BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	AS 2021-003
Petition of Midwest Generation	)	
for an Adjusted Standard from 845.740(a)	)	
and a Finding of Inapplicability of Part 845	)	(Adjusted Standard)
(Waukegan Station)	)	

To: See attached service list.

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Illinois Environmental Protection Agency's RESPONSE TO PETITIONER'S POST-HEARING BRIEF, a copy of which is herewith served upon you.

Dated: June 27, 2024

Respectfully submitted,
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

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ILLINOIS EPA'S RESPONSE TO PETITIONER'S POST-HEARING BRIEF

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ("Illinois EPA" or "Agency") by and through its counsel and submits its Response to Petitioner's Post-Hearing Brief in the above captioned case. Illinois EPA states as follows:

INTRODUCTION

On March 13, 2024, the Hearing Officer in the instant case ordered the parties to file closing briefs by May 14, 2024, and any response briefs by June 27, 2024. Both Midwest Generation, LLC ("Petitioner") and the Agency filed post-hearing briefs on May 14, 2024. Consistent with the Hearing Officer's order, the Agency provides this response to Petitioner's post-hearing brief.

The Agency provided post-hearing support for its Recommendation to deny Petitioner's adjusted standard in its post-hearing brief filed on May 14, 2024. In that brief, the Agency explained that the Grassy Field at Petitioner's Waukegan Station is a CCR surface impoundment and should be regulated under the Illinois rules at 35 Ill. Adm. Code 845 ("Part 845") as such. The Agency now provides additional support for its Recommendation in response to Petitioner's post-hearing brief ("Pet. Brief").

THE GRASSY FIELD IS A CCR SURFACE IMPOUNDMENT

The Agency and Petitioner agree there are three criteria in the definition of a CCR surface impoundment that must be met and that the act of sluicing does not create a CCR surface

impoundment. However, Petitioner still does not appear to fully understand the definition of a CCR surface impoundment.

A CCR surface impoundment is defined as a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the surface impoundment treats, stores, or disposes of CCR. 415 ILCS 5/3.143, 35 Ill. Adm. Code 845.120, and 40 CFR 257.2. Petitioner argues that the Grassy Field is not a CCR surface impoundment because it has never satisfied the second criteria, that it was not "designed to hold an accumulation of CCR and liquids." The history of the site demonstrates that this is untrue.

CCR was sluiced into the original Slag Field (referred to as the "Original Slag-Ash Field" and the "Old Pond" in past filings). Significantly, sluiced CCR is an accumulation of CCR and liquids. The USEPA supports the Agency's position with its definition of "Liquids":

> Liquids means any fluid (such as water) that has no independent shape but has a definite volume and does not expand indefinitely and that is only slightly compressible. This encompasses all of the various types of liquids that may be present in a CCR unit, including water that was sluiced into an impoundment along with CCR, precipitation, surface water, groundwater, and any other form of water that has migrated into the impoundment, which may be found as free water or standing water ponded above CCR or porewater intermingled with CCR. 89 Fed. Reg. 39100 (May 8, 2024).

The parties agree that the act of sluicing in and of itself does not create a CCR surface impoundment. However, this is because CCR could be sluiced into a tank, but that was not the practice being used at the Waukegan Station between 1939 and 1946. Petitioner's Brief at 5-6. Because there was a series of sand dunes, the Slag Field contained multiple natural topographic depressions. Petitioner's witness Mr. Tom Dehlin confirmed at hearing that the low points in sand dunes are natural topographic depressions. 2/14/24, Tr., P. 123. Petitioner confirms that the area referred to as Grassy Field, which composes approximately the western one third of the Slag Field, does contain CCR. Pet. Brief at 2. Therefore, an accumulation of CCR and liquids was placed into

natural topographic depressions, and CCR is still stored there. Each element of the definition of a CCR surface impoundment is met, with the early portion of the process displayed in a 1946 aerial photo. Pet. Brief App. A (Ex. 41) at 8.

Conveniently ignoring the earliest CCR surface impoundments within the Slag Field, Petitioner's analysis of the Slag Field begins between 1946 and 1961, referring to this 15-year time frame as "Phase 1." Pet. Brief at 5-6. However, in Petitioner's Exhibit 27 to its Response to the Agency's Recommendation (Sargent & Lundy's report on the classification of the Grassy Field), Mr. Dehlin provides the following statements in his description of the stages of development of the area that would become Grassy Field. Mr. Dehlin begins his description of the Slag Field by comparing boundary maps with a 1961 aerial photo. Petitioner's Ex. 27, Pg. 54/81 pdf. Mr. Dehlin first describes the northern boundary as ditch between the Coal Yard and the Slag Field which in implies that, in his opinion, a dike was also present. Petitioner's Ex. 27, Pg. 54/81 pdf. On the west side of the Slag Field, Mr. Dehlin assumes the property line is the western boundary of the Slag Field. Petitioner's Ex. 27, Pg. 54/81 pdf. Based on a similar coloration in the aerial photo and the presence of a berm to the east of the Coal Yard, Mr. Dehlin opines it is likely a berm exists to prevent CCR, sluice water, and storm water from directly entering Lake Michigan. Petitioner's Ex. 27, Pg. 55/81 pdf. On the south side of the Slag Field, Mr. Dehlin states that the South Ditch is north of the southern property line and is the southern extent of the Slag Field. Petitioner's Ex. 27, Pg. 55/81 pdf. Unlike the north ditch, Mr. Dehlin does not state that a ditch on the southern Slag Field boundary implies a dike, however the presence of a dike is confirmed by figures in Petitioner's Exhibit 27. Petitioner's Ex. 27, Figure 4-1, Pg. 61 and Drawing 5082-C-5005, Petitioner's Ex. 27, Pg.75. Figure 4-1 and Drawing 5082-C-5005 show topographically that a berm does exist north of the south ditch. The same drawings are provided in Pet. Brief, App. A at 14 and

15. Petitioner states that "The South Ditch is a permanent and key feature throughout the history of the Site…" Pet. Brief at 6. It follows then, that the berm north of the South Ditch is also a permanent and key feature of the site. In describing "Phase 1" of the Slag Field, Petitioner states that CCR was sluiced to the Slag Field. Pet. Brief at 6. Therefore, between 1946 and 1961, and accumulation of CCR and liquids was placed into a bermed area, as described by Mr. Dehlin and confirmed by Petitioner's brief that still stores CCR. Pet. Brief at 2. Again, Petitioner's own documents and witnesses demonstrate that the Slag Field as a whole, and Grassy Field as the remaining identifiable portion of the Slag Field, meet the definition of a CCR surface impoundment.

At hearing and in its post-hearing brief, Petitioner spends a significant amount of time trying to argue that "accumulation" and "holding" must involve some time element and some volume of liquids, even though the definition of a CCR surface impoundment contains neither a time nor volume specification for accumulation. Pet. Brief at 22-25. The USEPA provides an example illustrating the flawed nature of Petitioner's arguments regarding accumulation of liquids:

> To illustrate further, consider a diked area in which wet CCR is accumulated for future transport to a CCR landfill or beneficial use. The unit is accumulating CCR, while allowing for the evaporation or removal of liquid (no free liquids) to facilitate transport to a CCR landfill or for beneficial use. In this instance, the unit again meets all three definition criteria, it is a diked area (i.e, there is an embankment), it is accumulating CCR for ultimate disposal or beneficial use; and it is removing any free liquids (i.e, treatment). As such this unit would meet the definition of CCR surface impoundment. 80 Fed. Reg. 21357 (April 17, 2015).

This example considers even less volume of water than is used to transport the CCR to the impoundment during sluicing. Even the gravity drainage of pore water, as identified in the USEPA's definition of "Liquids" is considered an accumulation. Contrary to the point Petitioner

argues with its schematic drawing, no pool of water to promote sedimentation is required for an accumulation of CCR and liquids. Pet Brief, App. A at 4.

At hearing, Mr. Dehlin stated that CCR surface impoundments discharge water. 2/14/24, Tr. Pg 129. Under further questioning, Mr. Dehlin stated in reference to a 1961 aerial photo that the ditch he identified was designed to carry an accumulation of liquid out of the Slag Field, where it had separated from CCR, to the South Ditch. 2/14/24, Tr. Pgs. 130-131. As noted above, Mr. Dehlin describes the Slag Field as a bermed area, into which Petitioner's Brief confirms an accumulation of CCR and liquids was be placed in the form of sluiced CCR. Petitioner's Brief confirms that CCR is still stored in the Grassy Field, which is part of the Slag Field. Pet. Brief at 2. Therefore, even using Petitioner's own incorrect precept that there must be a standing pool of water, the Slag Field meets the definition of a CCR surface impoundment.

During "Phase 2" of the Slag Field, which Petitioner describes as "Original Ash Pond and Inactive Slag Field" (1970-1978), the western portion of the Slag Field, which would become Grassy Field, was still being used as a CCR surface impoundment. Pet. Brief at 6. Aerial photographs show topographically that the "Original Ash Pond" berm had two areas lower areas "outlets" in the berm. Pet. Brief, App. A at 14 and 15. One outlet in the western berm of the "Original Ash Pond" and one in the southwest corner of the berm. Pet. Brief, App. A at 14 and 15. The topographic map of the "Inactive Slag Field" shows an accumulation of what is presumably CCR in the "Inactive Slag Field", adjacent to the outlet in the western berm of the "Original Ash Pond". Pet. Brief, App. A at 14 and 15. The landform depicted in the topographic maps is consistent with liquid deposition of solid materials. In addition to these topographic features, Appendix A to Petitioner's brief shows the continued existence of a berm north of the South Ditch, a berm near the western property line and ditches designed to discharge water from the "Inactive

Slag Field". Pet. Brief, App. A at 14 and 15. It appears as though the "Inactive Slag Field" was actually being used as a secondary CCR surface impoundment the treat overflow of CCR and liquids from the "Original Ash Pond" and was accumulating a mappable quantity of CCR. The topographic maps also display closed topographic depressions within the larger bermed area, which would have accumulated rainwater falling into the area and potentially overflow water from the "Original Ash Pond". Pet. Brief, App. A at 14 and 15. The topographic and heat maps also demonstrate ditches were present to discharge accumulated water from the "Inactive Slag Field". Pet. Brief, App. A at 14 and 15. Based on topographic maps and Petitioner's acknowledgement that CCR was being sluiced to the "Original Ash Pond", the "Inactive Slag Field" is a bermed area, in which there is an accumulation of CCR and liquids and the area still stores CCR. Therefore, as late as 1978, the area referred to as the "Inactive Slag Field," which became Grassy Field, meets the definition of a CCR surface impoundment.

PETITIONER'S CONCERNS OVER DUAL REGULATION ARE UNFOUNDED

In its brief, Petitioner discusses at length its concerns over dual regulation as a CCR management unit (CCRMU) and a CCR surface impoundment but suggests as a CCRMU that the Agency's Site Remediation Program (SRP) would provide a functional means by which Grassy Field can be managed. Pet. Brief at 26-32. In reality, every CCR surface impoundment in the State is subject to dual regulation because Illinois does not currently have primacy from USEPA for regulating CCR surface impoundments under Part 845.[1] Further, under Part 257, CCRMU are required to do groundwater detection monitoring for constituents in Appendix III to Part 257 and assessment monitoring for constituents in Appendix IV to Part 257. If monitoring shows

[1] The Agency is currently in the process of obtaining primacy and is awaiting USEPA's determination.

statistically significant increases over background, corrective action under Part 257 is required. 89 Fed. Reg. 39100 (May 8, 2024).

When there is an exceedance of Appendix IV constituents under Part 257, corrective action and hence post-closure care cannot be completed until the groundwater protection standards (GWPS) for those constituents have been met. 89 Fed. Reg. 39067 (May 8, 2024). Therefore, the risk-based approach under the Site Remediation Program is not applicable to a CCRMU unless constituent concentrations also happen to be below the GWPS. 89 Fed. Reg. 39067 (May 8, 2024). Being classified as a CCRMU under Part 257 simply allows Petitioner to regulate itself under Part 257, which is a self-implementing program with no USEPA review or permitting requirements. 89 Fed. Reg. 39094 (May 8, 2024).

The Illinois Legislature gave the Board broad authority to regulate CCR surface impoundments in Section 22.59(m) of the Illinois Environmental Protection Act ("the Act"):

> "The provisions of this Section shall apply, without limitation, to all existing CCR surface impoundments and any CCR surface impoundments constructed after the effective date of this amendatory Act…" 415 ILCS 5/22.59(m).

The Act creates two groups of CCR surface impoundments: those constructed any time in the past and any that will be constructed in the future. Therefore, as explained in the Agency's Brief, the area now referred to as Grassy Field, which was part of the Slag Field, was first a series of CCR surface impoundments made up of multiple natural topographic depressions, which were designed to hold an accumulation of liquid and CCR and still store CCR today. The Grassy Field was also part of the Slag Field when it was described by Petitioner's witness as an area of manmade berms designed to hold an accumulation of CCR and liquids, which still stores CCR today. The Agency has also explained based on the evidence provided by Petitioner that even after the Slag

Field was divided into subareas, the western portion, which became Grassy Field still contained an accumulation of CCR and liquids, was a bermed area and still stores CCR.

Contrary to Petitioner's assertions, the Agency is not trying to shoe-horn the Grassy Field into the definition of a CCR surface impoundment. Because of the broad authority under Section 22.59(m) of the Act, since the area occupied by Grassy Field was designed and operated as a CCR surface impoundment in the past, Grassy Field remains a CCR surface impoundment.

WHEREFORE, for the reasons stated above and in its Post-Hearing Brief, Illinois EPA respectfully reiterates its recommendation that the Board DENY Petitioner's request for a Board finding of inapplicability of Part 845.

Respectfully submitted,

Dated: June 27, 2024

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BY: /s/Rebecca Strauss
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THIS FILING IS SUBMITTED ELECTRONICALLY

CERTIFICATE OF SERVICE

I, the undersigned, on affirmation certify the following:

That I have electronically served the attached **NOTICE OF ELECTRONIC FILING** and **ILLINOIS EPA'S RESPONSE TO PETITIONER'S POST-HEARING BRIEF** upon those listed on the Service List before 4:30 p.m. on June 27, 2024.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

By: /s/ Rebecca.Strauss
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DATED: 6/27/2024

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