BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

To: See Attached Service List (Via Electronic Filing)

PLEASE TAKE NOTICE that the undersigned filed today with the Office of the Clerk of the Illinois Pollution Control Board by electronic filing the following RESPONDENT'S RESPONSE TO PUBLIC COMMENTS OF SIERRA CLUB, EARTHJUSTICE, AND PRAIRIE RIVERS NETWORK, a copy of which is attached hereto and hereby served upon you.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

By: /s/ Mallory Meade

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Dated: February 4, 2025

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 4, 2025, before 5:00 P.M., she caused to be served by electronic mail, a true and correct copy of the following instruments entitled Notice of Filing and Respondent's Response to Public Comments of Sierra Club, Earthjustice, and Prairie Rivers Network to:

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This email transmission contains 14 pages.

s/ Mallory Meade
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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 she verily believes the same to be true.

s/ Mallory Meade
Mallory Meade
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Environmental Bureau

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 RESPONSE TO PUBLIC COMMENTS OF SIERRA CLUB, EARTHJUSTICE, AND PRAIRIE RIVERS NETWORK

NOW COMES Respondent, the Illinois Environmental Protection Agency ("Illinois EPA") by and through its attorney, Kwame Raoul, Attorney General of the State of Illinois, and hereby responds in partial opposition to the Public Comments of Sierra Club, Earthjustice, and Prairie Rivers Network filed on November 21, 2024 ("Cmt." or "Comment"), and Petitioner's Response to that Comment filed on January 10, 2025 ("Petitioner's Response"), as follows.

Introduction

The Comment is divided into three main parts, which respectively make the following arguments:

i. Illinois EPA cannot concur with any alternative source demonstration (ASD) for a CCR surface impoundment until it issues an operating permit for that impoundment that includes an approved groundwater monitoring program (Cmt. at 1);

ii. the Newton ASD fails to adequately identify an alternative source of contamination (Cmt. at 5); and

iii. Illinois EPA has broad discretionary authority to review and either concur or not concur with ASDs (Cmt. at 6).

Illinois EPA takes no issue with Part II of the Comment, and briefly touches on Part III below. Illinois EPA addresses the majority of this Response to Part I, which for the reasons set forth below is inconsistent with the applicable statutory and regulatory scheme.

Petitioner's Response states that Petitioner "supports" Part I of the Comment. Pet'r Resp. at 15. It parts ways with the Comment, however, as to the appropriate relief. While the Comment argues for judgment in Illinois EPA's favor (Cmt. at 9), Petitioner contends that the Board should instead dismiss this appeal for lack of jurisdiction. Pet'r Resp. at 15. This is a curious argument for Petitioner to make, as Petitioner accepted the Board's authority to hear this appeal enough to file the Petition in the first place. And, if this appeal is dismissed, Illinois EPA's nonconcurrence with Petitioner's ASD would stand unchallenged. Regardless, the Board has jurisdiction to adjudicate this Appeal and should uphold Illinois EPA's nonconcurrence, for the reasons below.

I. Exceedances exist and must be acted on even in the absence of an approved groundwater monitoring program.

The Comment summarizes its argument in part I as follows: "An approved groundwater monitoring program is . . . an *essential prerequisite for any exceedance, which is the trigger for an ASD*." (Cmt. at 3, emphasis in original.) By this argument, until an operating permit and groundwater monitoring program have been approved, an ASD is unnecessary because exceedances do not exist. For the following reasons, this argument is inconsistent with the text of Part 845.

A. Exceedances exist independently of operating permit approval.

Section 845.120 of the Board Rules defines "exceedance of the groundwater protection standard," in pertinent part, as follows:

> an analytical result with a concentration greater than the numerical value of the constituents listed in Section 845.600(a), in a down gradient well; or
>
> when the up gradient background concentration of a constituent exceeds the numerical value listed in Section 845.600(a), an analytical result with a concentration at a statistically significant level above the up gradient background concentration, in a down gradient well.

35 Ill. Adm. Code 845.210. By this definition wells must be classified as "up gradient" and "down gradient" in order to determine whether an exceedance has occurred. But contrary to the Comment's argument, the above definition does not require that this necessary classification of wells be part of an *approved* or *established* groundwater monitoring program.

Moreover, Part 845 also refers to exceedances *before* any approved groundwater monitoring program exists. Section 845.230(d)(2) lists various required contents of initial operating permit applications for existing CCR surface impoundments, including "[h]istory of *known exceedances of the groundwater protection standards in Section 845.600*, and any corrective action taken to remediate the groundwater." 35 Ill. Adm. Code 845.230(d)(2)(M) (emphasis added). Thus, Part 845 contemplated that there could be "exceedances" at least as early as the date of its adoption (April 21, 2021), and that owner/operators' *initial* operating permit applications (due by October 31, 2021*, see* 35 Ill. Adm. Code 845.230(d)(1)) would enumerate those exceedances. Thus, an "exceedance" under Part 845 necessarily can exist even before there is an approved operating permit or groundwater monitoring plan.

Consistently with this, the Board Rules provide that the "groundwater protection standards at the waste boundary *must* be" those listed in Section 845.600(a)(1), unless the exception of a higher background concentration under 845.600(a)(2) applies. 35 Ill. Adm. Code 845.600(a) (emphasis added). Here again, in adopting Part 845 the Board plainly contemplated that the

standards, and where applicable their exceedances, would exist even if no approved groundwater monitoring plan was yet in effect.

To be sure, there could be circumstances under which a dispute over the classification of monitoring wells would create difficulties with determining whether an exceedance as defined in Section 845.120 occurred. Petitioner's Response highlights one possible scenario, observing that "[t]he [groundwater protection standards] 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." Pet'r Resp. at 6 (emphasis in original). But Petitioner has not argued that the background concentration of chloride applicable to the Newton PAP is greater than the value set forth in Section 845.600(a)(1). Nor has Petitioner disputed that a chloride exceedance occurred at monitoring well APW15 (only whether the PAP was its source). The fact that a hypothetical operator of a hypothetical impoundment *could* argue for a higher background concentration based on a particular identification of upgradient and downgradient wells, which in some future case *could* create difficulties in determining whether an exceedance has occurred, is irrelevant to this appeal.

B. In this case, Petitioner's operating permit application provides a sufficient basis for enforcement of groundwater monitoring and groundwater protection standards at the Newton PAP.

Nothing in Part 845 limits groundwater monitoring requirements to impoundments that have received a permit. Quite the contrary: Section 845.650 opens with the statement that "[t]he owner or operator of a CCR surface impoundment must conduct groundwater monitoring consistent with this Section." 35 Ill. Adm. Code 845.650(a). The only mention of permits in that Section is the statement that "[t]he owner or operator of the CCR surface impoundment must *submit* a groundwater monitoring plan to the Agency with its operating permit application." *Id.*

(emphasis added). The groundwater monitoring requirements of Section 845.650 thus apply to all CCR surface impoundments, whether they have been issued an operating permit or not.

The Comment lists numerous cases in which the federal government identified serious flaws in groundwater monitoring at CCR impoundments. Cmt. at 3-5. Illinois EPA does not dispute that this risk is real. But some of these federal findings on which the Comment relies *also* involved the evaluation of ASDs under the federal rules. *See, e.g.,* Calaveras decision at 55-58, *available at* https://www.regulations.gov/document/EPA-HQ-OLEM-2022-0333-0001. Thus, although USEPA identified serious flaws in groundwater monitoring at these impoundments, those flaws did *not* prevent the operator from detecting exceedances potentially requiring corrective action, nor did they prevent USEPA from evaluating the ASDs. A flawed groundwater monitoring network can still identify exceedances of applicable standards, even if those same flaws might also justify rejecting an ASD submitted in relation to the exceedances.

II. Adopting the Comment's argument would lead to absurd results and impermissible gaps in the enforcement of Part 845.

Exceedances of a groundwater protection standard trigger the entire Part 845 corrective action process, not just the ASD process. *See* 35 Ill. Adm. Code 845.650, 845.660, 845.670. If an approved groundwater monitoring program were an "essential prerequisite" for an exceedance, as the Comment contends, then it would also be an essential prerequisite for *any* requirement of corrective action under Subpart F. This would leave an unacceptable gap in Part 845 that would allow exceedances originating from CCR leachates, such as the chloride exceedance at issue in this appeal, to remain unaddressed.

Thus, adopting the Comment's reasoning would result in an outcome significantly less protective of public health and the environment than the status quo: operators of CCR surface

impoundments would have no obligation under Part 845 to monitor, report, or take corrective action against detected exceedances until after a permit issues.

Worse, if the Board were to adopt the Comment's interpretation, an owner/operator could simply never submit—or could even withdraw—its Part 845 permit applications, so that there would never be an approved groundwater monitoring program. While the failure to file such applications would violate other provisions of Part 845, the corrective action requirements would no longer come into play. Illinois EPA would then be unable to enforce the groundwater protection standards in Section 845.600, or any of the resulting corrective action requirements in Subpart F. Thus, under the Comment's interpretation, Part 845 would have its teeth pulled. An interpretation that leads to such a self-defeating result cannot be sustained.

The Comment argues that exceedances cannot exist until Illinois EPA has approved a groundwater monitoring plan. Illinois EPA disagrees with this not only for the above reasons, but also because, even if imperfect, Petitioner's groundwater monitoring network has detected actual exceedances of groundwater protection standards that must be addressed.

The record in this case provides sufficient information for both Illinois EPA and the Board to conclude that an exceedance has occurred. Petitioner's operating permit application of October 25, 2021 classifies its monitoring wells as either "background" or "compliance" (i.e. downgradient). R. at R001254. Petitioner's authorized representative certified the operating permit application, of which these specific determinations are a part, to be "true, accurate, and complete" and "prepared . . . in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted." R. at R000580. And the groundwater monitoring plan itself also bears the certifications of a professional engineer and a professional geologist. R. at R001244. Even though Petitioner's groundwater monitoring network has not yet been approved

through the permitting process, it is reasonable to hold Petitioner accountable for groundwater exceedances that Petitioner itself has detected and acknowledged.

A. Multiple considerations support immediate enforcement of corrective action requirements

The Comment's interpretation of Part 845 would leave substantial parts of the statutory and regulatory scheme unenforceable until an operating permit issues. Such a result is not needed. Illinois EPA finds multiple reasons why it is preferable not to defer enforcement until the permitting process is complete.

First, the Coal Ash Pollution Prevention Act ("CAPPA"), 415 ILCS 5/22.59 (2022), provides that "[n]o person shall cause or allow the discharge of any contaminants from a CCRSI into the environment so as to cause . . . a violation of this Section or any regulations or standards adopted by the Board . . ." 415 ILCS 5/22.59(b)(1) (2022). An exceedance of the groundwater protection standards in Section 845.600(a) would plainly be within the scope of this prohibition. And the Legislature did not condition this prohibition on an *approved* operating permit or established groundwater monitoring plan before such a violation could exist. The Comment's interpretation would thus weaken the enforcement of CAPPA contrary to the Legislature's intent.

Second, holding an owner/operator accountable for exceedances identified pursuant to the groundwater monitoring plan in its operating permit application is protective of public health and the environment, consistent with the purposes of CAPPA and the Environmental Protection Act ("Act") as a whole, 415 ILCS 5/1 *et seq*. (2022). Adopting the Comment's view would be less protective of public health and the environment than the Agency's current interpretation. Critically, the choice the Comment presents is not between groundwater monitoring under an unapproved permit application and groundwater monitoring under an approved permit. It's between groundwater monitoring under the unapproved application and no groundwater

monitoring at all. Nor is this harm merely hypothetical: Petitioner has voluntarily acknowledged some exceedances and commenced the corrective action assessment process for those. R. at R001611. If the Comment's argument were accepted, Petitioner, and other similarly situated impoundment operators, would have no incentive to participate in the corrective action process. Indeed, if no exceedances could be actionable under Part 845 until the permitting process were complete, operators would have no incentive to actively participate in the permitting process itself.

Third, doing so ensures that Part 845 remains at least as protective as the federal rules under subpart D of 40 C.F.R. pt. 257, as CAPPA requires. *See* 415 ILCS 5/22.59(g)(1) (2022). Many provisions of Part 845 parallel similar provisions of the federal rules. For example, the requirements for groundwater monitoring and evaluation of exceedances under Section 845.610(b)(3)(A) and (c) parallel those under the federal rules at 40 C.F.R. 257.90(b) and (c). But the federal rules are self-executing and thus contain no analog to Part 845's requirement for approval of the groundwater monitoring plan. If Part 845's approval requirement were construed as a prerequisite for enforcement, as the Comment urges, Part 845 would be substantially less protective than the federal rules, in violation of CAPPA. Moreover, CCR surface impoundments subject to Part 845 are also subject to groundwater monitoring under the federal rules. Thus, if the groundwater monitoring rules under Subpart F were construed as applying only to those impoundments with approved operating permits, Part 845 would cover fewer impoundments than the federal rules and thus would be less protective than CAPPA requires. In the Illinois context, this is particularly notable with respect to the Waukegan plant (mentioned in Cmt. at 3, 4, 5), where USEPA has evaluated ASDs based on groundwater monitoring that has been underway under the federal rules. *See* Waukegan proposed decision, *available at* https://www.regulations.gov/document/EPA-HQ-OLEM-2023-0209-0001. If Part 845 were

construed to bar Illinois EPA from evaluating these same exceedances that USEPA is evaluating under the federal rules, the state rule would again be less protective than the federal one. This would not only contravene CAPPA but would imperil the State's ability to seek primacy for regulation of CCR surface impoundments in Illinois.

Fourth, doing so is consistent with the overall statutory and regulatory scheme of CAPPA, the Act, and Part 845. CAPPA allowed some time for the Board to adopt the rules now found in Part 845 (415 ILCS 5/22.59(g) (2022)), but nothing suggests a legislative intent for these rules, once adopted, to simply stand in abeyance until permits issue. Likewise, Subpart F's groundwater monitoring and corrective action requirements apply to "[a]ll CCR surface impoundments"—not only those that have received permit approval. *See* 35 Ill. Adm. Code 845.610(a). The Legislature anticipated that there would likely be delays in permitting. Section 39(a) of the Act, for example, provides that the "[t]he 90-day and 180-day time periods for the Agency to take final action do not apply to . . . CCR surface impoundment applications under subsection (y) of this Section." 415 ILCS 5/39(a) (2022). But CAPPA makes no corresponding provision for a delay in enforcement. Rather, CAPPA imposes an *immediate* prohibition on releases from CCR surface impoundments (415 ILCS 5/22.59(b)(1) (2022)), not merely on releases after a permit is approved. Moreover, the complexity of the task of determining whether a groundwater monitoring network is sufficient (and groundwater flows are properly characterized), as emphasized in the Comment (at 3), suggests that rushing this process would be both difficult and unwise. Thus, Part 845's corrective action scheme should be construed consistent with the Board's and Legislature's intent to prohibit releases from CCR surface impoundments even as permit applications are pending.

Fifth, doing so is consistent with CAPPA's goal "to promote . . . the responsible disposal and storage of coal combustion residuals, so as to protect public health and to prevent pollution of

the environment of this State." 415 ILCS 5/22.59(a) (2022). The Comment expresses a reasonable concern that "[w]ithout an approved program, owners/operators may be engaging in a variety of erroneous monitoring practices that result in contamination from the CCR surface impoundment not being fully detected or characterized." Cmt. at 3. But making an approved program a requisite for an exceedance would replace this potentially less-than-full detection not with more complete detection, but *no* detection at all until a permit is approved.

III. Even if the Comment's reasoning is accepted, the Board has jurisdiction over this proceeding under the Act.

Petitioner argues that if the Board accepts the Comment's argument, then the appropriate relief would be for the Board to dismiss Petitioner's own petition for lack of jurisdiction. Pet'r Resp. at 9. However, Section 5(d) of the Act, 415 ILCS 5/5(d) (2022), provides as follows:

> The Board shall have authority to conduct proceedings . . . upon other petitions for review of final determinations which are made pursuant to this Act or Board rule and which involve a subject which the Board is authorized to regulate.

Petitioner submitted an ASD, pursuant to Board rule. R. at R001606. Illinois EPA issued a final non-concurrence with that ASD, pursuant to Board rule. R. at R001965. And Petitioner filed a petition for review of the Agency's non-concurrence, pursuant to Board rule. R. at R001972. The Legislature has authorized the Board to regulate the subject of discharges from CCR surface impoundments in general, and ASDs in particular. *See* 415 ILCS 5/22.59(g) (2022). Even if the parties were mistaken as to the Board rules' requirements, as the Comment argues, all of these actions were taken pursuant to Board rules. The Board accordingly has the authority to conduct this proceeding, and thus has jurisdiction over the subject matter, under Section 5(d) of the Act.

Because the Board has jurisdiction over the subject matter, if the Board were to adopt the Comment's argument, the appropriate relief would be for the Board to exercise its jurisdiction and

deny the petition for review on the grounds that the relief sought (concurrence with Petitioner's ASD) is not available at this stage.

IV. Illinois EPA's discretion in enforcing Part 845 extends to pre-permit enforcement.

Part III of the Comment presents a detailed and well-supported argument that, among other things, "IEPA may validly exercise discretion in scrutinizing ASDs and their factual and evidentiary support in order to determine whether the ASD adequately demonstrates that 'a source other than the CCR surface impoundment caused the contamination.'" Cmt. at 8, quoting 35 Ill. Adm. Code 845.650(e). Such discretion also should extend to Illinois EPA's seeking corrective action for groundwater quality exceedances prior to the issuance of an operating permit. As the Comment states, "[a]n administrative agency 'may validly exercise discretion to accomplish in detail what is legislatively authorized in general terms,' and it has the power to do what is reasonably necessary to fulfill its duties." Cmt. at 8, citing *R.L. Polk & Co. v. Ryan*, 296 Ill. App. 3d 132, 140-41 (1998). Here, under CAPPA and Part 845, Illinois EPA has a duty to protect the public health and environment of Illinois from harm caused by CCR surface impoundments. To accomplish that goal, Illinois EPA must have the discretion to act (including concurring or not concurring in ASDs) based on reasonably available information, even when permits have not yet been issued. IEPA's discretion in scrutinizing the evidentiary support for ASDs should pertain, regardless of whether a permit has been issued.

Conclusion

Illinois EPA has no quarrel with the Comment's view that it would be preferable to have these ASD discussions in the context of an approved operating permit and groundwater monitoring program. But in the absence of such an approved permit and program, it is appropriate and necessary for Illinois EPA to hold impoundment owner/operators to account for exceedances of

groundwater protection standards that the owner/operators themselves have detected and reported. Doing so is consistent with the overall scheme and purpose of CAPPA and Part 845. And not doing so would have absurd and counterproductive results, as it would leave the corrective action requirements of Part 845 toothless and unenforceable.

Accordingly, as the Comment argues, the Board should uphold Illinois EPA's nonconcurrence with Petitioner's ASD and should grant Illinois EPA's motion for summary judgment.

Respectfully Submitted,

PEOPLE OF THE STATE OF ILLINOIS
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