1] The VN issued to IPGC related to a different generating station.
[2] Attached as Document 14 to PCB 24-43, Expert Report of Melinda Hahn (Aug. 1, 2024). Oddly, IEPA failed to include this document - which consists of the underlying groundwater monitoring results forming the basis of the Newton ASD, is cited and referenced within the Newton ASD, and was submitted to and before the Agency at the time it reviewed the Newton ASD - in the Record for this appeal. IPGC disagrees with the Hearing Officer decision

B. Commentors argue there can be no "exceedance" of GWPS triggering the ASD provisions until IEPA issues a final operating permit with an approved groundwater monitoring program

> Commentors note:
>
> before an ASD may be approved, there must be a "detected exceedance" for a given surface impoundment—here, the PAP—as well as a method for determining what contamination comes from that impoundment. Moreover, the proper sampling, analysis, and statistical evaluation of groundwater must be established so that an error in the same can be readily identified.
>
> Under Part 845, none of these elements can be properly determined without an approved groundwater monitoring program.

P.C.#1 at 2. To explain in more detail, under Commentors' argument an exceedance of the GWPS cannot occur until there is an approved operating permit because, without a final operating permit, the owner or operator of a CCR surface impoundment does not have a GMP with:

(1) an approved monitoring network with final, approved upgradient monitoring wells to be used to determine background concentrations for 845.600 constituents or final approved downgradient monitoring wells in which to monitor for GWPS exceedances,

(2) approved statistical methods to determine background concentrations, or

(3) approved statistical methods to determine whether a downgradient sample is at a statistically significant level above background concentrations.

Indeed, approval and finalization of the groundwater monitoring network and the statistical methods for evaluating background concentrations and downgradient groundwater samples that apply to a CCR surface impoundment occurs through the issuance of a Part 845 operating permit. An operating permit application for a CCR surface impoundment includes proposals for each of these elements of a GMP. *See* 35 Ill. Adm. Code 845.230(d)(2) or (3). Prior to issuing a final operating permit, the Agency may ask for further information or propose additional conditions or requirements that impact the scope of sampling, sampling/statistical methodology, and the ultimate

---

denying to supplement the Record with this document, which should clearly be included in the IEPA Record for this case.

background concentrations of constituents. See 35 Ill. Adm. Code 845.230, .250, .270. The Agency acknowledged that an iterative process of requesting additional information and making changes to GMPs could occur as part of the Part 845 operating permit process. *See, e.g.* R20-19, IEPA's Answers to Pre-Filed Questions at 47 (Aug. 3, 2020) (excerpts attached as Exhibit 1). Thus, a final GMP, with a final groundwater monitoring network and final statistical methods for evaluating groundwater samples, will not exist until IEPA has issued an operating permit.

Under Commentors' argument, without these elements of a GMP, including a final groundwater monitoring network and final statistical methods, there is no Part 845 GWPS exceedance (i.e. what Commentors refer to as a "detected exceedance") triggering an ASD. P.C.#1 at 3. This is because, under Commentors' argument, without these elements (1) the GWPS that apply to the CCR surface impoundment are not final and, (2) when the GWPS for a constituent is based on background concentration, whether an exceedance has occurred remains uncertain.

First, the GWPS that apply for a particular CCR surface impoundment are not finalized until IEPA issues an operating permit with approved monitoring well locations and background concentrations. The GWPS that apply for a particular CCR surface impoundment are the *higher* of (1) the values set forth in 845.600(a)(1) *or* (2) the background concentrations of 845.600(a)(1) constituents. 35 Ill. Adm. Code 845.600(a). The background concentration for a particular constituent is determined by the location of the upgradient (or "background") wells used to determine background, the sampling location within that well, and the statistical procedures used to evaluate background samples. 35 Ill. Adm. Code 845.630, .640. Thus, if the operating permit for a CCR surface impoundment results in a change in the location of background wells, the sampling locations (i.e., depths) of background wells, or in the statistical methods used to determine background concentrations, it may result in multiple changes in the GWPS that apply.

Currently, GWPS for the Newton PAP are set based on the proposed background concentrations included in the pending Newton PAP operating permit application, including its proposed upgradient/background sampling locations and proposed statistical methods. The final GWPS that will apply to the Newton PAP could, certainly, change through the final operating permit issued by IEPA.

Second, when a background concentration serves as the GWPS for a constituent, whether a GWPS exceedance has occurred cannot be determined until statistical methods have been finalized for evaluating whether a downgradient sample is at a statistically significant level above upgradient background. When a background concentration serves as the GWPS for a constituent, an exceedance occurs when there is "an analytical result with a concentration at a statistically significant level above the up gradient background concentration, in a down gradient well." *See* 35 Ill. Admin. Code 845.120 (definition of "Exceedance of the groundwater protection standard"). Thus, until there is a GMP with approved statistical methods, there cannot be a final determination regarding whether the concentration of a constituent in a downgradient well is at a statistically significant level above the background concentration for that constituent. Currently, for the Newton PAP, whether a downgradient concentration is at a statistically significant level above a background concentration for a constituent is determined based on the proposed statistical methods provided with IPGC's operating permit application for the Newton PAP. Again, the final statistical methods used to determine whether a downgradient concentration is at a statistically significant level above background may change through the final operating permit issued by IEPA.

According to Commentors' argument, the certainty of an approved GMP is a prerequisite to determining a GWPS exceedance and engaging in follow up actions including an ASD. Based

on their arguments, only an official GWPS exceedance can trigger additional obligations under 845.650, including IEPA's responsibilities to concur or not concur with an ASD.

The requirements in 35 Ill. Adm. Code 845.650(d) and (e) are predicated upon the detection of a GWPS exceedance. "If one or more constituents are detected, and confirmed by an immediate resample, to be in exceedance of the groundwater protection standards in Section 845.600," the owner or operator of a CCR surface impoundment is required to take a series of steps to characterize the release and to take steps to initiate and institute corrective action. 35 Ill. Adm. Code 845.650(d), 845.660-.680. An owner or operator may also submit an alternative source demonstration in such an event, which the Agency is required to respond to in writing with a concurrence or non-concurrence. 35 Ill. Adm. Code 845.650(e). However, according to Commentors, there can be no GWPS exceedance (i.e. detected exceedance) until an approved GMP. Therefore, Sections 845.650(d) and (e) cannot be triggered until a GMP is approved through a finalized operating permit.

C. If the Board agrees with Commentors' argument, the proper recourse is dismissal of this proceeding for lack of jurisdiction

Thus, Commentors' argument is, essentially, that Part 845 contemplates having a final GMP in place prior to requiring owners and operators, and IEPA, to make decisions regarding the presence of GWPS exceedances and follow up actions (including the submittal and review of ASDs). As noted above, due to IEPA's interpretation and desire, IPGC has been sampling, determining GWPS "exceedances," and engaging in additional activities under 35 Ill Adm. Code 845.650(e) based upon the proposed GMP included in the Newton PAP's operating permit application. IPGC stands by the GMP submitted with that application. That said, should the Board

agree with Commentors' position, the proper recourse is for the Board to dismiss this ASD proceeding for lack of jurisdiction.

The Board has jurisdiction over this ASD appeal under 35 Ill. Adm. Code 845.650(e) and 35 Ill Adm. Code Part 105 only if IEPA had the authority to concur or not concur with the ASD, thereby issuing a final agency decision. However, if the ASD provisions are not triggered, and in turn IEPA cannot concur or not concur with an ASD for the Newton PAP, without an approved GMP issued through a final operating permit, there necessarily can be no final agency decision for the Board's review. Thus, the Board must dismiss this case for lack of jurisdiction.

II. Commentors Other Arguments Are Irrelevant and/or Incorrect

The Commentors then make contradictory, incorrect, and irrelevant arguments regarding the ASD for the Newton Power Station ("Newton ASD"), Petitioner's arguments in this appeal, and the scope of discretion IEPA should be provided.

A. The Newton ASD identified an alternative source and is compliant with 845.650(e); Section II of the Comment is irrelevant, outside the scope of this proceeding and incorrect

The Commentors request the Board "affirm IEPA's non-concurrence with the ASD" based on Commentors' mistaken belief that the Newton ASD failed to "specifically and sufficiently" identify the alternative source or sources of groundwater pollution at the PAP. P.C.#1 at 5-6. However, this belief is both factually incorrect and outside the scope of this proceeding and the Board should disregard the entirety of Section II of the Comment. To the extent any issue exists in this proceeding regarding the alternate source of the chloride exceedance that is the subject of the Newton ASD, it is whether the information identified in IEPA's Data Gaps should or should not be required in support of the Newton ASD.

i. Commentors' arguments are irrelevant and beyond the scope of this proceeding.

To begin with, rather than focus on the proper scope of this proceeding – the Agency's reasons for nonconcurrence with the Newton ASD and whether they are appropriate – Commentors attempt to comment more generally regarding the Newton ASD.[3] Commentors' contentions in Section II of the Comment are not relevant to IEPA's bases for denial and as such are outside the scope of this proceeding. IPGC petitioned the Board for review *of IEPA's nonconcurrence* with the Newton ASD (the "Denial" or "IEPA's Denial"), and as such this proceeding is necessarily limited to the rationale outlined in that nonconcurrence.

It is firmly established under Illinois law that in an appeal of a final Agency decision, the issues on appeal are framed by the Agency decision itself and new grounds for denial may not be introduced at the review stage because "[p]rinciples of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases" for IEPA's denial. *Centralia Environmental Services, Inc. v. IEPA*, PCB 89-170, slip op. at 7 (May 10, 1990); *Pulitzer Community Newspapers, Inc. v. IEPA*, PCB 90-142, slip op. at 5-6 (Dec. 20, 1990) (barring IEPA from asserting on appeal new bases for denial that were not disclosed in the denial letter). IEPA's Denial set fourth three separate bases for the Agency's non-concurrence ("Data Gaps"), none of which involved the suggestion that the ASD failed to identify a specific alternative source. IPGC's Petition was necessarily crafted to address IEPA's stated bases for denial. It is unreasonable and unfair for Commentors to seek to introduce an entirely new basis for denial more than a year after the close of the public comment period provided for by Section 845.650(e).

Commentors had (and took full advantage of) the opportunity to review and place their opinions on the Newton ASD in the administrative record prior to IEPA's final decision but elected

[3] Notably, the Comment does not specifically address the propriety of any of the "Data Gaps" IEPA identified as the basis for its nonconcurrence. It does generally comment on information in the ASD regarding the alternative source, but provides no information or comment in support of IEPA's "Data Gap(s) 2 and 3" related to alternative source characterization. The Comment further includes no discussion regarding "Data Gap 1."

to not present *any* arguments regarding the substance of the ASD. *See* R. 30 at R001948-1951. Instead, they asserted meaningful review of the Newton ASD was impossible because there is no approved groundwater monitoring program for the PAP. *Id.* at R001948. Commentors reassert this argument in their Comment (P.C.#1 at 1-5), but then contradict themselves and attempt a second bite at the apple. However, this review proceeding before the Board is not a proper forum for the Commentors to introduce new arguments regarding the Newton ASD for the Board's consideration. Doing so would result in an unlawful expansion of the scope of this proceeding. *See KB Sullivan, Inc. v. IEPA*, PCB 21-78, slip op. at 6 (Aug. 11, 2022) ("IEPA cannot [at the review stage] argue reasons for the denial that are not cited in the denial letter.").

ii. Commentors mischaracterize the conclusions of the ASD.

Moreover, Commentors' suggestion that the ASD fails to identify a specific alternative source (which echoes arguments made by IEPA in its Motion for Summary Judgment) is wrong. It overtly mischaracterizes the content of the Newton ASD, tries to play a semantics game based on isolated statements, and a full and fair reading of the Newton ASD makes plain that Commentors and IEPA are incorrect. *Compare* P.C.#1 at 5 *and* IEPA Motion at 11-12 *with* R. 12 at R001617.

Commentors quote a *single sentence* from the Newton ASD in isolation and remark that "[t]his language in the ASD submittal thus . . . omits the specific identification of an actual alternative source as the cause of the exceedance." P.C.#1 at 5 (*citing* R. 12 at R001617). This statement is at best misguided and at worst is intentionally misleading. While it is true that the specific sentence cited out of context by Commentors does not reference the alternative source, a thorough reading of the full document (or indeed even the full page that Commentors cite to) demonstrates that the Newton ASD did in fact identify a specific alternative source. The Newton ASD explicitly states *on the same page cited to by Commentors* that "it has been demonstrated that

the GWPS exceedance of chloride at APW15 is not due to the PAP but is from a source other than the CCR unit" and "[b]ased on the review of regional literature and site-specific bedrock conditions, chloride concentrations in bedrock groundwater are a likely source of chlorine observed in APW 15 . . .." R. 12 at R001617. It further contains a description of the various evidence and citations to multiple documents demonstrating that the chloride exceedance is due to bedrock groundwater, which Commentors wholly ignore. *Id.* at R001612-1614, 1618-1619. In response to Agency questions, IPGC explained "[t]he combined strength of the lines of evidence in the Primary Ash Pond ASD demonstrates that the Primary Ash Pond is not the source of the chloride exceedance at APW15 (and did not contribute to the chloride exceedance at APW15) and that the likely source is native bedrock." R. 29 at R001940. The letter goes on to explain that evidence in the ASD "are strong indictors that the bedrock beneath the Primary Ash Pond also contains chloride." *Id.*

Thus, Commentors either misread the Newton ASD or are deliberately mischaracterizing its evidence and conclusions, but there is no reasonable argument that the Newton ASD failed to identify a specific alternative source.

The incongruity of Commentors' claims is belied by the fact that the Comment immediately contradicts itself: after definitively asserting that the Newton ASD did not identify any specific alternative source, Commentors next attempt to explain that the evidence the Newton ASD relied upon when identifying a specific alternative source is insufficient. P.C.#1 at 6. To begin with, any concerns Commentors may have with specific evidence utilized (or not) by the Newton ASD are questions of fact to be evaluated by the Board after hearing, not on motions for summary judgment. *Coole v. Cent. Area Recycling*, 384 Ill. App. 3d 390, 396 (2008) (*citing AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill.App.3d 17, 31 (2005)). Regardless, Commentors' argument

again is misguided and misinterprets the arguments made by IPGC, and the Newton ASD provided sufficient evidence to support its conclusions in accordance with Section 845.650(e).

The regulations require that an ASD "include a report that contains the factual or evidentiary basis for any conclusions and a certification of accuracy by a qualified professional engineer."35 Ill. Adm. Code § 845.650(e). Commentors do not and cannot argue that the Newton ASD failed to do this. Instead, Commentors, without any legal or scientific support, raise factual contentions that the alternative source evidence provided in and relied upon by the ASD is "both completely speculative and not site specific." P.C.#1 at 6.

But this accusation is only possible because Commentors again misleadingly pull the Newton ASD's language out of context. Commentors definitively state that the Newton ASD's conclusions were based only upon a "review of regional literature" and thus are speculative and not "site specific." *Id.* (*citing* R. 12 at R0001617). However, the full sentence cited by Commentors reads: "Based on the review of regional literature *and site-specific bedrock conditions*, chloride concentrations in bedrock groundwater are a likely source of chloride observed in APW15 for the following reasons[.]" R. 12 at R0001617 (emphasis added). Once again, the Comment accuses the Newton ASD of lacking information that is objectively present in the exact pages that Commentors themselves cite to.

Commentors do not provide any further information or argument in support of their contention that the ASD is lacking in "site-specific" information, requires any specific additional site-specific information, or is "speculative." However, IPGC notes that it has addressed this issue in detail elsewhere in this proceeding. *See, e.g.,* PCB 24-43, IPGC Response to IEPA's Motion for Summary Judgment at 20-26. As previously explained, the evidence and information provided by the ASD *is site specific*, supports the criteria in 845.650(e), and any argument to the contrary is

the result of a lack of scientific understanding of the data presented in the ASD. *Id.* (*citing* Hahn Report at 16-17).[4] That said, to the extent there is a difference of opinion on this issue and/or, more relevantly, whether Data Gaps 2 or 3 are, by a preponderance of evidence, appropriate bases upon which to not concur with the Newton ASD, it is a question of fact for the Board to decide after hearing.

B. Commentors misconstrue IPGC's Summary Judgment Motion and IEPA's legal obligation to articulate an appropriate basis for ASD denials.

Commentors fundamentally misunderstand the scope and basis of IPGC's summary judgment motion, incorrectly asserting IPGC's argument is that "IEPA is prohibited from demanding any specific information" in an ASD. P.C.#1 at 6. IPGC has never suggested such an interpretation. Instead, IPGC has maintained that IEPA's reasons for denial may not be insufficient or improper. *See KCBX Terminals Co. v. IEPA*, PCB 14-110, slip op. at 46 (June 19, 2014). While IEPA certainly could provide any reasoned justification it chooses to deny an ASD, the Agency has an obligation to provide sufficient and proper bases for its decisions and to adequately articulate those bases when issuing decisions.

In this proceeding, IPGC is not challenging IEPA's authority to review an ASD or suggesting that the statutes or regulations include insufficient guidance to allow IEPA to "make decisions on ASD sufficiency." *See* P.C.#1 at 7. Rather, IPGC is challenging IEPA's Denial of the Newton ASD, including the sufficiency and propriety of the *specific* bases for nonconcurrence

[4] Commentors further include an unsupported statement appearing to accuse IPGC of attempting to "supplement the record on appeal with conclusions that . . . are not supported by the ASD and were not before the Agency." They do so, however, without pointing to any specific information they believe is outside of the record. That said, any evidence IPGC has presented in this proceeding with respect to the alternative source identified in the Newton ASD is expert testimony regarding why and how the information *included in the ASD* properly supported the bedrock as the alternative source. Indeed, Dr. Hahn's testimony in this case is directly related to explaining IEPA's incorrect review of the information in the underlying ASD and explaining why IEPA's bases for not concurring with the Newton ASD are not scientifically or technically supportable. This is in contrast to the unsupported and speculative statements made by IEPA in its Summary Judgment Motion and by Commentors without citation to any supporting declaration, affidavit, or other evidence.

articulated in the Denial.[5] Petition at 9-16. In its summary judgment motion IPGC argues, as a matter of law, the absence of a *legal* requirement that an ASD include any specific information (i.e. the facts and evidence included are a matter of professional judgment) *and* that (while IEPA may base a denial on lacking information) the information IEPA demands for an ASD must not result in absurd, unjust or impossible results. PCB 24-43, IPGC Motion for Summary Judgment at 13-14.

Any suggestion in the Comment that IEPA should have wide or absolute discretion over the reasons they provide for denial ignores the multitude of Board case law explaining that an Agency denial must provide "the reasons for the denial and the statutory and regulatory support for such denial" (*Pulitzer*, PCB 90-142, slip op. at 6 (Dec. 20, 1990)) and that the standard of review of the Agency's denial in an appeal is a preponderance of the evidence (*Aqua Illinois, Inc. v. IEPA*, PCB 23-12, slip op. at 8 (Dec. 15, 2022)). Indeed, the Board and Illinois Courts have long held that for decisions where the Agency must act on a short timeframe it is "essential" that the Board conduct a full *de novo* review and not simply defer to the Agency because "due to the time restraints placed on the Agency, it cannot hold full hearings to develop the issues of the case."

[5] Commentors' reliance on *Freedom Oil v. IPCB*, 275 Ill.App.3d 508 (Sept. 21, 1995) and *Hillside v. John Sexton Sand & Gravel Corp.*, 105 Ill.App.3d 533 (Mar. 26, 1982), is thus misguided and irrelevant. *Freedom Oil* involved whether the Board had the authority to conduct a telephonic hearing absent explicit statutory or regulatory authority. 275 Ill.App.3d at 515-517. The court found that the Board had implied discretion to determine how to run meetings, but emphasized that the Board had followed all necessary procedures (including notice to petitioner) and, critically, that the plaintiff "does not argue the procedures used to conduct the telephone conference were improper, nor does it allege it suffered any prejudice by the failure of the Board to adopt formal procedures for conducting such meetings. *Id.* at 518. The Court further emphasized that the plaintiff made no attempt to attend the meeting (in person or via telephone). *Id.* Again, IPGC is not challenging IEPA's authority to "conclude whether an entity has or has not sufficiently demonstrated that blame falls on an alternative source." P.C.#1 at 8. Instead, and in direct contrast to the petitioner in *Freedom Oil*, IPGC is alleging that the specific bases relied upon by IEPA to reach its conclusion were insufficient and improper *and* that IPGC has been materially prejudiced by IEPA's use of insufficient and improper bases.

Similarly, the plaintiff in *Hillside* challenged the Agency's transfer of a permit on the grounds that the Agency exceeded its statutory authority by transferring the permit "without prior adoption of formal procedures" and that the Agency's existing procedures did not sufficiently "confine the Agency's discretion." 105 Ill.App.3d at 535, 543. But IPGC has not argued that Section 845.650(e) is insufficient to provide standards for IEPA's review of ASDs nor, as Commentors confusingly suggest, has IPGC suggested that "the regulations need to articulate every detail necessary for its enforcement." P.C.#1 at 8.

ESG Watts, Inc. v. Pollution Control Board, 286 Ill.App.3d 325, 331 (1997). In such cases, it is the hearing before the Board which ensures the necessary "procedures, such as cross-examination, are available for the [petitioner] to test the validity of the information the Agency relies upon in [its decision]." *EPA v. Pollution Control Board*, 115 Ill.2d 65, 70 (1986).

The rules grant IPGC the right to appeal IEPA's Denial before the Board, and 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). That IEPA may determine whether an ASD includes sufficient factual support does not absolve IEPA of its obligation to articulate sufficient and proper bases for its final determination. To conclude otherwise would render IPGC's right to appeal meaningless. To paraphrase the Comment, if IEPA's discretion is as broad as the Commentors suggest, IEPA could issue a non-concurrence stating that the Agency does not concur because the ASD did not include a pudding recipe, and the regulated source would be powerless to argue that a pudding recipe is not a valid requirement for an ASD. *See* P.C.#1 at 9.

III. Conclusion

For the reasons stated above, IPGC supports Commentors' argument in Part I of the Comment that an GWPS exceedance is not possible, and therefore IEPA is not authorized to concur or not-concur with an ASD, until there is a final operating permit including a final groundwater monitoring plan that has been approved by the Agency. If the Board agrees, it should dismiss this matter for lack of jurisdiction and issue a decision explaining that a GWPS exceedance cannot be

determined until IEPA issues an operating permit with an approved groundwater monitoring plan. For the reasons stated above, Commentors' additional arguments in Parts II and III of the Comment should be rejected.

Respectfully submitted,

/s/ Bina Joshi
Bina Joshi

ARENTFOX SCHIFF LLP
Joshua R. More
Bina Joshi
Samuel A. Rasche
233 South Wacker Drive, Suite 7100
Chicago, Illinois 60606
(312) 258-5500
Joshua.More@afslaw.com
Bina.Joshi@afslaw.com
Sam.Rasche@afslaw.com

Attorneys for Illinois Power Generating Company

EXHIBIT 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Respectfully submitted,

Dated: August 3, 2020

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Christine Zeivel
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
(217) 782-5544

Petitioner,

BY: /s/ Christine Zeivel
Christine Zeivel

THIS FILING IS SUBMITTED ELECTRONICALLY

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

ILLINOIS EPA'S PRE-FILED ANSWERS

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

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

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

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

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

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

6. On July 14, 2019, the hearing officer granted the Agency's request.

7. Since receiving all the pre-filed the questions, Agency staff has been working diligently to respond to all the pre-filed questions. However, despite the extra time granted the Agency was not able to prepare final answers by the August 3, 2020 filing deadline for the following: Dynegy and Midwest Generation.

8. The Agency will continue to work to address questions raised by Dynegy and Midwest Generation and hopes to file written answers before the first hearing. If that is not possible, the Agency will be prepared to address those pre-filed questions at the August hearing.

9. The Agency is today filing responses to: Little Village Environmental Justice Organization, ELPC, Prairie Rivers Network and Sierra Club, CWLP, Illinois Environmental Regulatory Group, Ameren, and the Board.

10. It should be noted that if a question was directed at a witness and the Agency answered it as a panel, the answer is provided as: "Agency Response".

2. **Does the hydrogeologic site assessment require determination of the vertical distance between the bottom of the CCR and the uppermost zone of saturation?**

   Response: Yes. As stated above, water table elevations and aquifer potentiometric surface maps are required as part of the hydrogeologic characterization. These are potential migration pathways and the information would be required.

   a. **Would you agree that knowing that distance is necessary to identify contamination migration pathways? If not, please explain.**

Response: Please see answer above.

3. **You state that, for existing CCR surface impoundments, "[a]ny discrepancies noted between the site characterization data and proper designs of the monitoring system and monitoring plans will be noted and missing data will be requested and addressed."**

   a. **Could you please explain what you mean by "addressed"?**

   Response: If data is noted to be missing from the hydrogeologic site characterization that is needed for the design of the groundwater monitoring system and monitoring plan, the missing data will be requested, reviewed when submitted, and any changes then needed to the monitoring system and plan will then be requested of the owner or operator
   If the site characterization data indicates that the monitoring system was not properly designed or implemented, what will the Agency do?
   Response: See answer to a) above.

   b. **Will the Agency require a new groundwater monitoring design be submitted in order to issue an operating permit for the impoundment?**

      Response: If needed, yes. In most cases, it is anticipated that some changes to the monitoring plan will be requested to be submitted.

   c. **If the pre-existing groundwater monitoring system at sites that are currently monitoring groundwater is not designed so that background monitoring wells meet the proposed requirements, how will the Agency address that?**

      Response: If this is found to have occurred, changes to the groundwater monitoring plan will be requested, which may involve installation of new groundwater monitoring wells.

4. **Do the proposed regulations require that leakage of water from unlined ponds be evaluated with respect to its influence on groundwater flow directions and**