BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on March 5, 2025, I electronically filed with the Clerk of the Illinois Pollution Control Board ("Board") the **Second Public Comments of Earthjustice, and Prairie Rivers Network, and Sierra Club**, copies of which are attached hereto and herewith served upon you.

Dated: March 5, 2025

Respectfully Submitted,

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SECOND PUBLIC COMMENTS OF EARTHJUSTICE, PRAIRIE RIVERS NETWORK, AND SIERRA CLUB

Illinois Power Generating Company ("IPGC"), the Petitioner in this matter, operates the Primary Ash Pond ("PAP"), a coal ash impoundment, at the Newton Power Plant in Jasper County, Illinois ("Newton"). IPGC, through its not-yet-approved groundwater monitoring system, detected chloride contamination exceeding groundwater protection standards. In an effort to demonstrate that the PAP was not the source of the chloride contamination, IPGC submitted an alternative source demonstration ("ASD") to the Illinois Environmental Protection Agency ("IEPA" or "Agency"), with which IEPA did not concur. IPGC appealed IEPA's non-concurrence to the Illinois Pollution Control Board ("Board"). Commenters Sierra Club, Earthjustice, and Prairie Rivers Network ("Commenters") submitted public comments on the parties' Motions for Summary Judgment in this matter in November 2024 ("P.C. #1"). Both IPGC and IEPA have now responded to those public comments, and, pursuant to 35 Ill. Adm. Code 101.628(c), 101.110(a), and 105.100(b), Commenters respectfully submit the present public comments to address certain points in those responses.

I. Introduction

The Agency presents a variety of reasons why, it contends, it may review and address ASDs prior to issuing an operating permit with an approved groundwater monitoring program for the relevant CCR surface impoundment (here, the PAP at the Newton plant). None of them survive scrutiny. To begin, although the term "exceedance" may have been used loosely to refer to excess concentrations that precede approval of the groundwater monitoring program, context—namely, the long history of groundwater monitoring at CCR surface impoundments in Illinois—reveals that the use of that term in Section 845.230(d)(1)(M) is shorthand for excess pollutant concentrations found in historic monitoring data. Indeed, multiple regulated entities' filings confirm that they understand, and have understood, any "exceedances" prior to approval of a groundwater monitoring program to be merely "potential exceedances" for purposes of Part 845. This interpretation is consistent with testimony from IEPA staff during the rulemaking that

led to Part 845 as well as the structure of Part 845, as directed by the Coal Ash Pollution Prevention Act ("CAPPA") (Public Act 101-171). Interpreting "exceedance" or "groundwater protection standard" to pre-date Agency review and approval would undermine the key Agency review-and-approval function mandated by CAPPA as well as the legislature's directive that public participation be meaningful. What is more, that interpretation jeopardizes Illinois' possibility of obtaining primacy over its CCR program. As explained in more detail herein, the Board should reject the Agency's approach, hold that ASDs are premature unless and until a final operating permit has been issued for the site (here, Newton), and direct the Agency to focus on review and issuance of the operating and construction permits that have been pending before it for years.

II. Part 845 Does Not Contemplate ASDs Unless and Until the Agency has Approved the Groundwater Monitoring Program for the CCR Surface Impoundment in an Operating Permit.

A. The Board Must Account for the History of Groundwater Monitoring at CCR Surface Impoundments in Illinois in Interpreting Part 845.

IEPA asserts that Part 845's references "to exceedances before any approved groundwater monitoring program exists" establishes that "exceedances" may predate the approval of groundwater monitoring programs.[1] IEPA is incorrect. The references in Part 845 to historic "exceedances" must be interpreted in the context of the history of groundwater monitoring at CCR surface impoundments in Illinois. Groundwater monitoring under other regulatory regimes[2] has been ongoing at numerous CCR surface impoundments in the State since approximately 2010, after the December 2008 CCR impoundment collapse near Kingston, Tennessee prompted the Agency to request such monitoring from impoundment operators;[3] at certain impoundments, monitoring has been ongoing for far longer.[4] And most other CCR surface impoundments in Illinois that were not already conducting monitoring began doing so by October 2017, when the 2015 Federal CCR Rule's[5] groundwater monitoring requirements went into effect.[6]

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[1] *See* IEPA, Respondent's Response to Public Comments of Sierra Club, Earthjustice, and Prairie Rivers Network at Section I(A), PCB 2024-043 (Feb. 4, 2025) ("IEPA Response") (emphasis omitted).
[2] *See* 35 Ill. Adm. Code Part 620; IEPA, Pre-filed Testimony of Lynn Dunaway at 2–4, PCB R2020-19 (June 2, 2020).
[3] *See, e.g.,* "Illinois EPA's Ash Impoundment Strategy Progress Report" (Oct. 2011), https://www2.illinois.gov/epa/Documents/iepa/water-quality/watershed-management/ash-impoundment/ash-impoundment-progress-102511.pdf.
[4] For example, the Joliet 9 CCR surface impoundment has been monitoring groundwater for multiple decades. *See* Order and Opinion of the Board at 11, PCB AS-9 (Aug. 15, 1996) (approving groundwater monitoring program for the site and noting that there are 10 pre-existing monitoring wells).
[5] Hazardous and Solid Waste Mgmt. Sys.: Disposal of Coal Combustion Residuals From Elec. Utils., 80 Fed. Reg. 21302 (Apr. 17, 2015) ("2015 Federal CCR Rule").
[6] *See* 40 C.F.R. § 257.94(b) (requiring existing CCR surface impoundments to take "eight independent samples from each background and downgradient well" to be analyzed for the constituents listed in Appendices III and IV of the rule—the same constituents for which 35 Ill. Adm. Code § 845.600(a)(1) sets groundwater protection standards, plus calcium—"no later than October 17, 2017"); IEPA, Pre-filed Testimony of Lynn Dunaway at 4, PCB R2020-19 (June 2, 2020). Because the 2015 Federal CCR Rule unlawfully excluded "legacy" CCR surface impoundments, that is, inactive impoundments at inactive power plants, *see Util. Solid Waste Activities Grp. v. Env't Prot. Agency*, 901

Part 845 acknowledges this historic reality by directing owners or operators of CCR surface impoundments to report, in their operating permit applications, instances in which concentrations in excess of the Part 845 groundwater protection standards were identified—using the shorthand "exceedances" for such instances—as well as any corrective action undertaken under other regulatory schemes to address them.[7] That information is useful to IEPA and the public to augment the CCR surface impoundment's hydrogeologic site characterization and ensure that the approved groundwater monitoring program, following IEPA and public review, fully monitors all potential contaminant pathways as required by 35 Ill. Adm. Code § 845.630(a)(2).

B. Part 845 Calls for Agency Review and Approval of Background Concentrations, Groundwater Protection Standards, and Exceedances.

The Agency also gets it wrong with regard to the groundwater protection standards.[8] Part 845 provides that the groundwater protection standards are the numerical values set out in Section 845.600(a)(1) unless there is a higher background concentration at the site[9]—a question that IEPA is directed to determine as part of its review of groundwater monitoring programs. Review of Part 845 Section 610 makes that clear. For existing CCR surface impoundments, among the "Required Submissions and *Agency Approvals* for Groundwater Monitoring" that must be included in initial operating permit applications are samples from background wells and "design and construction plans of a groundwater monitoring system that meets the requirements of Section 845.630"[10]—the section that sets out, at (a)(1), the requirements for establishing background groundwater concentrations. If the groundwater monitoring system, including background concentrations, could be developed by the permit applicant prior to and independent of Agency approval, Part 845 would not include them under a header of "Agency Approvals."

That the Agency would need to review and approve background concentrations has been plain since the Agency proposed what became Part 845. Lynn Dunaway, then-Environmental Protection Specialist IV with over 30 years of experience at the Agency, testified that "[t]he use of existing data from existing monitoring wells for the calculation of background groundwater quality *would be subject to Agency review as part of the initial operating permit*."[11] Background groundwater quality, he noted, "is vital to any groundwater sampling and analysis plan. Without an understanding of the groundwater quality that is flowing onto a facility and beneath the CCR surface impoundment(s), an owner or operator can't accurately determine if or to what extent a

F.3d 414, 432 (D.C. Cir. 2018), those legacy impoundments were not subject to federal groundwater monitoring requirements until USEPA issued expanded federal mandates in May 2024. *See* Hazardous and Solid Waste Mgmt. Sys.: Disposal of Coal Combustion Residuals from Elec. Utils.; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38950 (May 8, 2024), https://www.govinfo.gov/content/pkg/FR-2024-05-08/pdf/2024-09157.pdf (amending 40 CFR § 257) ("2024 Federal CCR Rule").

[7] *See* 35 Ill. Adm. Code § 845.230(d)(2)(M); note that the "corrective action" noted in that provision could not be referencing corrective action under Part 845, since, under 35 IAC 845.200(a)(3), no corrective action may be taken at CCR surface impoundments without a new or modified Part 845 permit. Naturally, no such permits had been issued prior to the finalization of Part 845.

[8] *See* IEPA Response at Section I(A).

[9] 35 Ill. Adm. Code § 845.600(a)(2).

[10] *Id.* § 845.610(b)(1)(B) (emphases added).

[11] IEPA, Pre-filed Testimony of Lynn Dunaway at 12 (June 2, 2020) (emphasis added).

CCR surface impoundment is impacting groundwater."[12] Proper determination of background concentrations is, accordingly, the backbone of the groundwater monitoring system: without it, groundwater protection standards cannot be set and exceedances cannot be determined.[13] Agency review and approval is thus the prerequisite for the groundwater monitoring program to move forward, and that scheme is both the intent and mandate of Part 845. Therefore, ASDs are not ripe for Agency review until IEPA has reviewed and approved the site's groundwater monitoring program in an approved operating permit.

C. Regulated Entities Have Recognized Since the Promulgation of Part 845 that ASDs were Not Ripe until IEPA Issued a Final Operating Permit.

Filings from regulated entities—owners/operators subject to Part 845—further underscore that the rules make review and approval by the Agency a prerequisite to exceedances, the establishment of background concentrations, and groundwater quality standards. Petitioner IPGC notes in its response to Commenters' first comments in this docket that, following a violation notice issued to it and other entities in 2022, it "explained to IEPA that a [groundwater protection standard] exceedance could not occur until the Agency issued an operating permit with an approved [groundwater monitoring program]."[14] IPGC elaborates on the reasoning for this conclusion, echoing and extending Commenters' explanation of how Part 845 makes clear that Agency pre-approval is the jumping-off point for exceedances, background determinations, and groundwater protection standards.[15]

As early as 2021, other Luminant subsidiaries noted that the "exceedances" to be included in the initial operating permit application under the provision IEPA references in its response[16] were merely "potential exceedances" because the groundwater monitoring program for the relevant site was not yet approved. In its operating permit application for the Edwards Power Plant, Illinois Power Resources Generating, LLC., wrote: "Groundwater concentrations from 2015 to 2021 presented in the Hydrogeologic Site Characterization Report. . . are considered potential exceedances because the methodology used to determine them is proposed in the Statistical Analysis Plan. . . which has not been reviewed or approved by IEPA at the time of submittal of the. . . Operating Permit Application."[17] That same year, Dynegy Midwest Generation wrote nearly identical language in its Operating Permit Application for the Vermilion Power Plant North Ash Pond/Old East Ash Pond.[18]

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[12] *Id*. at 10.
[13] *See* PC #1 at 2-3.
[14] IPGC, Response to Comments of Sierra Club, Earthjustice, and Prairie Rivers Network at 3, PCB 2024-043 (Jan. 10, 2025) ("IPGC Response").
[15] *See id.* at 4-7.
[16] 35 Ill. Adm. Code § 845.230(d)(2)(M).
[17] IPGC, Edwards Operating Permit application at Attach. M, History of Potential Exceedances (Oct. 25, 2021), https://www.luminant.com/documents/ccr/il-ccr/Edwards/2021/2021%2010%2030%20Edwards%20AP%20Op%20Permit%20App%20W1438050005-01.pdf .
[18] Dynegy Midwest Generation, LLC, Vermilion NAPS/OEAP Operating Permit application at Attach. R, History of Potential Exceedances (Oct. 25, 2021), https://www.luminant.com/documents/ccr/il-ccr/Vermilion/2021/2021%2010%2030%20Vermilion%20NAP-OEAP%20Op%20Permit%20App%20W1838000002-01,03.pdf.

Similarly, in the October 2021 initial operating permit application for the Waukegan Generating Station, Midwest Generation, LLC listed groundwater samples with concentrations above the standards set out in Section 845.600(a)(1) and stated that "Proposed [groundwater protection standards] developed in accordance with Section 845.600(b) are presented in Section 9.4 above. Once Illinois EPA reviews and approves those proposed GWPSs, those values will be used for subsequent groundwater monitoring data comparisons."[19] The company likewise noted that, "[b]ecause the GWPSs are under review, there are no approved GWPSs for the constituents in the groundwater and accordingly, it cannot be determined if there is an exceedance of the groundwater protection standards in Section 845.600."[20] Midwest Generation, LLC, included near-identical statements in the initial operating permit applications for Joliet 29 Generating Station and Joliet 9 Generating Station ("Lincoln Stone Quarry"), also submitted in 2021.[21] In short, regulated entities have, since shortly after Part 845 was issued, properly understood the rules as requiring Agency pre-approval of groundwater monitoring programs to establish groundwater protection standards and determine exceedances. Without those Agency pre-approvals, evaluation of ASDs is premature.

D. Part 845 Neither Creates "Difficulties" Nor Allows Operators to Decline to Submit Permit Applications.

The Agency's further assertions—suggesting that Part 845 could "create difficulties" as to the determination of an exceedance[22] and that owners or operators of CCR surface impoundments could simply decide not to seek a permit[23]—also fail. The Agency sets permit limits like groundwater protection standards all the time—for example, limits in discharge permits under the Clean Water Act and Prevention of Significant Deterioration permits under the Clean Air Act. Permit applicants propose limits; the Agency reviews and approves or rejects them and sets out final limits in permits. Commenters certainly hope that the Agency does not find that longstanding, basic oversight process "create[s] difficulties."

The suggestion that owners or operators of CCR surface impoundments could simply abstain from the permitting process altogether ignores multiple provisions of Part 845. As IPGC discusses in its response to the Agency's response, Part 845 requires operating, closure, and corrective action permits and bars owners and operators from operating, closing, or conducting corrective action at CCR surface impoundments without a permit.[24] Obtaining, and operating in accordance with, an IEPA-issued permit is not optional.

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[19] Midwest Generation, LLC, Initial Operating Permit Application for Waukegan Generating Station at 24 (Oct. 29. 2021), http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/WAU_APE_IPI.pdf.

[20] *Id*.

[21] *See* Midwest Generation, LLC, Initial Operating Permit Application, Joliet 29 Generating Station at 21–22 (Oct. 29, 2021), http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/JOT_AP2_IPI.pdf; Midwest Generation, LLC, Initial Operating Permit Application, Joliet 9 Generating Station at 24–25 (Oct. 29, 2021), http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/LSQ_SQ1_IPI.pdf.

[22] IEPA Response at Section I(A).

[23] *Id*. at Section II.

[24] 35 Ill. Adm. Code § 845.200(a); *see also* IPRG, Response to Comments of Illinois Environmental Protection Agency at 2–3 (Feb. 25, 2025).

III. Review and Issuance of ASD Decisions Prior to Issuance of the Operating Permit Contravenes and Undermines the Coal Ash Pollution Prevention Act.

A. Review and Issuance of ASDs Prior to Issuance of the Operating Permit Undermines the Permitting Program Required by CAPPA.

In December 2016, Congress adopted the Water Infrastructure Improvements for the Nation Act ("WIIN Act").[25] The WIIN Act amended the Resource Conservation and Recovery Act ("RCRA") by, among other things, directing EPA to approve state coal ash permitting programs that "require[] each coal combustion residuals unit located in the State to achieve compliance with . . . criteria that [are] at least as protective as" the federal criteria for CCR units under 40 C.F.R. Part 257.[26]

US EPA has explained that the 2015 Federal CCR Rule was promulgated to be self-implementing with the understanding that there would be no permitting oversight allowing for essential site-specific analysis.[27] As such, the WIIN Act called for important increases in oversight and enforcement at coal ash disposal sites by authorizing states like Illinois to replace the self-implementing 2015 Federal CCR Rule with a permitting scheme similar to other environmental programs where regulatory requirements are administered and enforced through permits.[28] The WIIN Act also required state permit programs to ensure that all CCR units achieve compliance with criteria at least as protective as the 2015 Federal CCR Rule and that state programs must be "a permit program or other system of prior approval and conditions," meaning that state permit programs must require prior state approval of key permitting documents and inputs before any continued operation, closure, or corrective action can occur.[29]

To address the hole in regulatory oversight left by the 2015 Federal CCR Rule, CAPPA, signed by Gov. Pritzker in July 2019, required the establishment of a comprehensive permitting program—mandating that all requirements applicable to CCR impoundments be included in permits;[30] that the Agency receive significant funding to implement the permitting program;[31] and that the program include robust, meaningful opportunities for public participation.[32]

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[25] Pub. L. No. 114-322, 130 Stat. 1628 (2016) (codified at 42 U.S.C. § 6945(d)).
[26] 42 U.S.C. § 6945(d)(1)(B) (emphasis added); *see also Util. Solid Waste Activities Grp v. EPA*, 901 F.3d 414, 437 (D.C. Cir. 2018) ("the WIIN Act does not affect the validity of the Rule itself . . . ").
[27] 80 Fed. Reg. 21,302, 21,311 (Apr. 17, 2015); *USWAG*, 901 F.3d at 437 (citing counsel for EPA's oral argument explanation that certain provisions of the 2015 Federal CCR Rule "cry out for site specific enforcement").
[28] 42 U.S.C. § 6945(d)(1)(B). The WIIN Act also called on US EPA to adopt a permitting program for "nonparticipating State[s]"—*e.g.* those that do not have a US EPA-approved state CCR permitting program—but made implementation of that mandate subject to the "availability of appropriations." *Id.* at § 6945(d)(2)(B). US EPA has not yet implemented a federal CCR permitting program; accordingly, the Federal CCR Rule remains self-implementing in all states except Oklahoma, Georgia, and Texas, which received US EPA approval for their programs. *See* US EPA, Permit Programs for Coal Combustion Residual Disposal Units (Aug. 12, 2024), https://www.epa.gov/coalash/permit-programs-coal-combustion-residual-disposal-units.
[29] 42 U.S.C. § 6945(d)(1)(B).
[30] 415 ILCS 5/22.59(g)(3) requires that the rules "specify which types of permits include requirements for closure, post-closure, remediation and all other requirements applicable to CCR surface impoundments."
[31] 415 ILCS 5/22.59(j) specifies fees to be paid by owners and operators of CCR surface impoundments, while 415 ILCS 5/22.59(k) specifies that those fees are to be deposited into the "Environmental Protection Permit and Inspection Fund."
[32] *See* 415 ILCS 5/22.59(a), (a)(5), (g)(6).

The Agency claims that Petitioner's operating permit *application* provides a sufficient basis for enforcement of groundwater monitoring and groundwater protection standards at the Newton PAP.[33] That application, however, only includes a *proposed* groundwater monitoring program. Allowing Petitioner to detect and identify exceedances and then reviewing an ASD based on those exceedances is tantamount to letting Petitioner establish and approve its own groundwater monitoring program—a result that would undermine the permitting program required by CAPPA.

Part 845 is not self-implementing like the 2015 Federal CCR Rule. If Part 845 were self-implementing, there would be no need for IEPA to review and issue operating permits. However, CAPPA was drafted explicitly to require agency oversight, in contrast to the federal CCR regulatory scheme. Thus, in accordance with CAPPA, Agency approval of an operating permit, including a groundwater monitoring program, must occur before an ASD is ripe for evaluation.

B. Review and Issuance of ASDs Prior to Issuance of the Operating Permit Also Undermines Public Participation.

Meaningful public participation is a necessary requirement of the permitting process and is required by CAPPA.[34] Public participation is a key safety valve that helps to ensure compliance and minimizes risk to the environment. When agencies lack resources to ensure that industry meets all permit requirements, the public can step in to protect the environment and communities. Moreover, community members often have local knowledge that can help regulators make better-informed decisions about a site. Public participation in permitting serves the same goals as public participation in rulemaking; in both contexts, the public can voice their concerns and provide new information to the government body making a determination.[35]

As such, Part 845 requires draft operating permit determinations to be subject to public notice and comment as well as a public hearing, if a significant degree of public interest exists.[36] Without an opportunity to review and comment on the full operating permit application, including the proposed groundwater monitoring program, residents cannot adequately scrutinize whether the activities happening in their communities put them, or their environment, at risk, nor can they offer input that may help minimize any such risk. Thus, allowing ASDs to be reviewed prior to the issuance of an operating permit and approved groundwater monitoring program that was subject to public participation requirements would undermine CAPPA and Part 845.

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[33] IEPA Response at 4.

[34] *See* 415 ILCS 5/22.59(g)(6); *see also id.* 5/22.59(a)(1)

[35] *See Conn. Light & Power Co. v. Nuclear Reg. Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982) ("The purpose of the comment period is to allow interested members of the public to communicate information, concerns, and criticisms to the agency during the rule-making process. If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals. As a result, the agency may operate with a one-sided or mistaken picture of the issues at stake in a rule-making"); *see also Senn Park Nursing Ctr. v. Miller*, 455 N.E.2d 153, 158 (Ill. App. Ct. 1st Dist. 1983) ("We note first that public participation 'in the rule-making process is essential in order to permit administrative agencies to inform themselves and to afford adequate safeguards to private interests.'") (internal citations omitted).

[36] *See* 35 ILCS 845.620(b)-(d).

IV. Issuing Operating Permits First, As Part 845 Demands, Is More Protective Than Addressing ASDs Before Groundwater Monitoring Programs Are Approved.

The Agency claims that requiring issuance of operating permits before ASDs can be addressed or the corrective action process can commence would be "significantly less protective of public health and the environment" than the status quo.[37] This is incorrect. Attempting to address "imperfect" exceedances[38]—which is how IEPA refers to potential exceedances based on unapproved and unreviewed groundwater monitoring programs—before issuance of operating permits is, as explained in more detail below, a flawed and ineffective process that will also likely be inefficient and costly. On the contrary, complete, fully-reviewed groundwater monitoring programs are essential to ensure all contamination coming from a CCR surface impoundment is identified.

As discussed in Commenters' previous comments in this docket, an approved groundwater monitoring program establishes which monitoring wells, at which locations and depths, are necessary to identify pollution that the CCR surface impoundment is causing or contributing to.[39] Without 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. Among other flaws, owners or operators may have set up a groundwater monitoring system that is missing contaminant pathways; treating CCR-contaminated wells as "background" wells, resulting in pollution associated with the CCR surface impoundment improperly not being classified as an exceedance; or failing to account for "mounding" or other hydrogeological characteristics that affect groundwater flow.

The risks that the legislature directed the Agency and Board to minimize by establishing a permitting program have become more apparent every time US EPA has examined compliance with the Federal CCR Rule by owners and operators.[40] Just this January, US EPA came to an agreement with Springfield utility City Water, Light, and Power over a multitude of alleged violations at its Dallman and Lakeside CCR surface impoundments.[41] If IEPA had reviewed the groundwater monitoring program, structural stability documentation, and other documentation included in the operating permit application for those impoundments in a timely fashion, surely many of those violations would have been corrected—resulting in less risk for Springfield residents, more comprehensive identification of pollution, and likely a more expedient timeline for cleaning up that contamination.

Thus, without an IEPA-approved program properly revealing which contamination is coming from a CCR surface impoundment like the Newton PAP, *there is insufficient information for IEPA to determine—or for Petitioner to demonstrate—the full nature and extent of the pollution or that the pollution is NOT coming from the PAP.*

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[37] IEPA Response at 5.
[38] *Id.* at 6
[39] *See* 35 ILCS. § 845.630.
[40] *See* PC #1 at 3–5.
[41] *See* US EPA, EPA and City of Springfield, Illinois, Reach Agreement on Coal Ash (Jan. 27, 2025), https://www.epa.gov/newsreleases/epa-and-city-springfield-illinois-reach-agreement-coal-ash.

The Agency claims that if an approved groundwater monitoring program were an "essential prerequisite" for an exceedance, operators of CCR surface impoundments would have no obligation under Part 845 to monitor, report, or take corrective action against detected exceedances until issuance of an operating permit.[42] However, allowing corrective action to commence based on limited, potentially misleading information will likely only result in partial remediation that is ineffective—in fact, it may make pollution worse—as well as inefficient and costly. Part 845 identifies the specific steps that an owner/operator of a CCR surface impoundment must take to operate the impoundment, which include monitoring, detecting, reporting, and remediating contamination. Allowing operators like Petitioner to "jump ahead" in that process and skip necessary steps, like obtaining an operating permit with an approved groundwater monitoring program, because the Agency has experienced significant delays in the permitting process is not the solution and will likely only create additional problems. For instance, Petitioner could potentially devote resources and incur costs cleaning up contamination associated with "imperfect" exceedances only to have to redo, or even remove, the work when an approved groundwater monitoring program determines the full nature and extent of the contamination and/or that the previously completed remediation was inadequate.

Critically, addressing ASDs before the Agency issues operating permits is not only ineffective, but it is also delaying the issuance of operating and construction permits that will lead to comprehensive cleanup of groundwater pollution. Part 845 required all operating permit applications to be submitted by October 31, 2021. Nearly three and a half years have now passed, and the Agency has issued only a *single* operating permit.[43] Although there may be multiple factors causing this significant delay, there is no disputing that the multiple proposed ASDs that have been submitted in the past three and a half years, including Petitioner's, has delayed the comprehensive permitting review that Agency staff should be focused on. To make matters worse, nothing indicates that ASD-related delays will halt or slow down anytime soon.

Thus, IEPA should not address ASDs or allow corrective action to commence before groundwater monitoring programs are approved and operating permits are issued because it is less protective of public health and the environment, ineffective, and inefficient.

V. Agency Issuance of Operating Permits Prior to Reviewing or Granting ASDs is Required for Primacy.

The Agency contends that relying solely on an operator's permit *application* to "hold[] it accountable" for exceedances is more protective of health and the environment than doing so once a final operating permit, with an approved groundwater monitoring program, is issued—and that waiting until IEPA has issued the permit could "imperil the State's ability to seek primacy for regulation of CCR surface impoundments in Illinois."[44] In fact, the opposite is true.

The WIIN Act specifies that to obtain primacy a State must have in place "a permit program or *other system of prior approval* and conditions" ensuring compliance with the Federal

[42] IEPA Response at 5-6.
[43] IEPA, Operating Permit for CCR surface impoundments at the Powerton Generating Station, Pekin, IL (July 3, 2024), http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/POW_BB_IPII.pdf.
[44] IEPA Response at Section II(A).

CCR Rule or other provisions at least as protective as that rule. By including the word "other" before "system of prior approval," the WIIN Act makes clear that state permit programs must require prior State-agency approval of owners' or operators' plans or proposals to comply with the substantive provisions.[45] Indeed, US EPA has denied primacy where, among other things, a State did not satisfy the mandate for prior approval of a permit application. In US EPA's denial of Alabama's primacy application, it explained:

> Permits must implement the underlying regulations by establishing clear and enforceable requirements that a facility must satisfy to comply with the underlying regulations…. [T]he [Assessment of Corrective Measures, "ACM"] at Colbert [coal-fired generating station] had been submitted to the [Alabama Department of Environmental Management, "ADEM"] prior to permit issuance, but ADEM did not determine in the permitting action whether the ACM met the requirements in the regulation, or whether a revised ACM must be submitted to address any deficiencies. ADEM simply copied and pasted corrective action requirements from the regulations into the permit, without applying those requirements to the specific facts at the site. That is not adequate oversight and implementation. *ADEM's failure to adjudicate the requirements applicable to Colbert, or to review and either approve or disapprove submitted application materials, means its permit program is not operating as a 'system of prior approval*.'[46]

The only way to ensure that an owner or operator is satisfying the rules—and therefore ensure that human health and the environment are protected, as RCRA and CAPPA demand—is for the Agency to follow the prior-approval permitting structure that the WIIN Act, CAPPA, and Part 845 require. Thus, the Agency's current practice is what is putting primacy at risk.

VI. Conclusion

For all the reasons explained herein, an ASD is premature unless and until the Agency has approved the groundwater monitoring program for the CCR surface impoundment in a final operating permit that incorporates and accounts for public comment. Accordingly, the Board should: (1) reject this challenge and uphold the Agency's denial of IPGC's ASD for the PAP at Newton, and (2) direct the Agency to focus not on premature ASDs but rather on what CAPPA and Part 845 direct it to do: review and issue permits that detail and ensure compliance with Illinois' CCR requirements so that pollution from Illinois' many leaking CCR ponds can be fully detected and comprehensively remedied.

Dated: March 5, 2025

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[45] 42 U.S.C. § 6945(d)(1)(B).
[46] US EPA, Alabama: Denial of State Coal Combustion Residuals Permit Program, 89 Fed. Reg. 48,774, 48,805 (June 7, 2024) (emphasis added).

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CERTIFICATE OF SERVICE

The undersigned, Jennifer Cassel, an attorney, certifies that I have served by email the Clerk and by email the individuals with email addresses named on the Service List provided on the Board's website, *available at* https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=17449, a true and correct copy of the **Second Public Comments of Earthjustice, Prairie Rivers Network, and Sierra Club**, before 4:30 p.m. Central Time on March 5, 2025. The number of pages in the transmission is 14 pages.

Dated: March 5, 2025

Respectfully Submitted,

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