BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	
PETITION OF SOUTHERN ILLINOIS POWER COOPERATIVE FOR AN ADJUSTED STANDARD FROM 35 ILL. ADMIN. CODE PART 845 OR, IN THE ALTERNATIVE, A FINDING OF INAPPLICABILITY	AS 2021-006 (Adjusted Standard)

NOTICE OF FILING

To: Don Brown, Clerk of the Board
Illinois Pollution Control Board
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Chicago, Illinois 60605

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the attached Corrected Exhibit 39[1] to the Second Amended Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845

[1] On December 20, 2024, Southern Illinois Power Cooperative filed its Second Amended Petition with the original Exhibit 39, which inadvertently lacked the indicated redline. Corrected Exhibit 39 replaces the filed original.

and a Finding of Inapplicability and a Certificate of Service, copies of which are herewith served upon you.

Respectfully Submitted,

SOUTHERN ILLINOIS POWER COORPERATION

/s/ *Sarah L. Lode*

Dated: January 21, 2025

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this day of:

I have electronically served a true and correct copy of the attached CORRECTED EXHIBIT 39 TO THE SECOND AMENDED PETITION OF SOUTHERN ILLINOIS POWER COOPERATIVE FOR AN ADJUSTED STANDARD FROM 35 ILL. ADM. CODE PART 845 AND A FINDING OF INAPPLICABILITY by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

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My e-mail address is Sarah.Lode@afslaw.com;

The number of pages in the e-mail transmission is 103.

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

/s/ *Sarah L. Lode*

Dated: January 21, 2025

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CORRECTED EXHIBIT 39

BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF: PETITION OF SOUTHERN ILLINOIS POWER COOPERATIVE FOR AN ADJUSTED STANDARD FROM 35 ILL. ADMIN. CODE PART 845 OR, IN THE ALTERNATIVE, A FINDING OF INAPPLICABILITY	AS 2021-006 (Adjusted Standard)

SECOND AMENDED PETITION FOR AN ADJUSTED STANDARD FROM 35 ILL. ADMIN. CODE PART 845 ~~OR, IN THE ALTERNATIVE,~~AND A FINDING OF INAPPLICABILITY

Submitted on behalf of
Southern Illinois Power Cooperative

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I. INTRODUCTION

This Second Amended Petition for an Adjusted Standard ("Petition") concerns eight existing and former ponds located at Southern Illinois Power Cooperative's ("~~SIPC~~SIPC's") Marion Generating Station ("Marion Station") in Williamson County, Illinois. These ponds are as follows: Pond 3 (including Pond 3A), Pond 4, former Pond B-3, South Fly Ash Pond, ~~and~~ Pond 6 (~~collectively,~~together the "De Minimis Units"), ~~and~~ the ~~former~~Initial Fly Ash Holding Area, the former Replacement Fly Ash Holding Area, and the former Fly Ash Holding Area Extension (~~collectively,~~together the "Former Fly Ash Holding Units").[1] ~~.~~ This Second Amended Petition also addresses a unit known as the Former Landfill Unit, located on top portions of the Former Fly Ash Holding Units.

This Second Amended Petition amends the Amended Petition for Adjusted Standard filed by SIPC on ~~May 11~~September 2, 2021~~, including to reflect~~. The Amended Petition reflected the results of a Pond Investigation Report for Certain Ponds at ~~Southern Illinois Power Company's~~SIPC's Marion Station ("Pond Investigation Rep."), ~~attached as~~ (Ex. 29),[2] ~~, as well as~~ the Updated Opinion of Lisa Bradley~~, which is attached as Updated Ex. 28~~ ("Updated Bradley Op.") (Updated Ex. 28), and the Supplemental Declaration of Kenneth W. Liss~~, which attached as Ex. 30~~ ("Supp. Liss Dec.").~~[3]~~ (Ex. 30). A redline comparison showing changes made since the initial Petition ~~is~~was attached as ~~Ex.~~Exhibit 31. This Second Amended Petition reflects an

[1] The De Minimis Units and the Former Fly Ash Holding Units are depicted on the Site Map prepared by Andrews Engineering for SIPC (May 2021) ("Site Map"), Ex. 3.

[2] For Exhibit 29, the Pond Investigation Report, SIPC ~~has~~ attached to the electronically filed version of ~~this~~the Amended Petition only the Report itself and not the appendices, as they are several hundred pages long. Those appendices ~~are~~were being transmitted separately to the Board and to IEPA. *See* Pond Investigation Rep., Ex. 29.

~~[3] SIPC has attached only new or updated (labeled "Updated Ex. ___") exhibits to this Petition. All other exhibits referred to within are attached to SIPC's original petition.~~

updated proposed adjusted standard, a Human Health and Ecological Risk Assessment from Gradient Corporation (Ex. 37), the Expert Opinion of Andrew Bittner setting forth a closure impact assessment for Pond 4 (Ex. 38), and the Expert Opinion of Ari Lewis regarding the De Minimis Units (Ex. 36).[3]

As discussed herein, neither the De Minimis Units nor the Former Fly Ash Holding Units are regulated "CCR surface impoundments" for purposes of Illinois's ~~newly enacted~~ Standards for the Disposal of Coal Combustion Residuals ("Part 845"). Nor are they CCR surface impoundments regulated by the federal CCR regulations upon which Part 845 was based. None of these former or current ponds ~~poses~~pose the types of risks to the environment and human health that federal and state CCR regulations aim to address. In fact, they fall into categories of units that were intended to be excluded from the definition of CCR surface impoundment. Indeed, some of the ponds at issue closed decades ago and have not contained water since then, ~~while another~~some are secondary and tertiary finishing ponds containing *de minimis* amounts of CCR, and one had any water and CCR removed years ago. Nevertheless~~, while discussions continue~~, the Illinois Environmental Protection Agency ("IEPA") has so far taken the incorrect position that all eight current and former ponds, and the Former Landfill Area, are covered by Part 845.

Compliance with Part 845 is plainly not required for the ~~ponds and former ponds~~units at issue, which do not fall under the definition of "CCR surface impoundment" and therefore are not covered by Part 845. ~~And~~However, to the extent the Illinois Pollution Control Board (the

[3] SIPC has attached only new (beginning with Exhibit 32) or updated (labeled "Second Amended Pet. Updated Ex. ___") exhibits to this Petition. All other exhibits referred to within are attached to SIPC's initial or Amended Petition, as the case may be.

"Board") finds that any of the units at issue are regulated CCR surface impoundments (they are not), an adjusted standard is warranted because they differ from the surface impoundments the Board targeted for regulation under Part 845 and the ~~exorbitant costs of compliance with Part 845 are not warranted in light of the fact that the~~ units at issue pose minimal—if any—risk to human health and the environment. The updated adjusted standard proposed in this Second Amended Petition will not result in any adverse impact to health or the environment while allowing for adjustments based on the units' unique characteristics.

Accordingly, for the reasons set forth herein, SIPC respectfully requests that the Board issue a finding of inapplicability with respect to the current and former ponds at issue or, in the alternative, an adjusted standard ~~exempting the units at issue from Part 845 requirements~~as set forth in Appendix A to this Second Amended Petition.

II. FACTUAL AND PROCEDURAL BACKGROUND.[4]

A. Nature of Petitioner's Activity and General Plant Description

Marion Station is a gas and coal-fired power plant located approximately seven miles south of the City of Marion in Williamson County, Illinois. *See* Site Map, Ex. 3. Marion Station currently consists of one operating coal-fired unit (Unit 123), with a nominal capacity of 1402 Metric Million British Thermal Units per hour ("mmBtu/~~hour~~hr"), and two additional gas-fired combined-cycle units (Units 5 and 6).

[4] The Declarations of Wendell Watson (Second Amended Pet. Updated Ex. 1) and Todd Gallenbach~~,~~ ~~Exs. 1 and~~ (Updated Ex. 2~~,~~) are provided in support of facts stated herein regarding Marion Station and the current and former ponds at issue. SIPC's investigation into the facts set forth herein is ongoing, and SIPC reserves the right to further supplement or amend its Second Amended Petition to reflect receipt of new or additional information.

Unit 123 was constructed in the early 2000s, repowering the existing steam turbine that had been powered by retired Units 1, 2, and 3. Units 1, 2, and 3 were 33-megawatt ("MW") coal-fired cyclone generating units constructed in the 1960s. An additional 173 MW coal-fired unit (Unit 4) came online in 1978. Unit 4 shut down permanently in October 2020. A 109 MW circulating fluidized bed boiler provides steam to generating Unit 123. The two gas-fired simple-cycle units (Units 5 and 6) are nominally rated at 969 mmBtu/hr each (dependent upon ambient air temperature). Marion Station uses Illinois basin bituminous coal for Unit 123. Since 1978, SIPC also has burned more than ten million tons of mine waste, helping to clean up many abandoned mines.

SIPC owns 4,674 acres around Marion Station and employs ~~seventy-eight~~seventy-seven people. Nearby Lake of Egypt (the "Lake") was constructed in 1963 to provide cooling water for the ~~station's~~Station's coal-fired generating units. The Lake provides some local public water supply and is also used for recreational purposes, such as boating and fishing. The local water authority periodically tests the Lake water for public use. *See, e.g.*, Lake Egypt Water District IL 1995200, Annual Drinking Water Quality Report (Jan. 1–Dec. 30, 2019), Ex. 4. SIPC owns several parcels bordering the plant property. Other nearby land uses include agricultural and recreational use, including a golf course and a country club. Shawnee National Forest is located approximately fifteen miles to the south of Marion Station. The closest identified potential groundwater well is at the Lake of Egypt Country Club, located more than 2,000 feet away from any pond at issue in this proceeding. That well is up gradient from the Station's pond system.

B. CCR Management at Marion Station.

Coal combustion residuals ("CCR") are a byproduct of the coal-fired power generation process. Currently, only Unit 123 generates CCR (in the form of ash) at the Station. ~~One hundred percent of the~~The majority of CCR generated from Unit 123 is handled dry and used for mine reclamation beneficial use off-site and a portion is sold for beneficial uses allowed under 415 Ill. Comp. Stat. 5/3.135. Unit 123 controls SO^2 through its combustion process, and thus, no scrubber is needed.

There is no wet handling of CCR generated from current operations at Marion Station. While in operation, ~~prior~~former Units 1, 2, and 3 generated CCR in the form of fly ash and bottom ash. Former Unit 4 generated CCR in the form of fly ash and bottom ash~~,~~ as well as scrubber sludge from an SO^2 scrubber installed around 1978. This was the first wet SO^2 scrubber installed in Illinois—and one of the first in the nation—and reflects SIPC's early environmental commitment, which continues to this day. The historic handling, storage, and disposal of CCR at Marion Station is described below.

1. Fly Ash.

SIPC began collecting fly ash from former Units 1, 2, and 3 after installing electrostatic precipitators ("ESPs")[5] at each unit in 1975 in accordance with the Clean Air Act.[6] Because Units 1, 2, and 3 were cyclone units, they generated relatively small amounts of fly ash as

[5] ESPs are control devices that capture particulate matter in the exhaust gas, including fly ash.
[6] Prior to installation of the ESPs, most of the fly ash from Units 1, 2, and 3 would have been expected to exit the stack with exhaust gases, and only minimal amounts of fly ash may have been collected from the cyclone Units 1, 2, and 3. On information and belief, any minimal amounts of fly ash collected would likely have been conveyed to Pond 1, Pond 2, or the Initial Fly Ash Holding Area, which had an outlet to Pond 3.

compared to other types of coal-fired boilers. Cyclone boilers produce less than twenty-five percent of the fly ash pulverized coal units produce.

Between 1975 and 1978, on information and belief, fly ash from Units 1, 2, and 3 was collected wet using a hydroveyer system and conveyed to an area labeled on historic documents as a "fly ash holding area" (the "Initial Fly Ash Holding Area") located just to the west of Pond 3. *See* Site Map, Ex. 3. In 1977, SIPC received a permit from IEPA to abandon and cover the Initial Fly Ash Holding Area and to construct an additional holding area for fly ash (the "Replacement Fly Ash Holding Area"). *See* IEPA Water Pollution Control Permit, No. 1977-EN-5732 (Nov. 14, 1977) ("1977 Permit"), Ex. 5.

In 1978, Unit 4 was constructed. Around the same time, the hydroveyer system was modified to allow for dry collection of fly ash. From 1978 until 2003, most of the fly ash collected from Unit 4 was collected dry using the hydroveyer system. Most of that fly ash was disposed of at a former on-site, permit-exempt landfill ("Former Landfill"), often mixed with scrubber sludge as discussed further below.

Also around 1978, documents indicate that SIPC constructed the Replacement Fly Ash Holding Area to the North of Pond 2. *See* 1977 Permit, Ex. 5. The Replacement Fly Ash Holding Area likely received spent water from the hydroveyer system, which is believed to have contained only *de minimis* amounts of fly ash. *See* Letter from SIPC to IEPA (July 27, 1982), Ex. 6. On information and belief, the Replacement Fly Ash Holding Area also was designated to receive sluiced fly ash from Unit 4 during intermittent emergencies in which the fly ash was unable to be conveyed to the Former Landfill. *Id*.

In or around 1981, SIPC received a permit from IEPA to build a fly ash holding area extension (the "Fly Ash Holding Area Extension"), to the west of the Replacement Fly Ash Holding Area, and a berm around a portion of the Former Landfill ~~area~~ that received fly ash and scrubber sludge from Unit 4. *See* IEPA Water Pollution Control Permit, No. 1981-EN-2776-1 (Oct. 13, 1981) ("1981 Permit"), Ex. 7. That bermed area collected ~~storm water~~stormwater runoff from the ~~landfill~~Former Landfill, and that collected water eventually became what is now denominated as Pond 6 (discussed *infra*).

On information and belief, between 1978 and 1985, limited fly ash from Units 1, 2, and 3[7] may have been sluiced to the Replacement Fly Ash Holding Area. In 1985, former Pond A-1 was constructed. After 1985, water from the hydroveyer system and, on information and belief, any fly ash from Units 1, 2, and 3 were conveyed to Pond A-1 or, in limited cases of Pond A-1 outrages between 1985 and 2003 (*see infra* ~~at 12–13~~at14–15), former Pond B-3. *See, e.g.*, Letter from SIPC to IEPA (Sept. 16, 1993) ("1993 Letter"), Ex. 8.

On information and belief, the Replacement Fly Ash Holding Area and the Fly Ash Holding Area Extension stopped receiving wastes after former Pond A-1 was built. Subsequently, those two units were drained of water—other than occasional ~~storm water~~stormwater runoff—and, by the early 1990s, were covered at least in part by the Former Landfill. Currently, the area that previously contained those units is within the ~~landfill~~Former Landfill cover area ~~that~~and part of the Proposed Closure Plan SIPC ~~has proposed~~submitted to IEPA for the Former Landfill, as described further below. Declaration of Kenn Liss ("Liss

[7] Units 1, 2, and 3 were run infrequently after the installation of Unit 4.

Dec."), Ex. 9; *see also* Andrews Engineering, SIPC's Proposed Closure Plan for IEPA Site No. 199055505 (Dec. 16, 2020) ("Former Landfill Closure Plan"), Ex. 10.

In 2003, SIPC repowered the old ~~boilers~~Units 1, 2, and 3 with a Circulating Fluidized Bed ("CFB"), now referred to as Unit 123. The CFB allowed SIPC to convert its fly ash system to one hundred percent dry ash handling and disposal and ended even the minimal wet fly ash discharge that had previously occurred at Marion Station.

2. Scrubber Sludge.

Unit 4 came online in 1978 and produced scrubber sludge, which was predominately calcium sulfite. The scrubber sludge was mixed with fly ash~~,~~ and moved via a conveyer to the Former Landfill, which ceased accepting waste prior to October 2015 and for which SIPC has submitted a landfill ~~closure plan~~Closure Plan to IEPA at IEPA's request (*see infra* at 15–16). Former Landfill Closure Plan, Ex. 10. In 2009, the scrubber was modified to a forced oxidation system, which produced calcium sulfate, better known as gypsum. One hundred percent of the gypsum generated at Marion Station was sold as an agricultural modifier or an ingredient for cement. With the closure of Unit 4, Marion Station no longer generates scrubber sludge or gypsum.

3. Bottom Ash.

Historically, bottom ash from now-retired Units 1, 2, 3, and 4 was sluiced to Ponds 1 and 2. On information and belief, SIPC sold one hundred percent of its bottom ash to shingle manufactures, grit blasting companies, and local highway departments for more than forty years. For almost the entire lives of the ponds, the water in Ponds 1 and 2, from which bottom ash was removed, discharged to Pond 4 and, from there, through permitted Wastewater Discharge Outfall

002. Beneficial use Ponds 1 and 2 are no longer in use with the closure of Unit 4 and ~~are undergoing closure~~have been cleaned to the clay. Ash from Unit 123's fluidized bed boiler is handled dry and beneficially used offsite.

4. Other Non-CCR Waste Streams.

Minor other non-CCR waste streams from the Marion Station, including air heater wash water and flue gas desulfurization decant excess water, were historically discharged to the former Emery Pond. ~~Former~~The former Emery Pond was built in the late 1980s as a ~~storm water~~stormwater storage structure for drainage from the adjacent plant area, including the more recent Gypsum Loadout Area. *See* Hanson, Emery Pond Corrective Action and Selected Remedy Plan, Including GMZ Petition (Mar. 29, 2019), Ex. 11. Process ~~waste water~~wastewater discharges to the former Emery Pond have ceased and any water or CCR in the former Emery Pond has been removed pursuant to closure and related plans overseen by IEPA. ~~Former~~The former Emery Pond's closure has been conducted consistent with Part 257~~,~~ and, although the field work was completed before adoption of Part 845, the closure was generally consistent with Part 845 as well. A new storm basin is located in the area of the former Emery Pond.

C. The Ponds Subject to This Petition.

This Petition concerns the De Minimis Units~~:~~ five current or former ponds at SIPC's Marion Generating Station~~—~~: the South Fly Ash Pond, Pond 3 (including Pond 3A), Pond 6, Pond 4, and former Pond B-3, which have contained only *de minimis*, if any, amounts of CCR. These current and former ponds are described in Section C.1. This Petition also addresses the Former Fly Ash Holding Units: three former fly ash ponds that closed and were dewatered

decades ago, at least one of which under IEPA oversight and permitting, and are now part of the Former Landfill, which are described below Section C.2.

1. The De Minimis Units.

A map showing the location of the De Minimis Units is attached to SIPC's May 11, 2021, Petition. Site Map, Ex. 3. As discussed below, none of the De Minimis Units receive or received meaningful direct discharges of CCR and, to the extent they contain CCR as a result of limited historic or incidental discharges, such CCR should be *de minimis* in light of historic practices. In addition, as discussed *infra* at ~~30–32~~31–33, Haley & Aldrich, Inc., on behalf of SIPC, has completed an investigation of the De Minimis Units pursuant to an investigation protocol negotiated with IEPA, which confirmed that the De Minimis Units contain only *de minimis* amounts of CCR ~~and thus are not the types of units that were intended to be regulated under Part 257 or Part 845, and do not pose an appreciable threat to human health or the environment warranting regulation under Part 845~~. *See infra* at ~~30–32~~31–33; *see also* Pond Investigation Rep., Ex. 29.

South Fly Ash Pond – The South Fly Ash Pond was built around 1989 as a potential replacement for Pond A-1, in case one was needed. *See* IEPA Water Pollution Control Permit, No. 1989-EN-3064 (May 17, 1989), Ex. 12. Ultimately, Pond A-1 did not need replacement and operated until 2003, as described above~~. The~~; thus, despite being permitted as a fly ash settling pond, the South Fly Ash Pond ~~has historically received~~was never used for that purpose. Rather, the South Fly Ash Pond served as a secondary finishing pond, receiving decant water from the former Emery Pond~~, which has ceased since former~~ until Emery Pond stopped receiving process ~~waste water~~wastewater discharges in the ~~Fall~~fall of 2020. No fly ash, bottom ash, or scrubber

sludge was ever directly sent to or placed into the South Fly Ash Pond. If the pond received any CCR throughout its life, it was *de minimis*, consisting only of any residual CCR in decanted pond overflow ~~or storm water~~from the former Emery Pond or stormwater.

The Pond Investigation Report confirms that the South Fly Ash Pond contains minimal sediments, with a mean sediment thickness of approximately 1.57 feet, representing approximately 11 percent of historic pond volume[8]. *See* Pond Investigation Rep., Ex. 29 at 7. That is far less than the amount of sediment present in a typical CCR surface impoundment ~~which~~that is used for the storage, treatment, or disposal of CCR. *Id*. at 7–8 ("In Haley & Aldrich's experience, for typical CCR impoundments, the volume of CCR materials is often a major portion (>50%) of the overall impoundment volume."). Further, of that small amount of sediment, only a fraction (ranging from ~~10~~ten percent to ~~64~~sixty-four percent in the sediment samples that were taken from the South Fly Ash Pond) is estimated to include CCR material.[9] *Id*. at 14. Further, the South Fly Ash Pond has a berm, but boring logs associated with the berm do not indicate the presence of fly ash in that berm. *Id.* at Attachment C (boring logs for B-B3a and B-B3b).

Pond 3 (including 3A) – Water from the South Fly Ash Pond is permitted to flow to Pond 3, then Ponds 6 and 4, before discharging through Outfall 002.[9][10] *See* IEPA Reissued National

[8] As explained in the Pond Investigation ~~report~~Report, the South Fly Ash Pond's water level was lowered for operational reasons during the time the bathymetric survey. *See* Pond Investigation Rep., Ex. 29 at 7. As a point of comparison, Haley & Aldridge also estimated sediment volume as a percentage of pond volume using the 2007 pond elevation for the South Fly Ash Pond and Pond 4, which was determined to be more representative of historical conditions. *See id.*

[9] The CCR percentages included here and below, as reflected in Exhibit 29, include the estimated percentage of materials, through polarized light microscopy ("PLM"), determined to be fly ash, bottom ash and/or slag. Pond Investigation Rep., Ex. 29 at 14.

[9][10] SIPC timely applied for a National Pollution Discharge Elimination System ("NPDES") permit renewal and is currently working with IEPA on permit reissuance.

Pollutant Discharge Elimination System Permit, No. IL0004316 (February 1, 2007) ("2007 NPDES Permit"), Ex. 13. On information and belief, Pond 3 may have received some overflow from the Initial Fly Ash Holding Area and later the Fly Ash Holding Area Extension, serving as a secondary finishing pond. *See* IEPA Water Pollution Control Permit, No. 1973-ED-1343-OP (June 1973), Ex. 14. Pond 3 also received ~~storm water~~stormwater runoff, coal pile runoff, and water from the ~~plant's~~Station's floor drains. Later, by 1982, a berm was built within Pond 3 to separate Pond 3 ~~from the pond~~into two areas, with one area now known and referred to as Pond 3A.

Pond 3 has been cleaned to remove pond sediment and debris, including vegetation, twice—once in 2006 and again in 2011. Pond 3A was drained of water and cleaned of debris and sediment in 2014. Those cleanings would also have removed any CCR that may have collected in the pond from historic operations. Starting around 2007, SIPC built a berm around Pond 3 to prevent landfill runoff from reaching that pond. Since the pond's last cleanings, any CCR that has entered Pond 3 or Pond 3A is *de minimis*, such as through ~~storm water~~stormwater, potential overflow from South Fly Ash Pond, or air deposition; no ash has been placed in the pond for treatment, storage, or disposal.

The Pond Investigation Report, which included a survey of the ponded areas of Pond 3, confirms that Pond 3 (including 3A) contains minimal sediments, with a mean sediment thickness of approximately 1.38 feet in Pond 3 and 1.45 feet in Pond 3A, representing approximately 9 percent and 13.3 percent of pond volume, respectively. *See* Pond Investigation Rep., Ex. 29 at 7. That is far less than the amount of sediment present in a typical CCR surface impoundment which is used for the storage, treatment or disposal of CCR. *Id*. at 7–8 ("In Haley

& Aldrich's experience, for typical CCR impoundments, the volume of CCR materials is often a major portion (>50%) of the overall impoundment volume."). Further, of that small amount of sediment, only a fraction (ranging from ~~20~~twenty-three percent to ~~34~~thirty-four percent in the samples that were taken from Pond 3/3A) is estimated to include CCR material. *Id*. at 14~~.~~ (explaining slag, fly ash and bottom ash (i.e. CCR) makes up 23% and 34%, respectively, of the sediment samples from Pond 3). Additionally, samples from Pond 3A contain carbon contents much higher than would be expected from CCR materials. *Id.* at 8–10. A carbon to nitrogen/hydrogen correlation analysis demonstrates that coal is the likely common contributor to the organic content in pond sediment samples with a high carbon content. *Id.*

Pond 6 – Pond 6 was developed to manage ~~storm water~~stormwater runoff associated with the Former Landfill ~~at the facility~~ and grew within a berm built ~~for runoff~~to capture runoff from the Former Landfill that was addressed in a 1982 construction permit issued by IEPA. Originally, Pond 6 discharged through Outfall 001. In or around 1993, in accordance with another IEPA-issued permit, SIPC extended Pond 6 and installed pumps to pump water from Pond 6 to Pond 4, where it then discharged through Outfall 002 to Little Saline Creek. *See* 1993 Letter, Ex. 8. Outfall 001 was subsequently eliminated. Any CCR discharges Pond 6 received throughout its life were *de minimis*, consisting of incidental amounts of CCR inflow from other ponds and ~~storm water~~stormwater runoff~~.~~ from the Former Landfill. Thus, Pond 6 was designed and served as a stormwater management unit to contain runoff from the Former Landfill and was not designed to accumulate CCR and liquids or to treat, store, or dispose of CCR in more than *de minimis* amounts.

The Pond Investigation Report confirms that Pond 6 contains minimal sediments, with a mean sediment thickness of approximately 0.84 feet, representing approximately 8.2 percent of pond volume. *See* Pond Investigation Rep., Ex. 29 at 7. That is far less than the amount of sediment present in a typical CCR surface impoundment which is used for the storage, treatment or disposal of CCR. *Id*. at 7–8 ("In Haley & Aldrich's experience, for typical CCR impoundments, the volume of CCR materials is often a major portion (>50%) of the overall impoundment volume."). Further, of that small amount of sediment, only a fraction (ranging from ~~30~~thirty percent to ~~53~~fifty-three percent in the samples that were taken from Pond 6) is estimated to include CCR material. *Id*. at 14.

~~Moving forward, Pond 6 is expected to receive non-CCR runoff from the Former Landfill, and SIPC plans to manage Pond 6 in conjunction with the closure and post-closure management requirements of Part 811 with IEPA oversight.~~

Pond 4 – Pond 4 is a stormwater runoff and secondary finishing pond that received no more than *de minimis* amounts of CCR. Pond 4 has primarily served two purposes at the ~~facility~~Station: to receive decant water from Ponds 1 and 2, when they were in operation before Unit 4's shutdown, and to receive coal pile runoff. Pond 4 ~~currently receives~~has also received decanted overflow water from Pond 6 for approximately thirty years and discharges through Outfall 002 into the Little Saline Creek.

During an outage in ~~2012~~2010, Pond 4 was dewatered and cleaned down to the clay, removing plant debris and any ash ~~and~~, coal fines, and other sediment that may have collected in the pond. There were two types of materials in the pond after it was dewatered: (1) dry and dark materials (consisting of sixty to seventy percent of the pond materials) and (2) muddy materials

high in organic matter. Declaration of Jason McLaurin, Ex. 32. The dry and dark materials were taken to the coal yard to further dry and then were burned at the Station for fuel. *Id*. Again, this demonstrates the materials consisted of primarily coal fines deposited into the pond as a result of stormwater runoff from the coal pile and that the amount of CCR present in Pond 4 has been consistently *de minimis*. Since its cleaning in ~~2012~~2010, any CCR that has entered Pond 4 is *de minimis*, such as through ~~storm water~~stormwater, overflow from Pond 6, or air deposition. Pond 4's primary use continues to be to catch stormwater runoff from the coal pile.

The Pond Investigation Report confirms that Pond 4 contains minimal sediments, with a mean sediment thickness of approximately 1.67 feet, representing approximately 10.9 percent of pond volume. *See* Pond Investigation Rep., Ex. 29 at 7. That is far less than the amount of sediment present in a typical CCR surface impoundment which is used for the storage, treatment or disposal of CCR. *Id*. at 7–8 ("In Haley & Aldrich's experience, for typical CCR impoundments, the volume of CCR materials is often a major portion (>50%) of the overall impoundment volume."). Further, of that small amount of sediment, only a fraction (ranging from ~~25~~twenty-five percent to ~~68~~sixty-eight percent in the samples that were taken from Pond 4) is estimated to include CCR material. *Id*. at 14. Additionally, samples from Pond 4 contained carbon contents much higher than would be expected from CCR materials. *Id.* at 8–10. A carbon to nitrogen/hydrogen correlation analysis demonstrated that coal is the likely common contributor to the organic content in pond sediment samples with a high carbon content. *Id.*

Pond B-3 – Former Pond B-3 was built by 1985 and was used primarily as a secondary pond to Pond A-1. Pond A-1 received some fly ash (as described above) and coal pile runoff until 2003, at which time all fly ash was handled dry and the runoff was directed to Pond 4.

During periodic, intermittent outages of Pond A-1, former Pond B-3 may have received some discharges of fly ash from Units 1, 2, and 3 prior to their shut down in 2003. On information and belief, Pond A-1 was taken offline at most three to four times between 1985 and 2003, and each of those outages lasted approximately two weeks. Most (or all) of those outages would have occurred during boiler shutdowns, when Marion Station was operating at less than full capacity and generating less ash. Accordingly, any fly ash sluiced to former Pond B-3 during these intermittent outages would have been minimal.

In 2017, former Pond B-3 was cleaned out down to the clay and has not held water since that time. A BTU analysis showed the material removed had a heat content comparable to coal—not CCR—and at least a portion of the material was consumed for energy production.

Because former Pond B-3 no longer holds ~~any significant amount of~~ water, except in a small area of the former pond where ~~storm water~~stormwater may collect after storms before drainage and evaporation, it was not able to be included as part of the bathymetric survey conducted in conjunction with the ~~pond investigation~~Pond Investigation Report. However, Haley & Aldridge performed an analysis of two samples taken of a berm associated with former Pond B-3 in conjunction with the ~~pond investigation report~~Pond Investigation Report, as well as nine samples taken in 2017, and concluded that those samples contained little, if any, CCR material.[~~10~~11] *See* Pond Investigation Rep., Ex. 29 at 12 (including shake test results for samples B-B3a and B-B3b).

[~~10~~11] Hanson Engineering, which performed the bathymetric survey and collected the data analyzed in the Pond Investigation Report, attempted to take a soil boring from the area of former Pond B-3 but was unable to access the agreed-upon IEPA sampling location. *See* Pond Investigation Rep., Ex. 29 at 6.

2. The Former Fly Ash Holding Units.

As discussed below, the Former Fly Ash Holding Units no longer contain water and are covered by the Former Landfill (or, in the case of the Fly Ash Holding Area Extension, a combination of dry CCR disposed in the landfill area, as well as sediments and other materials cleaned out from the pond system). The Former Fly Ash Holding Units were located within the green area on the site map attached to SIPC's May 11, 2021 ~~original~~, initial Petition. Site Map, Ex. 3.

The Initial Fly Ash Holding Area – On information and belief, the Initial Fly Ash Holding Area received wet fly ash that was collected from Units 1, 2, and 3 until approximately 1977. In October 1977, IEPA issued a permit to SIPC for the Replacement Fly Ash Holding Area with a condition that required the Initial Fly Ash Holding Area to be abandoned and covered. *See* 1977 Permit, Ex. 5. In the early 1990s, plant personnel observed that while ~~storm water~~stormwater might on occasion collect for short periods after precipitation, the Initial Fly Ash Holding Area contained no pond or other area that continuously held water. Further, as of that time, the area was covered by a combination of the Former Landfill and a soil/vegetation cover. Based upon these area observations and in light of the "abandon and cover" permit condition, SIPC believes that the area was covered before the 1990s pursuant to the permit condition issued and approved by IEPA.

The Replacement Fly Ash Holding Area – In October 1977, IEPA issued a permit to SIPC to construct the Replacement Fly Ash Holding Area to the north of Pond 2. *See* 1977 Permit, Ex. 5. On information and belief, the Replacement Fly Ash Holding Area likely received spent water from the hydroveyer system, which likely contained *de minimis* amounts of fly ash.

The Replacement Fly Ash Holding Area also may have received discharges of fly ash from Units 1, 2, and 3 prior to the construction of Pond A-1 in 1985. On information and belief, the Replacement Fly Ash Holding Area may have also been designated to receive sluiced fly ash from Unit 4 during intermittent emergencies in which the fly ash was unable to be conveyed to the Former Landfill. It is unknown whether the Replacement Fly Ash Holding Area ever received sluiced fly ash from Unit 4 during emergencies. By the early 1990s, the Replacement Fly Ash Holding Area had been drained of water and was covered by the Former Landfill.

The Fly Ash Holding Area Extension – In or around 1982, SIPC received a permit from IEPA to construct the Fly Ash Holding Area Extension to the west of the Replacement Fly Ash Holding Area and build a berm around a portion of the Former Landfill area that received fly ash and scrubber sludge from Pond 4. *See* 1981 Permit, Ex. 7. The extent to which the Fly Ash Holding Area Extension actually received any fly ash is unknown. ~~By~~As with the Initial Fly Ash Holding Area, by the early 1990s~~,~~ the Fly Ash Holding Area Extension ~~also~~ did not hold water and was covered in part by the Former Landfill. The remaining area was covered by soil and other material from the ~~plant~~Station, including debris cleaned from the pond system.

All three Former Fly Ash Holding Units are in the area of the Former Landfill. *See* Site Map, Ex. 3. These units were included in the ~~landfill~~Former Landfill area and, thus, were of part of the Former Landfill operation for decades before the landfill ceased operating in 2015. At least most of the area that at one time encompassed these units when operating was covered by 1991, and the entire area was covered before October 2015 by ~~landfill~~Former Landfill material, which included dry CCR, soil, and sediments. As discussed above, use of the Former Landfill is believed to have started around 1978 for scrubber sludge and fly ash disposal. SIPC estimates

that the maximum volume of scrubber sludge and ash deposited in the Former Landfill was approximately 1.5 million cubic yards.

In September of 1992, SIPC submitted to IEPA an Initial Facility Report ("IFR") for the Former Landfill. *See* IEPA Initial Facility Report – for On-Site Facilities (Sept. 18, 1992), Ex. 15. In 1993, SIPC installed groundwater monitoring wells around the Former Landfill in accordance with Illinois landfill regulations. After that time, SIPC submitted annual groundwater monitoring reports to IEPA pursuant to the landfill regulations. Because the Former Landfill did not receive CCR after the effective date of 40 C.F.R. Part 257, Subpart D, the landfill is not subject to ~~the~~those requirements ~~of Part 257~~. *See* 40 C.F.R. § 257.50(d).

As discussed below, in March 2020, IEPA issued a Violation Notice ("VN") for the Former Landfill, alleging violations of Section 21 of the Illinois Environmental Protection Act ("the Act"), the Illinois landfill regulations, and Illinois's groundwater quality standards, and listing several remedial actions SIPC could take to resolve the alleged violations. *See* IEPA Violation Notice L-2020-00035 (Mar. 20, 2020) ("2020 Landfill VN"), Ex. 16. In December 2020, and in response to IEPA's request, SIPC submitted a ~~landfill closure plan~~Former Landfill Closure Plan to IEPA consistent with the Illinois landfill regulations for closure cited by IEPA in the landfill VN (2020 Landfill VN, Ex. 16), and since that time, SIPC has negotiated some elements of that plan with IEPA. SIPC ~~is~~was ready to proceed with that ~~landfill closure plan as soon as it receives IEPA's approval.~~ Closure Plan, in accordance with the requirements of 35 Ill. Admin. Code § 811.314, upon receiving IEPA's approval for the plan. *See* Former Landfill Closure Plan, Ex. 10, Figure B-05. In March 2021, nearly three months after receiving SIPC's proposed Closure Plan, an IEPA representative for the first time informed SIPC of a new

position that the Former Landfill was regulated by and required to close pursuant to Part 845, rather than pursuant to the Illinois landfill regulations under which the Former Landfill had been operating for decades (and under which IEPA had issued the VN). Subsequently, IEPA withdrew the Landfill VN via a letter dated May 6, 2021.

~~As set forth in the proposed landfill closure plan, SIPC intends to close the Former Landfill in accordance with the requirements of 35 Ill. Admin. Code § 811.314. At a minimum, the final proposed cover system for the Former Landfill will consist of a conventional soil cap with a minimum thickness of 6 feet (3-foot low permeability layer overlain by a 3-foot final protective layer) or an alternate geosynthetic cap with a minimum thickness of 4 feet consisting from the bottom up of the following: 1-foot thick low permeability layer, 40-mil linear low-density polyethylene (LLDPE) geomembrane, a double-sided geocomposite drainage layer and a 3-foot final protective layer. The proposed Former Landfill cover includes the area that once contained the Former Fly Ash Holding Units. *See* Former Landfill Closure Plan, Ex. 10, Figure B-05.~~

Despite issuing a VN to SIPC for alleged violations of landfill regulations, IEPA now appears to argue—apparently based on its proximity to the Former Fly Ash Holding Units—that the Former Landfill (which has been treated by SIPC and regulators as a landfill for more than thirty years) meets the definition of a CCR surface impoundment, "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," under ~~a rule~~Part 845 that became effective as of April 21, 2021 (and which explicitly exempts CCR landfills from coverage). As discussed *infra* at Part III.B, IEPA's position is incorrect. In

addition, this development has delayed finalization and execution of SIPC's proposed ~~landfill closure plan.~~Former Landfill Closure Plan. The Former Landfill area, including the Former Fly Ash Holding Units, is not a CCR surface impoundment and this area qualifies for a finding of inapplicability. However, to the extent the Board finds this area is a CCR surface impoundment, SIPC has proposed an adjusted standard that would close the entirety of this area consistent with Part 845 performance standards and with a Part 845 compliant groundwater monitoring and corrective action program.

D. The Federal CCR Rule and the WIIN Act.

CCR disposal is regulated at the federal level pursuant to Part 257, Subpart D, which was promulgated on April 17, 2015. *See* Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (April 17, 2015) ("Final Rule"), attached in relevant part as Second Amended Pet. Updated Ex. 17. Part 257 was promulgated pursuant to the federal Resource Conservation and Recovery Act, Subtitle D, and includes comprehensive technical requirements for regulated CCR landfills and CCR surface impoundments. Part 257 defines a "CCR surface impoundment" as "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR." 40 C.F.R. § 257.53.

In December 2016, the President signed the Water Infrastructure Improvements for the Nation Act (the "WIIN Act"), Pub. L. No 114-322 (2016). The WIIN Act authorized states to adopt permit programs that, upon approval by the U.S. Environmental Protection Agency ("U.S. EPA"), may operate in lieu of Part 257. 42 U.S.C. § 6945(d)(1)(B). State programs must be as protective as Part 257. *Id.* § 6945(d)(1)(B)(ii). The WIIN Act further allows U.S. EPA to

enforce violations of the Part 257 and requires U.S. EPA to develop a federal permitting program for CCR surface impoundments that would apply in states that elect not to seek approval of a state CCR permitting program. 42 U.S.C. § 6945(d)(2)(B).

In 2024, U.S. EPA amended Part 257 (the "2024 Legacy Rule"). *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38,950 (May 8, 2024) (the "2024 Legacy Pond Final Rule"), attached in relevant part as Ex. 33. The 2024 Legacy Rule amends Part 257 to include CCR regulations for inactive surface impoundments at inactive electric utilities, referred to as "legacy CCR surface impoundments," requiring owners and operators of legacy CCR surface impoundments to comply with all existing requirements applicable to inactive CCR surface impoundments at active facilities, except for the location restrictions and liner design criteria. In addition, the 2024 Legacy Rule establishes groundwater monitoring, corrective action, closure, and post closure care requirements for other areas where CCR was disposed of or managed on land outside of regulated units at regulated CCR facilities, referred to in the 2024 Legacy Rule as "CCR management units" (regardless of how or when that CCR was placed).

E. The Illinois CCR Act and Part 845.

On July 30, 2019, the Illinois Legislature adopted the Illinois Coal Ash Pollution Prevention Act ("Illinois CCR Act"). 415 Ill. Comp. Stat. 5/22.59. In the findings section of ~~that~~the Illinois CCR Act, the Legislature stated that "CCR generated by the electric generating industry has caused groundwater contamination and other forms of pollution at active and inactive plants throughout this State," and "environmental laws should be supplemented to

ensure consistent, responsible regulation of all existing CCR surface impoundments[.]"[11][12] 415 Ill. Comp. Stat 5/22.59(a)(3), (4).

The Illinois CCR Act copied Part 257's definition of a CCR surface impoundment: "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR." 415 Ill. Comp. Stat. 5/3.143. A pond that does not satisfy this definition is not subject to Part 257 or the Illinois CCR Act.

The Illinois CCR Act prohibits any person from allowing the discharge of contaminants from a CCR surface impoundment to the environment so as to cause a violation of the Illinois CCR Act; requires owner and operators of CCR surface impoundments to obtain construction permits from IEPA; requires IEPA approval prior to closing any CCR surface impoundment; and requires post-closure financial assurance for closed CCR surface impoundments.[12][13] 415 Ill. Comp. Stat. 5/22.59(b), (d), (f).

The Illinois CCR Act also set forth a fee regime, pursuant to which covered CCR surface impoundment owners and operators must pay initial and annual fees to IEPA for certain closed CCR surface impoundments, as well as those that have not completed closure. 415 Ill. Comp. Stat. 5/22.59(j). The Illinois CCR Act also required the Board to adopt rules governing CCR surface impoundments that must be at least as protective and comprehensive as Part 257. *See* 415 Ill. Comp. Stat. 5/22.59(g).

[11][12] Prior to passage of the Illinois CCR Act, most CCR surface impoundments in Illinois were regulated as ~~waste water~~wastewater treatment units. *See* ~~R 2020-019~~R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, IEPA's Statement of Reasons (Mar. 30, 2020) ("IEPA Statement of Reasons"), Ex. 18 at 4.

[12][13] The Illinois CCR Act's financial assurance requirements do not apply to SIPC because it is a not-for-profit electric cooperative. 415 Ill. Comp. Stat. 5/22.59(f).

F. The Part 845 Rulemaking.

On March 30, 2020, IEPA proposed regulations titled "Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments" to be included as Part 845 of Illinois Administrative Code's Title 35. According to the Statement of Reasons issued with the proposed regulations,

> ~~The~~[t]he foremost purpose and effect of this regulatory proposal is to fulfill Illinois EPA's statutory obligation to propose CCR rules consistent with the requirements in Section 22.59(g). The second purpose and effect of this regulatory proposal is to protect the groundwater within the state of Illinois. . . . Groundwater has an essential and pervasive role in the social and economic well-being of Illinois, and is important to the vitality, health, safety, and welfare of its citizens. This rule has been developed based on the goals above and the principle that groundwater resources should be utilized for beneficial and legitimate purposes. *See* 415 ILCS 55/1 *et seq*. ***Its purpose is to prevent waste and degradation of Illinois' groundwater***. The proposed rule establishes a framework to manage the underground water resource to allow for maximum benefit of the State.

IEPA Statement of Reasons, Ex. 18 at 10 (emphasis added)~~13~~.[14] IEPA's Statement of Reasons attached a list of "power generating facilities with CCR surface impoundments [that] may be affected by Illinois EPA's proposed rule." *Id*. at 36–37. IEPA indicated, incorrectly, on that list that Marion Station includes nine CCR surface impoundments. *Id*. at 37.

The Board held two sets of hearings and received 138 written public comments on the proposed rules. SIPC submitted public comments to the Board on September 25, 2020. In those

~~13 For all citations to R 2020-019 rulemaking materials—except Board orders and the final Part 845—we provided excerpted documents including only the relevant and cited page numbers, which were attached to SIPC's May 11, 2021 Petition. The page number cited here, and for all R 2020-019 materials, is the page number of the document, not the page number of the exhibit.~~

[14] For all citations to R2020-019 rulemaking materials—except Board orders and the final Part 845—we provided excerpted documents including only the relevant and cited page numbers, which were attached to SIPC's May 11, 2021, initial Petition. The page number cited here, and for all R2020-019 materials, is the page number of the original document, not the page number of the Exhibit.

comments, SIPC stated that only one of the units at Marion Station of the nine ponds then identified by IEPA—former Emery Pond (which is not at issue in this Petition)—is ~~actually~~ a regulated CCR surface impoundment as defined in the then-proposed regulations, the Illinois CCR Act, and Part 257. *See* ~~R 2020-019~~R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, SIPC Comments to Illinois Pollution Control Board (Sept. 25, 2020), Ex. 19.

G. The Board's Opinion and the Final Rule.

The Board issued its Second Notice Opinion and Order ("Second Notice Opinion") on February 4, 2021. The Second Notice Opinion largely adopted IEPA's proposed rules, including its definition of "CCR surface impoundment" 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." ~~R 2020-019~~R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845,* Illinois Pollution Control Board's Second Notice Opinion and Order at 11 (Feb. 4, 2021) ("Second Notice Opinion and Order"); *see also* 35 Ill. Admin. Code § 845.120. Thus, the Board, like the legislature in the Illinois CCR Act, adopted Part 257's definition of "CCR surface impoundment."

The final Part 845 also adopted the following definitions that are relevant to the instant ~~petition~~Petition:

> "Existing CCR surface impoundment" means a CCR surface impoundment in which CCR is placed both before and after October 19, 2015, or for which construction started before commenced prior to October 19, 2015 and in which CCR is placed on or after October 19, 2015. A CCR surface impoundment has started commenced construction if the owner or operator has obtained the federal, State, and local approvals or permits necessary to begin physical construction and

> a continuous on-site, physical construction program had begun before prior to October 19, 2015.
>
> . . .
>
> "Inactive CCR surface impoundment" means a CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains CCR on or after October 19, 2015. Inactive CCR surface impoundments may be located at an active facility or inactive facility.

35 Ill. Admin. Code § 845.120. The Board declined industry's request to adopt a new definition of *de minimis* units in Part 845, at least in part because it did not want to "create" new language that was not in Part 257, which could create inconsistency. Second Notice Opinion and Order at 14–15. In so doing, the Board appeared to recognize that such units may not be subject to Part 845, just as such units are not subject to Part 257, because they are not "CCR surface impoundments." The Second Notice Opinion suggested that there is authority to determine such units are not covered CCR surface impoundments subject to Part 845, and that operators of *de minimis* units could—if necessary—petition for a variance or an adjusted standard from Part 845 if it disagrees with how the IEPA characterized a unit:

> Regulatory relief mechanisms are available to owners and operators when they disagree with an IEPA determination concerning whether a unit is a CCR surface impoundment. In those instances, an owner or operator may seek an adjusted standard or a variance from the Board

Id. at 14.

Following approval by the Joint Committee on Administrative Rules ("JCAR"), the Board adopted Part 845 as final on April 15, 2021, with an effective date of April 21, 2021. *See* ~~R 2020-019~~R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, Illinois Pollution Control Board's Final Order Adopted Rule (Apr. 15, 2021) ("Final Order").

H. The ~~Violation Notices~~Pond Investigation

~~SIPC has received, over the course of the past three years, three VNs from IEPA that are relevant to this Petition.[14]~~

~~1. The Pond VNs.~~

~~On July 28, 2020, IEPA issued VN No. W-2020-00046 (the "Initial Fee VN") to SIPC alleging that SIPC failed to pay initial fees for current and former ponds at Marion Station that IEPA alleged were CCR surface impoundments that had not completed closure by the effective date of the Illinois CCR Act. *See* IEPA Violation Notice W-2020-00046 (July 28, 2020), Ex. 20. Specifically, the VN alleged that SIPC had not paid initial fees for Ponds 1, 2, 3, 4, 6, A-1, B-3, and South Fly Ash Pond. Relevant to this Petition, SIPC explained in response to IEPA's VN that Ponds 3, 4, 6, B-3, and South Fly Ash Pond do not meet the definition of a "CCR surface impoundment" under the Illinois CCR Act, including because they are *de minimis* ponds. SIPC proposed, but IEPA rejected, terms for a compliance commitment agreement to resolve the alleged violations. For the three ponds, all no longer in operation and at issue in the VN but not this Petition Ponds 1, 2, and A-1, SIPC denies they are regulated CCR surface impoundments[15]but is still discussing them with IEPA.~~

~~On December 16, 2020, IEPA issued another VN, No. W-2020-00087 (the "Annual Fee VN"), this time alleging that SIPC failed to pay annual fees as required by the Act for the same~~

~~[14] By a letter dated July 3, 2018, IEPA also issued a VN to SIPC pursuant to Section 31(a)(1) of the Act (Violation Notice No. W-2018-00041), alleging violations of groundwater quality standards for various constituents based on groundwater sampling at monitoring wells surrounding or near former Emery Pond. As discussed *supra*, SIPC closed former Emery Pond by removal pursuant to an IEPA-approved closure compliant with Part 257, and it is not included in this Petition.~~

~~[15] SIPC has explained to IEPA in response to the VN why the other three ponds are not regulated CCR surface impoundments: former Ponds 1 and 2 temporarily contained, when in operation, beneficially used CCR, as discussed above, and water, and CCR was removed from Pond A-1 before October 2015.~~

~~current and former ponds at issue in VN No. W-2020-00046. *See* IEPA Violation Notice W-2020-00087 (Dec. 16, 2020), Ex. 21. Again, SIPC responded, denying the allegations but proposing terms for a compliance commitment agreement to resolve the alleged violations. IEPA again rejected SIPC's proposal. SIPC remains in active negotiations with IEPA regarding the allegations in the Annual Fee VN.~~

~~As discussed *infra* at Part III.A, SIPC believes the history of the De Minimis Units, alone, makes clear that they are not CCR surface impoundments and should not be subject to the requirements of Part 845. In addition~~SIPC has received VNs from IEPA that are related to the units that are the subject of this Petition.[15] *See* 2020 Landfill VN, Ex. 16; IEPA Violation Notice W-2020-00046 (July 28, 2020), Ex. 20; IEPA Violation Notice W-2020-00087 (Dec. 16, 2020), Ex. 21. In connection with discussions related to these VNs, IEPA requested, and SIPC agreed, that SIPC complete a pond investigation pursuant to an agreed protocol designed to yield information related to whether the five De Minimis Units at issue in this Petition qualify as excluded *de minimis* units. The investigation was intended to gather information related to the extent and composition of the sediments in the De Minimis Units.

The pond investigation involved (1) completion of a bathymetric survey to determine the amount of sediments below water in the De Minimis Units (with the exception of former Pond B-3, which no long holds water); and (2) analysis of pond sediments to determine whether and to what extent they contain CCR. At the request of IEPA, soil borings were also taken from the

[15] By a letter dated July 3, 2018, IEPA also issued a VN to SIPC pursuant to Section 31(a)(1) of the Act (Violation Notice No. W-2018-00041), alleging violations of groundwater quality standards for various constituents based on groundwater sampling at monitoring wells surrounding or near the former Emery Pond. As discussed *supra*, SIPC closed the former Emery Pond by removal pursuant to an IEPA-approved closure compliant with Part 257, and it is not included in this Petition.

berms associated with Ponds 3 (including 3A), B-3, and 4.[16] Field work and data collection was completed by Hanson Engineering, Inc. Haley & Aldridge analyzed the results and authored the ~~report~~Pond Investigation Report. SIPC provided an initial version of that ~~report~~Report to IEPA on August 6, 2021. ~~H&A~~Haley & Aldridge subsequently updated the ~~report~~Report following a call with IEPA, including to address questions raised by IEPA, and that updated version is the version attached as Ex. 29.

~~As discussed *supra* at Part C.1., the results of the pond investigation confirm that the De Minimis Units are not CCR surface impoundments under Part 845 (or under Part 257). As discussed *infra*, the results of that investigation also confirm that the De Minimis Units do not have a material adverse effect on groundwater at Marion Station. In short, the Pond Investigation Report confirms that (1) only a fraction of the relatively thin sediment layer present in the De Minimis Units is CCR material; (2) the De Minimis Units are the type of "de minimis units" the U.S. EPA explicitly excluded from regulation under Part 257 (*see infra* at Part A.I.); and (3) regulating the De Minimis Units under Part 845 is not necessary for the protection of human health or the environment.~~

~~2. The Landfill VN.~~

~~As discussed *supra* at Part II.C.2, by letter dated March 20, 2020, IEPA issued a VN to SIPC pursuant to Section 31(a)(1) of the Act, No. L-2020-00035 (the "Landfill VN"), alleging SIPC's failure to comply with various requirements of Illinois landfill regulations in its operation~~

[16] IEPA also requested that borings be taken from former Pond A-1 (which is not part of this Petition) and former Pond B-3. As discussed ~~*supra* at 13~~, SIPC was unable to collect either of those borings because bedrock was encountered at the surface of former Pond A-1 (confirming no CCR present) and the designated boring area of former Pond B-3 was inaccessible. *See* Pond Investigation Rep., Ex. 29 at 6.

~~and management of the Former Landfill. *See* 2020 Landfill VN, Ex. 16. Specifically, IEPA alleged violations of Part 811's intermediate and final cover requirements, Parts 815 and 812's requirements for filing an IFR, Part 811's requirements related to final slope and stabilization, and Part 811 groundwater monitoring requirements. Nowhere in that VN did IEPA allege violations of or even reference Part 257, the Illinois CCR Act, or Part 845.~~

~~SIPC denied the allegations in the VN but provided certain requested information to IEPA and, in December 2020, submitted a proposed plan to close the Former Landfill in compliance with Parts 811 and 815. In March 2021, nearly three months after receiving SIPC's proposed landfill closure plan, an IEPA representative for the first time informed SIPC of a new position that the Former Landfill was regulated by and required to close pursuant to Part 845, rather than pursuant to the Illinois landfill regulations under which the Former Landfill had been operating for decades (and under which IEPA had issued the VN). Subsequently, IEPA withdrew the Landfill VN via a letter dated May 6, 2021. As set forth herein, SIPC disagrees with IEPA's new position.~~

I. Requested Relief

Through this ~~petition~~Petition, SIPC requests a finding of inapplicability from the Part 845 requirements for the De Minimis Units and the Former Fly Ash Holding Units (including the Former Landfill) or, in the alternative, an adjusted standard ~~exempting~~for the De Minimis Units and the Former Fly Ash Holding Units ~~from the requirements of Part 845~~as set forth in Appendix A.

III. REQUEST FOR FINDING OF INAPPLICABILITY.

The Board has recognized that a Petition for an adjusted standard can, in the alternative, seek a finding of inapplicability from the regulation at issue. *See* AS 2009-003, *In the Matter of Petition of Westwood Lands, Inc. for an Adjusted Standard from Portions of 35 Ill. Adm. Code 807.14 and 35 Ill. Adm. Code 807.104 and 35 Ill. Adm. Code 810.103 or, in the Alternative, a Finding of Inapplicability*, Opinion and Order of the Board (Oct. 7, 2010) (granting request for a finding of inapplicability from solid waste regulations); AS 2004-002, *In the Matter of Petition of Jo'Lyn Corporation and Falcon Waste and Recycling Inc. for an Adjusted Standard from 35 Ill. Adm. Code 807.103 and 35 Ill. Adm. Code 810.103, or in the Alterative, a Finding of Inapplicability*, Opinion and Order of the Board (Apr. 7, 2004) (granting a request for a finding of inapplicability from solid waste regulations). Such relief is appropriate here on the basis that none of the units at issue are CCR surface impoundments subject to Part 845, as set forth further below.

A. The De Minimis Units Are Not Subject to Part 845.

Part 845 is clear that it only regulates "CCR surface impoundments." The regulation's "Scope and Purpose" section specifies that Part 845 applies to "owners and operators of new and existing CCR surface impoundments," 35 Ill. Admin. Code § 845.100(a), and "inactive CCR surface impoundments at active and inactive electric utilities or independent power producers." *Id.* § 845.100(b). As discussed below, none of the units at issue are CCR surface impoundments, new or existing CCR surface impoundments, or inactive CCR surface impoundments, and therefore, none of the current and former ponds at issue are covered by Part 845.

1. The De Minimis Units Are Not "CCR Surface Impoundments."

As discussed below, the De Minimis Units are not "CCR surface impoundments" as defined in Part 257 or Part 845. Both Part 257 and Part 845 define a CCR surface impoundment as "a natural topographic depression, man-made excavation, or diked area, which ***is*** designed to hold an accumulation of CCR and liquids, ***and*** the unit[17] treat***s***, store***s***, or dispose***s*** of CCR." 40 C.F.R. § 257.53 (emphasis added); *see also* 35 Ill. Admin. Code § 845.120. None of the De Minimis Ponds meet this two-part definition~~, which focuses on the **present** function of an impoundment as of the effective date of Part 257~~.[18]

As discussed above, the De Minimis Units are not ~~presently~~ designed to—and do not—hold a necessary accumulation of CCR and liquids. ~~To the extent they ever did, they have not done so since long before October 19, 2015.~~ Accordingly, the De Minimis Units do not fall within the first part of the definition of CCR surface impoundment. ~~And~~Further, none of the De Minimis Units ~~currently~~ treat, store, or dispose of CCR, and (to the extent they ever did) have not done so since October 19, 2015, as required by the second part of the definition of CCR surface impoundment. ~~The De Minimis Units therefore fall outside the plain language of the definition of "CCR surface impoundment" and, consequently, Part 845.~~

[17] Part 845 substitutes "surface impoundment" for "unit," but this works no substantive change. 35 Ill. Admin. Code § 845.120

[18] Part 257, upon promulgation, did not impose any requirements on any CCR surface impoundments that no longer existed or had closed before the rule's effective date—i.e., those that no longer contained water and could no longer impound liquid. Final Rule, Second Amended Pet. Updated Ex. 17 at 21,343. Whether a unit met the definition of CCR surface impoundment depended on what waste was managed in the unit ***as of October 19, 2015***. The court's decision in *Util. Solid Waste Activities Grp. v. Envtl. Prot. Agency*, 901 F.3d 414 (D.C. Cir. 2018) ("*USWAG*") reversed and remanded the ~~federal rules~~Final Rule to the U.S. EPA to regulate any ash pond that was a "legacy pond," which is an inactive CCR surface impoundment at a closed or no longer operating facility. The *USWAG* decision described the risks posed by legacy ponds as risks associated with open, wet ponds that were not closed. See *USWAG*, 901 F.2d at 432–33. The *USWAG* decision's remand did **not** speak to ponds at active facilities that contained *de minimis* CCR or could no longer contain water and impound liquid as of the effective date of the ~~rule~~Final Rule. Accordingly, the *USWAG* decision did not order U.S. EPA to regulate units like the De Minimis Units or the Former Fly Ash Holding Units.

The De Minimis Units primarily received CCR only through their service as secondary finishing ponds (through decanted overflow water), stormwater runoff, or air deposition. The only unit to ever receive direct disposal of CCR was former Pond B-3. However, that disposal occurred only three to four times during then entire course of its operation (when Pond A-1 was not in operation). *See supra* at Part II.C.1. When materials from B-3 were removed in 2017, it had a high BTU content, and at least a portion of those materials were burned, suggesting any CCR in the pond was *de minimis*.

The fact that certain of the De Minimis Units *may* have received historic, largely indirect, discharges of CCR does not bring them within the definition of a "CCR surface impoundment." To the contrary, both the history and the current condition of the De Minimis Units make clear that they are precisely the type of *de minimis* units ~~that the U.S. EPA intended to exclude~~excluded from the definition of CCR surface impoundment in Part 257 and ~~which, accordingly, should also be excluded from~~ Part 845 ~~under the same definition~~.

In its preamble to the Final Rule, U.S. EPA stated that

> The Agency received many comments on the proposed definition of CCR surface impoundment. The majority of commenters argued that the definition was overly broad and would inappropriately capture surface impoundments that are not designed to hold an accumulation of CCR. Commenters were concerned that the proposed definition could be interpreted to include downstream secondary and tertiary surface impoundments, such as polishing, cooling, wastewater and holding ponds that receive only *de minimis* amounts of CCR.

Final Rule, Second Amended Pet. Updated Ex. 17 at 21,357.

In response to those concerns, U.S. EPA reviewed the risk assessment on which Part 257 was based "to determine the characteristics of the surface impoundments that are the source of the risks the rule seeks to address." *Id*.

> Specifically, these are units that contain a large amount of CCR managed with water, under a hydraulic head that promotes the rapid leaching of contaminants. . . . EPA agrees with commenters that ***units containing only truly "de minimis" levels of CCR are unlikely to present the significant risks this rule is intended to address***.

Id. (emphasis added).

Accordingly, U.S. EPA amended the definition of CCR surface impoundment in the Final Rule "to clarify the types of units that are covered by the rule": "a natural topographic depression, man-made excavation, or diked area, which ***is*** designed to hold an accumulation of CCR and liquids, ***and the unit treats, stores, or disposes of CCR***." *Id.* (emphasis added). The intent of the amendment was to implement U.S. EPA's determination, as described in Part 257's preamble, that *de minimis* units would be **excluded** from Part 257 requirements. U.S. EPA's amended definition is, as noted above, the same definition used in Part 845. *See* 35 Ill. Admin. Code § 845.120.

In making the change, U.S. EPA noted that it "

> agrees with commenters that relying solely on the criterion from the proposed rule that the unit be designed to accumulate CCR could inadvertently capture units that present significantly lower risks, such as process water or cooling water ponds, because, although they will accumulate any trace amounts of CCR that are present, they *will not contain the significant quantities* that give rise to the risks modeled in EPA's assessment. By contrast, units that are designed to hold an accumulation of CCR and in which treatment, storage, or disposal occurs will contain substantial amounts of CCR and consequently are a potentially significant source of contaminants." ~~Final Rule, Updated Ex. 17 at 21,357.~~

Final Rule, Second Amended Pet. Updated Ex. 17 at 21,357. U.S. EPA further stated that "CCR surface impoundments do not include units generally referred to as cooling water ponds, process water ponds, wastewater treatment ponds, storm water holding ponds, or aeration ponds. These units are not designed to hold an accumulation of CCR, and *in fact, do not generally contain*

significant amounts of CCR." *Id.* (emphasis added). Further, U.S. EPA stated that secondary or tertiary ponds that do not receive "significant amounts of CCR from a preceding impoundment" would not fall within the definition of a regulated CCR surface impoundment. *See Id.* at 21,357; *see also*, U.S. EPA, *Frequent Questions about Definitions and Implementing the Final Rule Regulating the Disposal of Coal Combustion Residuals*,[19] Ex. 34 ("Surface runoff, coal pile runoff, CCR landfill leachate, stormwater and evaporation ponds would not generally be expected to meet the definition of a CCR surface impoundment, because based on their typical design and function, such units are not usually designed primarily to hold an accumulation of CCR and liquid and would not be expected to treat, store, or dispose of CCR.")

U.S. EPA reiterated the *de minimis* exception in the 2024 Legacy Rule, explaining that "evaporation ponds, or secondary or tertiary finishing ponds that have not been properly cleaned up" are expected to "contain no more than a *de minimis* amount of CCR" and, therefore, would not be regulated under Part 257. 2024 Legacy Pond Final Rule, Ex. 33 at 39,050. Further, U.S. EPA stated in its proposal for the 2024 Legacy Rule that "the following would not be considered CCR [management units]: . . . closed or inactive process water ponds, cooling water ponds, wastewater treatment ponds, and storm water holding ponds or aeration ponds. These units are not designed to hold an accumulation of CCR, and *in fact, do not generally contain a significant amount of CCR*. . . ." Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals From Electric Utilities; Legacy CCR Surface Impoundments, 88 Fed. Reg. 31,982, 32,018 (May 18, 2023) (emphasis added), attached in relevant part as Ex. 35.

[19] Available at https://www.epa.gov/coalash/frequent-questions-about-definitions-and-implementing-final-rule-regulating-disposal-coal#q7.

SIPC's request that the Board find Part 845 inapplicable to the De Minimis Ponds is consistent with federal law as the units contain little to no CCR and, therefore, are not federally regulated.

The Illinois CCR Act and Part 845 both incorporate Part 257's definition of "CCR surface impoundment," ~~with~~including the amended language that implemented U.S. EPA's determination that *de minimis* units would not be considered regulated surface impoundments. Thus, Part 845 and the Illinois CCR Act do not apply to *de minimis* units.

The Board declined to "create" a new definition of "*de minimis,*" as it is not expressly defined in Part 257, but that decision did not mean that *de minimis* units would be covered under Part 845. Second Notice Opinion and Order at 14–15. Indeed, that decision was based at least in part on concerns about assuring conformity with ~~U.S. EPA's rule. *Id*~~Part 257, *id.* at 15~~. And~~, and Part 257 does not apply to *de minimis* units as such units are described by U.S. EPA, including in the Preamble to its ~~final CCR rule~~Final Rule. *See* Final Rule, Second Amended Pet. Updated Ex. 17 at 21,357. Consistently, the Board also implicitly recognized in its discussion of defining *de minimis* units that IEPA might make decisions about whether a unit qualifies as an excluded *de minimis* unit, and, if a company disagreed, it could ~~chose~~choose to seek relief from the Board, including, for example, through an adjusted standard. Second Notice Opinion and Order at 14. IEPA, and the Board, may determine that a unit is *de minimis* and thus not regulated because the regulations do not apply to such units under the identical "CCR surface impoundment" definitions in Part 257 and Part 845. Here, for the reasons set forth below, SIPC asks the Board in the first instance[~~19~~20] to determine that the De Minimis Units are not regulated CCR surface impoundments.

[~~19~~20] As set forth below, if the Board denies this request, SIPC asks the Board for an adjusted standard with respect to the De Minimis Units.

Both the Pond Investigation Report and the history of the De Minimis Units outlined above ~~shows~~show that ~~they~~the units do not "contain a large amount of CCR managed with water, under a hydraulic head that promotes the rapid leaching of contaminants." Final Rule, Second Amended Pet. Updated Ex. 17 at 21,357; *see also* Pond Investigation Rep., Ex. 29. To the extent any of the De Minimis Units ever received discharges of CCR, the discharges were mostly indirect, either from pond overflow or process ~~waste water~~wastewater. The only De Minimis Unit that is known to have received direct ~~wastewater~~ discharges of CCR—former Pond B-3~~20~~21—likely only did so for short periods of time, has not received any CCR for decades, and is no longer able to contain water. *See supra* at Part II.C.1. Accordingly, none of the ~~ponds~~De Minimis Ponds at issue ever contained "significant quantities" or "substantial amounts" of CCR. Further, all ~~of~~ the De Minimis Units have been cleaned of debris since Marion Station switched to fully dry handling ~~of~~ fly ash, and those cleanings would have removed any CCR that would have accumulated in them as a result of historic operations. As a result, the De Minimis Units simply do not present the "significant risks" Part 257~~,~~ and Part 845~~,~~ are intended to address.

This conclusion is bolstered by the results and analysis set forth in the Pond Investigation Report. As summarized in that report, Haley & Aldridge reviewed extensive information relating to the De Minimis Units, including bathymetric survey results, results of analyses of pond sediments, and results of a ~~polarized light microscopy ("~~PLM~~")~~ analyses, which characterize the fraction of CCR in sediment samples. Based on that information, Haley & Aldridge determined that the De Minimis Units contain on average less than 2 feet of total sediments. Of that less than two feet, Haley & Aldridge determined that the average fraction of

~~20~~21 While the South Fly Ash Pond was *designed* to receive direct discharges of CCR, it never did receive direct discharges of CCR. *See supra* at ~~8–9~~9–10.

CCR materials in the De Minimis Units was approximately ~~40~~forty percent. Pond Investigation Rep., Ex. 29 at 13. In other words, the De Minimis Units contain only a small amount of sediment, and only a fraction of those sediments ~~appear~~appears to contain CCR materials. Haley ~~and~~& Aldridge accordingly concluded that "these results are consistent with what we understand to be the function of [the De Minimis Units], which generally did not receive direct discharges of CCR materials, were not designed to hold an accumulation of CCR and water, and have not been used for the treatment, storage and disposal of CCR." Pond Investigation Rep., Ex. 29 at 7.

Haley & Aldridge also contrasted the volume and type of pond sediments in the De Minimis Units with the characteristics of a "typical" CCR surface impoundment that is used to treat, store, or dispose of CCR. As discussed in the Pond Investigation Report, the volume of sediments in such CCR surface impoundments generally is greater than ~~50~~fifty percent of pond volume. In contrast, the volume of sediments in the De Minimis Units ranged from 8.2 percent (Pond 6) to 13.3 percent (Pond 3A). Similarly, the total volume of sediments in the De Minimis Units is far smaller than one would expect to see in a CCR surface impoundment used for the treatment storage or disposal of CCR. *See* Pond Investigation Rep., Ex. 29 at 7. These results further bolster the conclusion that the De Minimis Units are not CCR surface impoundments as defined in ~~Part 257 (~~or Part 845~~)~~ or Part 257.

Further, ~~and as discussed *infra* at 44,~~ Haley & Aldridge reviewed multiple years of groundwater monitoring data collected by SIPC and determined that any CCR that is in the De Minimis Units has not had any appreciable impact on groundwater at SIPC. *See* Pond Investigation Rep., Ex. 29 at 26~~; *see also* Updated Bradley Op., Updated Ex. 28 at 21. Dr. Bradley~~. Ms. Lewis concurs with this conclusion and determines that the De Minimis Units do

not pose appreciable risk to human health or the environment—and are therefore not the type of units intended by regulated by Part 257845 or Part 845257—based on her review of the Pond Investigation Report and her own review of SiteStation groundwater monitoring data and pond histories. Updated BradleyAri Lewis, M.S. *Support for the Petition of an Adjusted Standard for Pond 4, Ponds 3 and 3A, Pond S-6, Former Pond B-3, and South Fly Ash Pond* (Dec. 20, 2024) ("Lewis Op."), Updated Ex. 28 at 21–2236. As discussed by DrMs. BradleyLewis in her updated report, the De Minimis Units are precisely the types of *de minimis* units that U.S. EPA sought to exclude from regulation under Part 257 because they do not "***present the significant risks [Part 257] is intended to address***." Final Rule, Second Amended Pet. Updated Ex. 17 at 21,357; *see also* Lewis Op., Ex. 36. They should likewise be excluded under Part 845, as discussed below.

Given that the De Minimis Units are not CCR surface impoundments under Part 257, the Board should find that they also are not covered by Part 845. As noted above, the definition of "CCR surface impoundment" is identical in both Part 257 and Part 845, and plainly excludes the De Minimis Units. As a practical matter, it would be anomalous, to say the least, that the same words mean something different in Part 845 and that a unit is subject to Part 845 but excluded byfrom Part 257 under the same rule language. Part 257 clearly excludes units such as the De Minimis Units. Further, the administrative record is clear that the legislature, IEPA, and the Board in adopting the same definition of "CCR surface impoundments" as Part 257, all intended for Part 845 to regulate the same universe of "CCR surface impoundments" as Part 257. *See, e.g.*, R 2020-019R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, IEPA Responses to

Pre-Filed Questions (Aug. 3, 2020) ("IEPA Responses"), attached in relevant part as Updated Ex. 22 at 7–8 ("It is the Agency's position that the same universe of CCR surface impoundments [that is regulated by Part 257] is intended to be regulated by Part 845."); *id*. at 17 ("CCR surface impoundments not subject to Part 257, are not subject to the requirements of Part 845. (Agency Response)"); ~~R 2020-019~~R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, Hearing Transcript (Aug. 11, 2020), Ex. 23 at 43–44 (Q: "[M]y question was is Part 845 intended to apply to the same ponds that are subject to requirements under Part 257 given that they both define CCR surface impoundments in an identical fashion?" A: "In the Agency's opinion, they will be the same ones."); Final Order at 8 (noting that "many of the technical elements required of owners and operators of CCR surface impoundments are already required under federal law.").

Indeed, to the extent IEPA *had* desired to deviate from Part 257 for the scope of units of covered by Part 845, it admitted that it did not conduct its own risk assessment or otherwise gather evidence that would support doing so. *See, e.g*., IEPA Responses, Updated Ex. 22 at 55 (Q: "Are you familiar with the Risk Assessment performed by U.S. EPA when it finalized the 2015 Federal CCR Rule?" A: "No."); ~~R 2020-019~~R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, First Supplement to IEPA Pre-Filed Responses (Aug. 5, 2020), Ex. 24 at 37–38 (admitting that IEPA did not perform its own risk assessment and IEPA relied upon U.S. EPA's risk assessment "to the extent that USEPA's risk assessment was used by USEPA to develop the

requirements of Part 257"). There is no question, then, that the De Minimis Units are excluded from regulation under both Part 257 **and** Part 845.

2. The De Minimis Units Are Not Existing or Inactive CCR Surface Impoundments.

The De Minimis Units also do not fall within the definition of "existing CCR surface impoundment" or "inactive CCR surface impoundment" under either Part 845 or Part 257. As an initial matter, under either regulatory scheme, a unit cannot be an "existing CCR surface impoundment" or an "inactive CCR surface impoundment" unless it is first a "CCR surface impoundment" which, as discussed above, the De Minimis Units are not. *See, e.g.*, Second Notice Opinion and Order at 15 ("The Board notes that for an impoundment to be an inactive surface impoundment, first it must be a *CCR surface impoundment*, which is defined in Section 845.120 as being designed to 'hold CCR and liquid.'" (emphasis in original)). Furthermore, it is undisputed that none of the De Minimis Units "received" CCR or had CCR "placed" in them—other than any small amounts that may have been incidentally deposited through indirect overflow discharges, runoff, or air—on or after October 2015. Other than B-3, they also did not "receive" CCR or have CCR "placed" in them—again, other than any small amounts that may have been incidentally deposited through indirect overflow discharges, runoff, or air—prior to October 2015. These ponds, used for secondary overflow, stormwater runoff, and landfill runoff, are exactly types of units U.S. EPA expected would be *de minimis.* The De Minimis Units thus are clearly not "existing CCR surface impoundments" under Part 257 or Part 845.

The De Minimis Units are likewise not "inactive CCR surface impoundments." Part 257 defines an "inactive surface impoundment" as a "CCR surface impoundment that no longer receives CCR on or after October 19, 2015 and still contains both CCR and liquids on or after

October 19, 2015" 40 C.F.R. § 257.53. Part 845 similarly defines "inactive CCR surface impoundment" as a "CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains CCR on or after October 19, 2015." 35 Ill. Admin. Code § 845.120. There is no dispute that CCR was never "placed" in the South Fly Ash Pond or Pond 6, either before or after October 19, 2015. Those ponds plainly are not inactive CCR surface impoundments. To the extent any CCR was ever "placed" in the Ponds 3, 4, or B-3 decades ago, the historical record is clear that any historic receipt of CCR by those ponds was temporary and intermittent in nature and of a *de minimis* ~~amounts of CCR~~amount not intended to be covered under Part 257 or Part 845. Accordingly, the De Minimis Units do not ~~*presently*~~ contain more than *de minimis* amounts of CCR, which is not sufficient to meet the requirements for regulation as an inactive CCR surface impoundment under either Part 257 or Part 845. Accordingly, the De Minimis Units should not be regulated as inactive CCR surface impoundments under Part 257 or Part 845.

B. The Former Fly Ash Holding Units Are Not Subject to Part 845.

1. The Former Fly Ash Holding Units Are Not CCR Surface Impoundments, Existing CCR Surface Impoundments, or Inactive CCR Surface Impoundments.

The Former Fly Ash Holding Units are likewise not "CCR surface impoundments" subject to Part 257 or Part 845. The Former Fly Ash Holding Units are—and have been since at least the early 1990s—dry and operated in conjunction with the ~~on-site~~ Former Landfill, which, in turn, has been operated and regulated as an on-site, permit-exempt landfill pursuant to 35 Ill. Admin. Code Part 815 for decades. *See e.g.* 2020 Landfill VN, Ex. 16. The Former Fly Ash Holding Units are not currently, and were not as of October 19, 2015, "designed to hold an

accumulation of CCR and liquids" and accordingly, fall outside of the plain definition of "CCR surface impoundment." *See supra* at Part III.A.1; *see also* U.S. EPA, Comment Summary and Response Document: Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities; Proposed Rule, Vol. 3 (Dec. 2014), Ex. 25 at 73 ("CCR surface impoundments that have been dewatered and are no longer able to hold free liquids" prior to October 19, 2015 "are not subject to [Part 257].").

Because the Former Fly Ash Holding Units are not CCR surface impoundments, they do not fall within the definition of "existing" or "inactive CCR surface impoundments." *See supra* at Part III.A.2 (relating to the De Minimis Units and emphasizing that ~~in order~~ to be regulated as an existing or inactive CCR surface impoundment, the unit at issue must first be a "CCR surface impoundment" within the meaning of Parts 845 and 257). ~~The Former Fly Ash Holding Units also do not satisfy other key elements of the "existing" and "inactive" CCR surface impoundment definitions.~~

~~The Former Fly Ash Holding Units cannot be "existing CCR surface impoundments" because they did not receive CCR after October 19, 2015. The Former Fly Ash Holding Units cannot be "inactive CCR surface impoundments" because, to the extent the units contained CCR after October 19, 2015, the units did not contain water after October 19, 2015. The Former Fly Ash Holding Units are thus plainly excluded from the Part 257 definition of "inactive CCR surface impoundment," which requires that an inactive unit contain CCR ***and water*** after October 19, 2015. *See* 40 C.F.R. § 257.53. In promulgating its definition of an inactive CCR surface impoundment, U.S. EPA noted that Part 257 "was designed to address units that pose the highest level of risk: "units that contain a large amount of CCR ***managed with water***, under a hydraulic head that promotes the rapid leaching of contaminants." Final Rule, Updated Ex. 17 at 21,357 (emphasis added). As a result, U.S. EPA decided not to "impose any requirements on any CCR surface impoundments that have in fact 'closed' before the rule's effective date [October 19, 2015] – i.e., those [like the Former Fly Ash Holding Area Units] that no longer contain water and can no longer impound liquid." *Id.* at 21,343. As discussed above, the record is clear that the legislature, IEPA, and the Board all intended for Part 845 to encompass the same universe of CCR surface impoundments as Part 257. *See supra* at Part III.A.1. Accordingly, because the Former Fly Ash Holding Units are not regulated as inactive CCR surface~~

~~impoundments under Part 257, they also should not be regulated as inactive CCR surface impoundments under Part 845.~~

2. The Former Fly Ash Holding Units Have Been Managed for Decades as a Landfill, which Is Excluded from Regulation under Part 845.

The Former Fly Ash Holding Units are not subject to Part 845 for the separate reason that they function (and have functioned for decades) as part of the Former Landfill, and both Part 257 and Part 845 make clear that CCR landfills are not surface impoundments. Part 257 specifically defines a CCR landfill as **not** being a CCR surface impoundment: "CCR landfill or landfill means an area of land or an excavation that receives CCR ***and which is not a surface impoundment***, an underground injection well, a salt dome formation, a salt bed formation, an underground or surface coal mine, or a cave." 40 C.F.R. § 257.53 (emphasis added). Part 257 likewise contains separate and distinct requirements for CCR landfills and CCR surface impoundments. *Compare*~~,~~ *e.g.*, 40 C.F.R. § 257.70 *with* 40 C.F.R. § 257.71 and 40 C.F.R. § 257.84 *with* 40 C.F.R § 257.83. The 2024 Legacy Rule continues to make this distinction by promulgating federal requirements for CCR landfills that ceased receiving CCR prior to October 19, 2015. 2024 Legacy Pond Final Rule, Ex. 33 at 38,951. There is simply no question that the U.S. EPA intended to regulate CCR landfills separately from CCR surface impoundments in Part 257.~~21~~22

Part 845 is likewise clear that it does not regulate CCR landfills; the "Scope and Purpose" section states "this Part ***does not apply*** to landfills that receive CCR." 35 Ill. Admin. Code § 845.100(h) (emphasis added); *see also* IEPA Responses, Updated Ex. 22 at 6 ("A man-made excavation where CCR is disposed could be a CCR surface impoundment or a landfill***, but a***

~~21~~22 As noted *supra*, the Former Landfill at Marion Station is not regulated pursuant to Part 257 because it stopped receiving waste prior to October 2015. 40 C.F.R. § 257.53.

landfill that receives CCR is not a CCR surface impoundment.")~~)~~ (emphasis added)). The Board explicitly declined to extend Part 845's reach to landfills and other unconsolidated piles of CCR during the rulemaking, stating "that regulation of these unconsolidated coal ash fills and piles is beyond the scope of [the Illinois CCR Act]." Second Notice Opinion and Order at 12. Instead, the Board opted to open a separate sub-docket to explore regulating CCR in landfills and unconsolidated coal ash fills and piles. *Id*. IEPA agreed with the Board, taking the position that "limiting Part 845 to CCR surface impoundments is necessary and appropriate." ~~R 2020-019~~R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, IEPA Post-Hearing Comments (Oct. 30, 2020), Ex. 26 at 10. There is no question that the Former Landfill~~ including~~, which includes the Former Fly Ash Holding Area Units~~ at Marion Station operated as a landfill and~~, has been regulated as a landfill for decades. *See supra* at Part II.C.2. Indeed, as recently as March 2020, IEPA issued a VN to SIPC for alleged violations of the Illinois landfill regulations at the Former Landfill. As part of the Former Landfill, the Former Fly Ash Holding Units cannot be subject to Part 845. Illinois landfill regulations, consistent with Part 257 and Part 845, clearly state that a landfill is not a surface impoundment.~~22~~23

3. The Board Should Reject IEPA's Apparent Position that the Historic Presence of a CCR Surface Impoundment Converts a Landfill into a CCR Surface Impoundment.

Finally, the Board should reject IEPA's apparent new and convoluted argument that, notwithstanding its regulation of the Former Landfill as a landfill for decades—including its

~~22~~23 35 Ill. Admin. Code § 810.103 ("~~"~~'Landfill' means a unit or part of a facility in or on which waste is placed and accumulated over time for disposal, and that is not a land application unit, a surface impoundment or an underground injection well."); *see also* 35 Ill. Admin. Code § 810.104 ("For the purposes of this Part and 35 Ill. Adm. Code 811 through 815, a surface impoundment is not a landfill.").

recent issuance of a VN asserting alleged violations of Illinois landfill regulationsregulation—, the landfill regulations do not apply, and the entire Former Landfill area, including the Former Fly Ash Holding Units, is actually a CCR surface impoundment subject to Part 845.

IEPA's argument appears to be this: the Former Fly Ash Holding Units were once, decades ago, used to store CCR and water. They no longer contain water and no longer receive CCR, but the fact that they once did and appear on a map in the vicinity of the Former Landfill somehow converts the (now closed) Former Landfill, which both SIPC and IEPA have recognized for decades as a landfill, into a CCR surface impoundment. This is an illogical and absurd result, and one that runs directly contrary to the definition of "CCR surface impoundment" in Part 257, Part 845, and Illinois landfill regulations.

As discussed *supra*, both Part 845 and the Illinois CCR Act incorporated Part 257's present tense language in their definitions of CCR surface impoundment. *See supra* at Part III.A.1. Those definitions must be construed to exclude units that have for decades operated as part of a landfill. In its preamble to Part 257, U.S. EPA made clear its intention to avoid exactly this type of result:

> EPA did not propose to require "closed" surface impoundments to "reclose." ***Nor did EPA intend, as the same commenters claim, that "literally hundreds of previously closed . . . surface impoundments—many of which were properly closed decades ago under state solid waste programs, have changed owners, and now have structures built on top of them—would be considered active CCR units***." Accordingly, the final rule does not impose any requirements on any CCR surface impoundments that have in fact "closed" before the rule's effective date—***i.e., those that no longer contain water and can no longer impound liquid***.

Final Rule, Updated Ex. 17 at 21,343 (emphasis added).

Treating the Former Fly Ash Holding Units, and indeed the entire Former Landfill, as CCR surface impoundments after years of regulating the area as a landfill thus flies in the face of

~~U.S. EPA's stated intent not to regulate units that "now have structures built on top of them" and that "no longer contain water and can no longer impound liquid." *Id.* It also contravenes the stated intent of the legislature, IEPA, and the Board for Part 845 to apply to the same universe of "CCR surface impoundments" as Part 257. As a practical matter, it also~~ upends years of settled expectations about the requirements for operation and closure, raising significant retroactivity and fairness concerns for this not-for-profit cooperative and its owners. The Board should reject IEPA's last-minute overreach and find that Part 845 does not apply to the Former Landfill, including the Former Fly Ash Holding Units.~~23~~24

IV. PETITION FOR AN ADJUSTED STANDARD.

If the Board declines to issue a finding of inapplicability and determines that the current and former ponds at issue in this Petition are "CCR surface impoundments," SIPC requests in the ~~alternative~~ that the Board grant an adjusted standard from 35 ~~Illinois Administrative~~Ill. Admin. Code Part 845 for the De Minimis Units and the Former Landfill (including the Former Fly Ash Holding Units). When petitioned, the Board may grant an adjusted standard from a rule of general applicability for persons who can justify such an adjustment under the applicable statutory factors. 415 Ill. Comp. Stat. 5/28.1(a).

In this Petition, SIPC is requesting an adjusted standard as described below and with the language presented in the attached Appendix A. The adjusted standard would result in the closure of all the units subject to this Petition consistent with Part 845 performance standards. It

~~23~~24 The Indiana Office of Environmental Adjudication recently rejected similar attempts by environmental groups to argue that a portion of a former Duke Energy ash pond—which had been closed for decades—was subject to Part 257, stating that "an impoundment's regulatory status over three decades ago is not relevant to determining whether it is currently subject to the Federal CCR Rule." *In the Matter of Objection to the Issuance of Partial Approval of Closure/Post Closure Plan Duke Gallagher Generating Station Ash Pond System*, No. 20-S-J-5096 (OEA May 4, 2021), Ex. 27 at 14.

will also require groundwater monitoring and corrective action for each of the units consistent with Part 845 requirements. SIPC's proposed adjusted standard accounts for the unique characteristics of these units while ensuring no adverse impact to health or the environment.

As set forth below, the requested adjusted standard is warranted ~~here~~ based on the factors set forth in Section 28.1 of the Act, including consistency with Section 27(a). Accordingly, SIPC's request for an adjusted standard for the De Minimis Units and the Former Landfill (including the Former Fly Ash Holding Units) should be granted in the event the Board does not grant its request for a finding of inapplicability.

A. Regulatory Standard.

Section 28.1 of the Act describes the factors the Board must consider in granting an adjusted standard:

> (c) If a regulation of general applicability does not specify a level of justification required of a petitioner to qualify for an adjusted standard[~~24~~25], the Board may grant individual adjusted standards whenever the Board determines, upon adequate proof by petitioner, that:
>
> (1) factors relating to that petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
>
> (2) the existence of those factors justifies an adjusted standard;
>
> (3) the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
>
> (4) the adjusted standard is consistent with any applicable federal law.

415 Ill. Comp. Stat. 5/28.1(c)(1)–(4).

Part 845, which is a regulation of general applicability, does not specify a level of

~~24~~25 Part 845 does not specify a level of justification required to qualify for an adjusted standard.

justification or other requirements for an adjusted standard outside of those set forth in Section 28.1 of the Act. Any adjusted standard must also be "consistent" with subsection (a) of ~~section~~Section 27 of the Act, which provides that ~~"~~

> the Board shall take into account the existing physical conditions, the character of the area involved, including the character of surrounding land uses, zoning classifications, the nature of the existing air quality, or receiving body of water, as the case may be[~~25~~26], and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution.~~"~~

415 Ill. Comp. Stat. 5/27(a).~~26~~27 Extremely high costs of controlling a particular pollutant have been determined to be economically unreasonable.[28] A treatment or control technology is not economically reasonable if it would not significantly improve environmental conditions or increase the aesthetic or recreational value of the receiving water body, especially given high associated implementation costs.[29]

As discussed below, granting the requested adjusted standard for the De Minimis Units

~~25~~26 The physical conditions at Marion Station and character of the area involved, including the character of surrounding land uses, zoning classifications, and the nature of the receiving body of water are discussed *supra* at Part II.A.

~~26~~27 The Illinois Court of Appeals has held that the Board's review is limited to the factors set forth in Sections 27(a) and 28.1: "The Act sets forth the factors the Board is to consider when determining whether to grant an adjusted standard. The Board lacks the authority to add to or rewrite the statutory factors." *Emerald Performance Materials, LLC v. Ill. Pollution Control Bd.*, 2016 IL App (3d) 150526, ¶ 27.

[28] *EPA v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 752 (2d Dist. 1999) (upholding Board's finding that compliance would be economically unreasonable where "[a]ccording to the uncontested figures Swenson presented, the cost of installing a powder coating system would be more than 15 times the average control cost the Board historically has used to measure reasonableness"); *see also Granite City Div. of Nat. Steel Co. v. Ill. Pollution Control Bd.*, 155 Ill. 2d 149, 183 (1993) ("The Act specifically provides for variance and adjusted standard procedures by which the Board may relieve a discharger from compliance with its environmental control standards upon a showing of unreasonable economic or individual hardship.").

[29] *See, e.g.*, R 1981-024, *In the Matter of Proposed Water Quality Standard for Wood River (Olin, East Alton)*, Proposed Rule First Notice Order and Opinion of the Board, at 6 (Nov. 12, 1982); PCB 2009-038, *Ameren Energy Generating Co. v. IEPA*, Order and Opinion of the Board, at 42 (Mar. 18, 2010).

and the Former Landfill (including the Former Fly Ash Holding Units) is justified by the factors set forth in Section 28.1 and consistent with the factors set forth in Section 27.

B.____ ~~The~~ De Minimis Units Pond 3/3a and South Fly Ash Pond.

1. SIPC Requests an Adjusted Standard ~~Exempting the~~for De Minimis Units ~~from all Provisions of Part 845~~ Pond 3/3a and the South Fly Ash Pond.

~~To the extent the Board determines that the De Minimis Units are "CCR Surface Impoundments" under Part 845, the Board should grant an adjusted standard from section 845.100 exempting the De Minimis Units from the requirements of Part 845. SIPC's proposed language is set forth *infra* in Part IV.D.~~

In the event the Board denies SIPC request for a finding of inapplicability, the Board should grant the very limited adjusted standard from Part 845 for De Minimis Units Pond 3/3A and the South Fly Ash Pond set forth in Appendix A. The primary adjustments requested from Part 845 for Pond 3/3A and the South Fly Ash Pond are related to the timeframe for submitting operating and closure construction permit application materials. These adjustments are a necessary step to the application of the remaining Part 845 requirements to these units. As of the filing of this Petition, the applicability of Part 845 has been stayed for Pond 3/3A and the South Fly Ash Pond and deadlines for submitting these permit application materials have passed. *See* 35 Ill. Adm. Code §§ 845.230, 845.700. As explained further below, these units are also not subject to Part 257's CCR requirements. Thus, these adjustments simply provide a reasonable timeframe for SIPC to take the steps necessary to comply with the remainder of Part 845's requirements.

Under the adjusted standard, SIPC also proposes to commit itself to closing these units via removal in accordance with Section 845.740. Thus, the closure alternatives assessment for

the units would consider only closure by removal with off-site disposal or on-site disposal (to the extent practicable). These units will otherwise be subject to the remainder of applicable Part 845 requirements, including those related to permitting, location restrictions, design criteria, operating criteria, groundwater monitoring and corrective action, closure and post-closure care, and recordkeeping.[30]

2. The Factors Relating to Pond 3/3A and the ~~De Minimis Ponds~~South Fly Ash Pond Are Substantially and Significantly Different from the Factors and Circumstances on which the Board Relied in Adopting Part 845.

In determining whether to grant an adjusted standard, the Board first considers whether the factors relating to the ~~Petitioner~~Petition are significantly different from the factors considered in adopting the regulation at issue (Part 845). *See* 415 Ill. Comp. Stat. 5/28.1(c)(1). As discussed below, ~~here~~ they are here.

Like the Part 257 rules relating to surface impoundments, Part 845 was intended to address the risks posed by CCR surface impoundments that have resulted or are likely to result in groundwater contamination:

> The second purpose and effect of this regulatory proposal is to protect the groundwater within the state of Illinois. The proposed rule contains a program for groundwater monitoring and the remediation of contaminated groundwater resulting from leaking CCR surface impoundments. Groundwater has an essential and pervasive role in the social and economic well-being of Illinois, and is important to the vitality, health, safety, and welfare of its citizens. This rule has been developed based on the goals above and the principle that groundwater resources should be utilized for beneficial and legitimate purposes . . . Its purpose is to prevent waste and degradation of Illinois' groundwater. The proposed rule establishes a framework to manage the underground water resource to allow for maximum benefit of the State.

[30] As a "not-for-profit electric cooperative as defined in Section 3.4 of the Electric Supplier Act," SIPC is exempt from the financial assurance requirements in Part 845. 415 Ill. Comp. Stat. 5/22.59(f).

IEPA Statement of Reasons, Ex. 18 at 10; *see also id*. at 3–4 ("The presence of [certain contaminants that can be found in CCR] threatens groundwater as these contaminants are soluble and mobile. When the CCR surface impoundments are not lined with impermeable material, these contaminants may leach into the ***groundwater***, affecting the potential use of the ***groundwater***." (emphasis added)).

In its Second Notice Opinion, the Board likewise emphasized that "[a]mong the program's primary goals is protecting groundwater from contamination by CCR pollutants leaking from surface impoundments." Second Notice Opinion and Order at 1; *see also id*. at 3 ("In Illinois, CCR has caused groundwater contamination and other forms of pollution that are harmful to human health and the environment."); *id*. at 41 ("[T]he installation and operation of a leachate collection system in a new CCR surface impoundments serves the same purpose as in a landfill to reduce the head on the liner to reduce the threat of groundwater contamination."); *id*. at 48 ("The Board finds that the proposed leachate collection system provides additional groundwater protection against the potential threats of contamination from new CCR surface impoundments, while allowing the operation of the impoundments in compliance with Part 845.").[~~27~~31]

In determining which types of CCR surface impoundments pose the risks that Part 845 seeks to address, Part 257 is instructive; both because of its identical definition of "CCR surface impoundment" and the fact that IEPA did not perform any risk assessment of its own to support its Part 845 proposal and, instead, modeled its proposal on Part 257, which was based upon U.S. EPA's risk assessment. In other words, because the IEPA-proposed and Board-adopted Part 845

[~~27~~31] The Illinois legislature also made clear that the Illinois CCR Act is intended to address and prevent groundwater contamination caused by CCR surface impoundments. *See* 415 Ill. Comp. Stat. 5/22.59(a)(3) ("The General Assembly finds that . . . CCR generated by the electric generating industry has caused ***groundwater*** contamination . . . ." (emphasis added)).

rules were based upon Part 257, and IEPA never conducted a risk assessment, Part 845 too must be based upon U.S. EPA's risk assessment. U.S. EPA was clear that it was targeting for regulation those "units that contain *a large amount* of CCR managed with water, under a hydraulic head that promotes the rapid leaching of contaminants." Final Rule, Second Amended Pet. Updated Ex. 17 at 21,357 (emphasis added); Lewis Op., Ex. 36 at 4–10.

The factors relating to Pond 3/3A and the ~~De Minimis Units~~South Fly Ash Pond are substantially and significantly different than those that motivated U.S. EPA in Part 257, and also the state legislature, IEPA, and the Board in regulating CCR surface impoundments in Illinois with the aim of protecting Illinois groundwater. As discussed above, these and the other De Minimis Units do not contain large amounts of CCR under a hydraulic head that promotes rapid leaching of contaminants to groundwater. ~~With the exception of Pond B-3 (which no longer contains water or any CCR but, as discussed above, at one time received very limited CCR during a handful of short periods), the De Minimis Units~~Lewis Op., Ex. 36 at 8–10, 14. These units are not known to have ever received direct wastewater discharges of CCR. To the extent ~~the De Minimis Units~~they received historic, indirect discharges of CCR, the amounts of CCR were *de minimis* in nature. *Id.* The South Fly Ash Pond served as a secondary pond, receiving only decanted water from the former Emery Pond. Pond 3/3A received overflow from the Initial Fly Ash Holding Area and later the Fly Ash Holding Area Extension, stormwater runoff, coal pile runoff, and water from the plant's floor drains. Further, ~~with~~since the closure of Unit 4 and the former Emery Pond, all CCR generated at the Station ~~will be~~is handled dry ~~and none of the De Minimis Units will~~, meaning no unit on site is continuing to receive any ~~future~~ direct discharges of CCR.

As ~~Dr. Bradley~~Ms. Lewis explains in her ~~updated~~ report, the U.S. EPA determined *de minimis* units—like ~~those at issue in this Petition~~Ponds 3/3A and the South Fly Ash Pond—do not pose the risk to groundwater, human health, or the environment that Part 257 (or Part 845) seeks to prevent. *See* ~~Updated Bradley Op., Updated Ex. 28 at 21.~~Lewis Op., Ex. 36 at E-1–E-2, 11–20 (explaining the De Minimis Units "do not present the same level of risk as the surface impoundments evaluated in the US EPA CCR risk assessment.").

These forgoing facts, alone, are sufficient to establish that Pond 3/3A and the ~~De Minimis Units~~South Fly Ash Pond do not pose a similar threat to groundwater as the CCR surface impoundments that motivated Part 257 and Part 845. This conclusion is bolstered by the Pond Investigation Report. As described in the report, Haley & Aldridge reviewed the results of shake tests taken of pond sediment samples, as well as the results of Site groundwater monitoring wells, and determined that any potential presence of CCR in ~~the De Minimis Unit sediments~~Pond 3/3A and the South Fly Ash Pond should not be expected to cause and has not had a material adverse impact on groundwater at the Site. *See* Pond Investigation Rep., Ex. 29 at 26; *see also* ~~Updated Bradley Op., Updated Ex. 28 at 21–22~~Lewis Op., Ex. 36 at 11–16. Further, a site-specific assessment of the De Minimis Units, including Pond 3/3A and the South Fly Ash Pond, confirms there is no unacceptable risk to human health or the environment from CCR constituents that may have migrated to groundwater. Lewis Op., Ex. 36 at 17–20 (demonstrating no unacceptable risk to human health or ecological receptors). Thus, the requested adjusted standard may be granted based upon this ~~Amended~~ Petition.

Another important difference between ~~the De Minimis Units~~these units and the CCR surface impoundments that drove Part 845 is the burden of compliance. During the rulemaking,

IEPA argued, and the Board agreed, that certain Part 845 requirements, including expedited timeframes for compliance, were feasible and reasonable because units subject to Part 845 were also subject to Part 257, and therefore, owners had years to develop and implement compliance plans. *See* Final Order at 8–9. However, as discussed above, the De Minimis Units, including Pond 3/3A and South Fly Ash Pond, are not subject to Part 257, and thus, there has been no need to undertake compliance actions under Part 257, such as groundwater and location restriction assessments. Accordingly, the ~~feasibility~~timing and cost of Part 845 compliance for ~~these De Minimis Units~~Pond 3/3A and the South Fly Ash Pond differs substantially from the units the Board anticipated would be covered by Part 845, which were units subject to Part 257 and that already had years of Part 257 compliance activity that could be used to comply with Part 845.

3. The Factors Relating to the ~~De Minimis Units~~Pond 3/3A and the South Fly Ash Pond—which Differ from those Relied upon by the Board in Passing Part 845—Justify an Adjusted Standard.

The factors unique to the ~~De Minimis Units~~Pond 3/3A and the South Fly Ash Pond—namely that they are not subject to Part 257 and do not contain a large quantity of CCR managed under a hydraulic head—justify the requested adjusted standard. As discussed above, the De Minimis Units like Pond 3/3A and the South Fly Ash Pond simply do not present the risks that Part 845 was intended to address. ~~And~~Additionally, the adjusted standard is only requesting adjustments to provide a timeline for coming into compliance with the full scope of Part 845 in the event a finding of inapplicability is not granted for Pond 3/3A or the South Fly Ash Pond. Further, as discussed below, ~~regulation under Part 845 will be extremely costly and burdensome for no meaningful environmental benefit~~the adjusted standard will have no

adverse impact to human health or the environment. Accordingly, SIPC's adjusted standard is justified.

4. The Requested Adjusted Standard Will Not Result in Adverse Environmental or Health Effects.

The adjusted standard requested for Pond 3/3A and the South Fly Ash Pond "will not result in environmental or health effects substantially or significantly more adverse than the effects considered by the Board in adopting" Part 845. 415 Ill. Comp. Stat. 5/28.1(c)(3).

As discussed above, the history of receipt of minimal~~, if any, direct CCR discharges makes clear that the De Minimis Units have minimal~~ amounts of CCR ~~and, therefore,~~indicate these units do not present the types of risk to human health and the environment that Part 845 (and Part 257) seek to address. ~~Moreover, one of the De Minimis Units – Pond B-3 – does not contain water, has not contained water since 2017, and has previously been cleaned up, removing any CCR that remained in it. As a result, none of the De Minimis Units have the characteristics of the CCR surface impoundments that drove the risks identified by EPA's risk assessment that warranted pond regulation under Part 257 – a substantial amount of CCR managed under a hydraulic head. The Pond Investigation Report confirms this conclusion. *See* Pond Investigation Rep., Ex. 29. Accordingly, as discussed above, Dr. Bradley has determined that the De Minimis Units are not expected to a have a substantial or significant adverse threat to human health or the environment warranting regulation under Part 845. Updated Bradley Op., Updated Ex. 28, at 21–22. As a result, Petitioner's~~ Neither of these units present a risk to human health or the environment. *See Gradient,* Human Health Risk Assessment, Marion Power Station (Dec. 20, 2024) ("Risk Assessment"), Ex. 37. Further, the units are not anticipated to pose a reasonable probability of adverse effects on health or the environment. Lewis Op., Ex. 36 at 4–20.

Significantly, the adjusted standard proposed for Pond 3/3A and the South Fly Ash Pond will require full compliance with the requirements of Part 845. The only adjustment being sought is for deadlines to submit operating and construction permit application materials. SIPC is further committing to close these units via a closure by removal, thereby removing any potential for sediments from these units to impact groundwater in the future. There is no adjustment being sought from the portions of Part 845 aimed at protecting human health and the environment, including its closure standards, groundwater monitoring requirements and corrective action requirements. Thus, the proposed adjusted standard will not result in any adverse environmental or health effects.

5. The Requested Adjusted Standard Is Consistent with Federal Law.

As discussed above, Pond 3/3A and the South Fly Ash Pond are not regulated as existing CCR surface impoundments or inactive CCR surface impoundments under Part 257. Accordingly, any adjustment from Part 845 for these units is consistent with federal law. *See* 35 Ill. Admin. § Code 104.406(i).

Further, Part 845 is not currently a federally designated program, thus Part 845 and Part 257 operate independently and concurrently. Owners and operators of CCR surface impoundments must comply with both sets of regulations and an adjustment from Part 845 has no impact on a requirement to comply with Part 257. Thus, the Board is free to grant an adjustment from Part 845 requirements without consideration of Part 257.

C. De Minimis Unit Former Pond B-3

1. SIPC Requests an Adjusted Standard for De Minimis Unit Former Pond B-3.

As explained above, former Pond B-3 was dewatered and cleaned to the clay in 2017, well before the promulgation of Part 845. Nothing remains within the unit other than an internal berm. Thus, it makes little sense to require Part 845 requirements related to continued operation or an extended closure construction application process apply to former Pond B-3, which poses no ongoing risk, does not currently have the characteristics of a CCR surface impoundment (lacking both water—other than the occasional stormwater—and sediment), and is nearly closed consistent with Part 845 closure by removal standards.

SIPC's adjusted standard for former Pond B-3 seeks to have those Part 845 provisions apply that are necessary to ensure the unit is closed consistent with Part 845 and in a way that is protective of human health and the environment. Under the adjusted standard, the unit will be subject to the same operating permit, and other operating requirements, applicable to units that completed closure prior to June 30, 2021. *See* 35 Ill. Admin. Code § 845.230(d)(3). SIPC will be required to submit a final closure plan for the unit to IEPA for review and approval and complete closure of former Pond B-3 in a manner consistent with Section 845.740's closure by removal requirements. Former Pond B-3 will also be subject to Part 845, Subpart F's groundwater monitoring and corrective action requirements and any recordkeeping requirements relevant to the Part 845 provisions that apply under the adjusted standard.

Given the unique nature of this unit, Part 845's location restrictions, design criteria, and other operating criteria, as explained below, do not make practical sense for former Pond B-3. Also, given that closure by removal consistent with Part 845 requirements is nearly complete

under the unit's current state, the adjusted standard seeks to have the closure process completed as quickly as possible, by requiring a closure plan and approval from IEPA but not requiring a closure construction permit. As explained further below, application of these requirements makes little sense given the unique nature of this unit and the adjusted standard will have no detrimental impact on human health or the environment.

2. The Factors Relating to former Pond B-3 Are Substantially and Significantly Different from the Factors and Circumstances on which the Board Relied in Adopting Part 845.

The factors relating to former Pond B-3 are substantially and significantly different from the factors considered by the Board in adopting Part 845 for the same reasons described in Section IV.B.2 above. *See* 415 Ill. Comp. Stat. 5/28.1(c)(1). Former Pond B-3 only ever accumulated small amounts of CCR compared to those CCR surface impoundments that were the subject of the risk assessment completed to justify promulgation of Part 257 and, correspondingly, Part 845. *See supra*, IV.B.2. Former Pond B-3 primarily served as a secondary pond, receiving decant water from Pond A-1. During three to four outages at Pond A-1, former Pond B-3 may have received discharges of fly ash from Units 1, 2, and 3 prior to their shut down in 2003. When former Pond B-3 was closed in 2017, tests confirmed its sediment was high in BTU content and at least a portion of the removed sediment was burned as fuel. This supports the conclusion that former Pond B-3 differs from the types of units intended to be regulated under Part 845 because it did not ever hold significant amounts of CCR. *See* Lewis Op. Ex. 36.

Additionally, since 2017, unlike all (or nearly all) of the units regulated under Part 845, this unit has been cleaned of sediments and no longer holds water, except in a small area of the former pond where stormwater may collect after storms before drainage and evaporation.

Samples taken of the berm at former Pond B-3 indicate it contains little, if any, CCR material. Pond Investigation Rep, Ex. 29 at 12. This further distinguishes former Pond B-3. There is no ongoing management of sediment with water, let alone CCR with water, that would justify the unit being subject to many of the Part 845 requirements related to ongoing operation, such as location restrictions, design criteria, and operating criteria. Many of these portions of Part 845 address physical circumstances that do not exist at former Pond B-3. *See generally* Second Notice Opinion and Order at 32–61. Instead, former Pond B-3 is most similar to a unit that underwent closure prior to the promulgation of Part 845. Thus, it makes sense for former Pond B-3 to be subject to the same operating permit, design criteria, and operating criteria applicable to such units under Part 845. This is what SIPC has proposed in its adjusted standard.

Further, given that former Pond B-3 has been cleaned to the clay, the only material that remains is a small internal berm with little, if any, CCR. Pond Investigation Rep., Ex. 29 at Appendix C. It makes little sense for closure of the unit under 845 to be completed via any method other than closure by removal (consistent with Section 845.740). Additionally, due to the limited steps that remain to complete closure of the unit by removal and the fact that the berm contains little, if any, CCR, it makes little practical sense for the unit to be subject to the full closure construction permitting requirements of Part 845.

The proposed adjusted standard for former Pond B-3 takes into account the unit's unique characteristics, while ensuring it closes with IEPA oversight, consistent with Part 845 closure performance standards, and subject to groundwater monitoring and corrective action requirements to protect against any risk to human health and the environment.

3. The Factors Relating to the Former Pond B-3—which Differ from those Relied upon by the Board in Passing Part 845—Justify an Adjusted Standard.

The factors unique to former Pond B-3 —namely that it is not subject to Part 257, does not contain, and has never contained, a large quantity of CCR managed under a hydraulic head, and has been dewatered and cleaned to the clay—justify the requested adjusted standard. As discussed above, former Pond B-3 simply does not present the risks that Part 845 was intended to address. Additionally, as discussed below, the adjusted standard for former Pond B-3 will have no adverse impact to human health or the environment. Accordingly, SIPC's adjusted standard is justified.

4. The Requested Adjusted Standard Will Not Result in Adverse Environmental or Health Effects.

~~requested~~ The adjusted standard requested for former Pond B-3 "will not result in environmental or health effects substantially ~~and~~or significantly more adverse than the effects considered by the Board in adopting" Part 845. 415 Ill. Comp. Stat. 5/28.1(c)(3).

~~Finally, granting the adjusted standard will not leave the De Minimis Units unregulated. To the contrary, the De Minimis Units that still contain water and are now acting as storm water ponds (Ponds 3 (including 3A), 4, 6, and the South Fly Ash Pond) have been and will continue to be covered by Marion Station's NPDES permit as part of the flow to permitted Outfall 002. *See* 2012 NPDES Permit, Ex. 13. Any groundwater impact from those storm water ponds, as well as former Pond B-3, also remains subject to Part 620 groundwater standards. Furthermore, as discussed below, Pond 6 will be monitored and regulated as part of the Former Landfill area after the landfill undergoes closure pursuant to Part 811.~~

As discussed above, the history of receipt of minimal amounts of CCR indicate this unit does not present the types of risk to human health and the environment that Part 845 and Part 257 seek to address. *See* Lewis Op., Ex 36. B-3 has been cleaned of sediment and no longer contains water (other than the occasional stormwater). It does not currently present a human health or environmental risk. *See* Risk Assessment, Ex. 37 (identifying no unacceptable risks to human or ecological receptors resulting from CCR exposures associated the De Minimis Units). Further, the former Pond B-3 is not anticipated to pose a reasonable probability of adverse effects on health or the environment. Lewis Op., Ex. 36 at 4–20.

More importantly, while evidence demonstrates that this unit does not and would not be expected to pose any risk to human health or the environment (*id.*) the adjusted standard also requires compliance with all Part 845 requirements necessary to ensure that is and remains the case. For example, the adjusted standard requires that closure of former Pond B-3 is completed consistent with Part 845 closure standards. It also requires that former Pond B-3 be subject to the groundwater monitoring and corrective action requirements in Part 845, meaning, if former Pond B-3 is causing or contributing to exceedances of the groundwater protection standards in Section 845.600, SIPC will be required to undertake corrective action to remediate that contamination. Thus, to the extent former Pond B-3 poses any risk to human health or the environment (and there is no indication that it does), those risks will be addressed under the adjusted standard.

5. The Requested Adjusted Standard Is Consistent with Federal Law.

As discussed above, the De Minimis Units, including former Pond B-3, are not regulated as existing CCR surface impoundments or inactive CCR surface impoundments under Part 257.

Accordingly, ~~exempting them~~any adjustment from ~~regulation under~~ Part 845 for former Pond B-3 is consistent with federal law. *See* 35 Ill. ~~Adm~~Admin. Code § 104.406(i).

Further, Part 845 is not currently a federally designated program, thus Part 845 and Part 257 operate independently and concurrently. Owners and operators of CCR surface impoundments must comply with both sets of regulations and an adjustment from Part 845 has no impact on a requirement to comply with Part 257. Thus, the Board is free to grant an adjustment from Part 845 requirements without consideration of Part 257.

6. ~~The Efforts Necessary for the De Minimis Units to Comply with Part 845 Are Not Economically Reasonable~~Consideration of Section 27(a) Factors.

Existing physical conditions, the character of the area involved, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution all support granting the adjusted standard for former Pond B-3. 415 Ill. Comp. Stat. 5/27(a). There are costs associated with the Part 845 requirements from which SIPC seeks an adjustment at former Pond B-3. Additionally, given the physical condition of the unit and surrounding area, these requirements make no practical sense as applied because, as explained above, former Pond B-3 was cleaned and closed years ago. A unit such as this simply does not cause a hazard, risk of structural instability, or contain material that could contribute fugitive dust, for example. The unit also poses no active threat to human health or the environment, including groundwater or a neighboring water body. Risk Assessment, Ex. 37; Lewis Op., Ex. 36.

D. De Minimis Unit Pond 4

1. SIPC Requests an Adjusted Standard for De Minimis Unit Pond 4

SIPC requests two adjustments from Part 845 requirements for De Minimis Unit Pond 4. First, like Pond 3/3A, the South Fly Ash Pond, and former Pond B-3, the adjusted standard

provides 12 months from its entry for SIPC to submit an operating permit application for Pond 4. Again, this adjustment is necessary because the deadline for submitting an initial operating permit application under Part 845 has passed (*see* 35 Ill. Admin. Code §§ 845.230; § 845.700) and Pond 4 is not subject to Part 257, so SIPC will not have already undertaken the activities necessary to compile the operating permit application. This adjustment will allow a reasonable period of time for SIPC to prepare its operating permit application for Pond 4.

Second, the adjusted standard provides an adjustment to the Part 845 closure construction permit application deadline. Under the adjusted standard, SIPC will be required to either initiate closure or begin retrofitting Pond 4, by way of submitting a construction permit application, upon the earlier of the following occurrences: (1) within 12 months of a finding that CCR within Pond 4 are the source of an exceedance of the Section 845.600 groundwater protection standards, or (2) the end of the life of the Marion Station. Thus, the adjusted standard will allow SIPC to continue the operation of Pond 4 through the end of Marion Station's life, so long as it is not contributing to groundwater contamination, as measured through a Part 845 compliant groundwater monitoring program. If Pond 4 is found to contribute to a groundwater protection standard exceedance, this extension no longer applies and SIPC must submit a closure or retrofit construction permit for Pond 4 within twelve months of that finding. As explained below, these adjustments account for Pond 4's unique condition and will be protective of health and the environment.

~~In evaluating a petition for an~~Under the adjusted standard, ~~the Board must take into account the technical feasibility and economic reasonableness of reducing a particular type of pollution. 415 Ill. Comp. Stat. 5/27(a). Extremely high costs of controlling a particular pollutant~~

have been determined to be economically unreasonable.[28] A treatment or control technology is not economically reasonable if it would not significantly improve environmental conditions or increase the aesthetic or recreational value of the receiving water body, especially given high associated implementation costs.[29] As discussed below, compliance with Part 845 is not reasonable for the De Minimis Units, which pose little to no risk to the environment and which will continue to be monitored and regulated pursuant to Marion Station's NPDES Permit and Part 620 groundwater regulations. Pond 4 will be subject to the remainder of Part 845's requirements, including any other applicable permitting requirements, location restrictions, design criteria, operating criteria, groundwater monitoring and corrective action requirements, closure and post-closure care requirements, and recordkeeping requirements. Through its adjusted standard, SIPC is also committing to closing this unit via closure by removal requirements (35 Ill. Admin. Code § 845.740). Thus, the closure alternatives assessment for the unit would consider only closure by removal with off-site disposal or on-site disposal (to the extent practicable).

[28] *EPA v. Pollution Control Bd.*, 308 Ill. App. 3d 741, 752 (2d Dist. 1999) (upholding Board's finding that compliance would be economically unreasonable where "[a]ccording to the uncontested figures Swenson presented, the cost of installing a powder coating system would be more than 15 times the average control cost the Board historically has used to measure reasonableness"); *see also Granite City Div. of Nat. Steel Co. v. Ill. Pollution Control Bd.*, 155 Ill. 2d 149, 183 (1993) ("The Act specifically provides for variance and adjusted standard procedures by which the Board may relieve a discharger from compliance with its environmental control standards upon a showing of unreasonable economic or individual hardship.").

[29] *See, e.g.*, R 1981-024, *In the Matter of Proposed Water Quality Standard for Wood River (Olin, East Alton)*, Proposed Rule First Notice Order and Opinion of the Board, at 6 (Nov. 12, 1982); PCB 2009-038, *Ameren Energy Generating Co. v. IEPA*, Order and Opinion of the Board, at 42 (Mar. 18, 2010).

~~Requiring SIPC to comply with Part 845 for the De Minimis Units, including for operation and closure, would require SIPC to incur substantial costs to mitigate risks that do not exist,[30] including costs to do the following:~~

- ~~Perform location restriction demonstrations including certification for each De Minimis Unit (35 Ill. Admin. Code §§ 845.300–340);~~
- ~~Perform a hydrogeological site investigation for each De Minimis Unit (35 Ill. Admin. Code § 845.620);~~
- ~~Install a groundwater monitoring system for each De Minimis Unit and collect groundwater monitoring data on at least a quarterly basis for at least 5 years with the potential to reduce the frequency to semiannually thereafter (35 Ill. Admin. Code § 845.650);~~
- ~~Prepare a hazard potential classification assessment and certification (35 Ill. Admin. Code § 845.400(a)(2));~~
- ~~Prepare a structural stability assessment and certification (35 Ill. Admin. Code § 845.450(c));~~
- ~~Prepare a safety factor assessment and certification with the operating permit application and subsequent annual inspections (35 Ill. Admin. Code § 845.460(b));~~
- ~~Prepare a fugitive dust control plan and certification with the operating permit application and subsequent annual inspections (35 Ill. Admin. Code § 845.500(b)(7));~~
- ~~Close the units in place or by removal (35 Ill. Admin. Code § 845.710); and~~
- ~~Perform numerous other assessments and analyses (*see, e.g.*, 35 Ill. Admin. Code §§ 845.510(c)(3), .530, .540).[31]~~

~~Many of these requirements make no practical sense as applied to the De Minimis Units, one of which (Pond B-3) was cleaned and closed years ago, another of which (Pond 6) will be addressed as part of the landfill closure under the Part 811 landfill requirements, and all of which~~

~~[30] As mentioned above, because the De Minimis Units are not subject to Part 257, none of these actions have been undertaken to date and all compliance costs would be attributed to Part 845.~~

~~[31] Due to the prescriptive nature of Part 845, technically feasible compliance alternatives to meet the requirements of Part 845 are very limited.~~

~~received and contain little, if any, CCR. Such units simply do not cause a hazard, risk of structural instability, or contain material that could contribute fugitive dust, for example.~~

2. The Factors Relating to Pond 4 Are Substantially and Significantly Different from the Factors and Circumstances on which the Board Relied in Adopting Part 845.

The factors relating to the Pond 4 are substantially and significantly different from the factors considered in adopting Part 845 for the same reasons described in Section IV.B.2, above. See 415 Ill. Comp. Stat. 5/28.1(c)(1). Pond 4 only ever accumulated small amounts of CCR compared to those CCR surface impoundments that were the subject of the risk assessment completed to justify promulgation of Part 257 and, correspondingly, Part 845. *See supra*, IV.B.2. Pond 4 never directly received CCR. It received decant water from Ponds 1 and 2, stormwater runoff from the coal pile, and overflow water from Pond 6. As part of regular maintenance activities at the Marion Station in 2010, Pond 4 was dewatered, and its contents removed. The majority of removed materials were dark in color, taken to the coal yard, and burned as fuel at the Station. This would not have been possible if the materials were CCR or high in CCR content. The Pond Investigation Report found that the materials sampled in Pond 4 contained high carbon content, which is also inconsistent with a finding that the materials are CCR or high in CCR content. Pond Investigation Rep., Ex. 29 at 8-10. This supports the conclusion that Pond 4 differs from the types of units intended to be regulated under Part 845 because it did not ever hold significant amounts of CCR. *See* Lewis Op., Ex. 36.

Additionally, unlike the CCR surface impoundments regulated under Part 845, Pond 4's primary purpose is not CCR management. Rather, its primary purpose has historically been and

continues to be stormwater management of the coal pile: an operating need for as long as the Marion Station is in operation.

3. The Factors Relating to Pond 4—which Differ from those Relied upon by the Board in Passing Part 845—Justify an Adjusted Standard.

The factors unique to Pond 4 —namely that it is not subject to Part 257, does not contain and has never contained a large quantity of CCR managed under a hydraulic head, and is primarily used for coal pile stormwater management—justify the requested adjusted standard. As discussed above, Pond 4 simply does not present the risks that Part 845 was intended to address. Additionally, as discussed below, the adjusted standard for Pond 4 will have no adverse impact to human health or the environment. Accordingly, SIPC's adjusted standard is justified.

4. The Requested Adjusted Standard Will Not Result in Adverse Environmental or Health Effects.

The adjusted standard requested for Pond 4 "will not result in environmental or health effects substantially or significantly more adverse than the effects considered by the Board in adopting" Part 845. 415 Ill. Comp. Stat. 5/28.1(c)(3).

Extending the closure construction permit deadline for Pond 4 will not have an adverse impact on human health or the environment. Pond 4 will still be subject to the groundwater monitoring and corrective action requirements in Part 845. Accordingly, if the Pond contributes to a groundwater protection standard exceedance, it will result in corrective action, similar to any other unit regulated under Part 845. Additionally, as explained above, to the extent Pond 4 is found to have contributed to an exceedance of the groundwater protection standards, the extension of its closure construction permit deadline to the end of the life of Marion Station will no longer apply. Instead, SIPC will be required to submit a closure or retrofit construction permit

within 12 months of such a finding. Thus, the adjusted standard ensures that Pond 4 is monitored for groundwater impacts and that any groundwater impacts will be remediated, resulting in no adverse impact on health or the environment.

Additionally, Pond 4 does not present a current risk to human health or the environment. Risk Assessment, Ex. 37 (identifying no unacceptable risks to human health or ecological receptors resulting from CCR exposures associated the De Minimis Units); Andrew Bittner, M.Eng., P.E. *Closure Impact Assessment, Pond 4* at 2 (Dec. 20, 2024) ("Bittner Op."), Ex. 38. Further, the units are not anticipated to pose a reasonable probability of adverse effects on health or the environment. Lewis Op., Ex. 36 at 4–20.

The closure impact assessment for Pond 4 further concludes that there is no reduction in risk to health or the environment that would be achieved through the closure of Pond 4, thus the extension of the closure construction permit deadline will not have an adverse impact on health or the environment. Bittner Op., Ex. 38 at 12. Specifically, this report demonstrates there is little risk of flood related CCR release from Pond 4; based on current groundwater monitoring data, Pond 4 is not the likely source of any potential groundwater protection standard exceedances; closure of Pond 4 is unlikely to affect the surface water quality in Little Saline Creek (however, construction activity associated with a closure or retrofit could increase the potential for surface runoff and sedimentation to the creek); and construction activities associated with closure or retrofit could result in air quality impacts (e.g., related to fugitive dust, green-house gas emissions) in greater amounts than the current status quo. Bittner Op., Ex. 38 at 12–16. Thus, extending the time period for closing Pond 4 will not have an adverse human health or environmental impact.

5. The Requested Adjusted Standard Is Consistent with Federal Law.

As discussed above, Pond 4 is not regulated as an existing CCR surface impoundment or inactive CCR surface impoundment under Part 257. Accordingly, any adjustment from Part 845 for Pond 4 is consistent with federal law. *See* 35 Ill. Admin. Code § 104.406(i).

Further, Part 845 is not currently a federally designated program, thus Part 845 and Part 257 operate independently and concurrently. Owners and operators of CCR surface impoundments must comply with both sets of regulations and an adjustment from Part 845 has no impact on a requirement to comply with Part 257. Thus, the Board is free to grant an adjustment from Part 845 requirements without consideration of Part 257.

6. Consideration of Section 27(a) Factors.

Existing physical conditions, the character of the area involved, and the technical feasibility and economic reasonableness of measuring or reducing the particular type of pollution all support granting the adjusted standard for Pond 4. 415 Ill. Comp. Stat. 5/27(a).

~~Compliance with Part 845 would also require that SIPC~~ If Pond 4 does not receive the requested adjusted standard, SIPC will be required to either retrofit or close the ~~De Minimis Units~~unit. *See* 35 Ill. Admin Code. §§ 845.700–.770. However, SIPC ~~plans to continue using Ponds 3, 6, 4, and the South Fly Ash Pond~~requires the continued use of Pond 4 into the foreseeable future for ~~storm water~~stormwater management at Marion Station, particularly due to the location of the coal pile. Accordingly, SIPC must either close ~~those ponds~~the pond by removal ***and then rebuild ~~them~~ as storm water basins,it*** as a stormwater basin or retrofit ~~them~~it by cleaning ~~them~~it (i.e., removing materials within the Pond) and installing a liner. Due to the additional exorbitant costs of dredging and installing liners ~~in Ponds 3, 4, 6, and the Fly Ash~~

~~Pond~~, closure by removal is the least costly, technically feasible alternative. ~~As discussed below, that~~That "least costly" alternative would still cost SIPC ~~nearly $15 million~~a significant amount in capital costs (with ~~little to no~~no human health or environmental benefit). *See* Supp. Liss Dec., Ex. 30 at ¶ 6; Bittner Op., Ex. 38. This cost does not include the cost of constructing a new ~~storm water basins as~~stormwater basin, which would be needed to replace ~~the De Minimis Units. *Id.*~~Pond 4. Supp. Liss Dec., Ex. 30 at ¶ 6.

Significantly, this adjusted standard does not propose to put economic reasonableness considerations above protection of human health and the environment. While there are significant costs with closing or retrofitting Pond 4 (and in the event of closure building a new stormwater basin to replace Pond 4), SIPC is committing to closing or retrofitting Pond 4 earlier than at the end of Marion Station's life if Pond 4 is found to potentially impact human health or the environment (i.e. if it is contributing to Section 845.600 groundwater protection standard exceedances).

~~The costs inherent in Part 845 compliance are exacerbated by the fact that the De Minimis Units are not and have not been subject to Part 257. Accordingly, compliance with Part 845 deadlines would, in some cases, be infeasible and, in many cases, more costly on the aggressive timeline adopted in Part 845, which assumed prior Part 257 compliance activity.~~

~~Andrews Engineering has performed a preliminary analysis of the costs of compliance associated with major components of Part 845 and conservatively estimates that closing the De Minimis Units pursuant to Part 845 would cost SIPC at least $14.85 million in capital and other upfront costs and nearly $100,000 per year in annual O&M costs (not including inflation) for a minimum of three years.[32]Liss Dec., Ex. 9 at ¶ 18. In contrast, SIPC calculated the operating~~

~~[32] This does not include the cost of constructing new storm water basins as needed to replace the De Minimis Units. This also does not include the costs of expediting work to meet Part 845's stringent~~

and maintenance costs of compliance with Marion Station NPDES permit requirements and Part 620 for the De Minimis units to be approximately $286,750 per year for three years.[33] This annual cost covers electrical and mechanical maintenance, power to operate the on-site pump system, pond maintenance, and sampling both the outfalls and groundwater monitoring wells.

This significant cost differential is not reasonable on its face, considering the minimal (if any) benefit conferred by compliance with Part 845. Moreover, should SIPC be required to comply with Part 845 for the De Minimis Units, significant adverse consequences could occur for those who already live in low-income rural Illinois communities. SIPC is a not-for-profit electric cooperative owned directly by its members, serving customers and businesses in more than twenty southernmost counties of Illinois. SIPC is defined as a "Small Business" by the U.S. Small Business Administration, but it is the largest taxpayer in Williamson County.

SIPC is currently ineligible to borrow subsidized funds to pay the costs required to comply with Part 845. When the costs of running its business suddenly increase, for example, to comply with Part 845, SIPC's already stretched working capital (short-term commercial paper at National Rural Utility Cooperative Financing Corporation) must be stretched even further to cover the costs. If the new costs are greater than the available working capital, SIPC will be forced to borrow on a short-term line-of-credit and possibly from an unsecured borrowing source

Minimis Units. This also does not include the costs of expediting work to meet Part 845's stringent deadlines, or alternative Board-ordered deadline, whichever may apply. The De Minimis Units are not subject to Part 257 and, thus, no Part 257 compliance activities have been performed although Part 257 coverage and related compliance activities were assumed by the Board in setting the Part 845 compliance deadlines for covered units. This also does not include additional costs that may be incurred due to potential ambiguities in the rules and does not include all plant personnel time.

[33] SIPC will have to continue paying these operational costs even if the De Minimis Units are closed under Part 845 and then replaced with storm water basins. Accordingly, the Part 845-related O&M costs that would apply if SIPC were required to close the units under Part 845 would be on top of SIPC's routine operational O&M costs for storm water management.

~~at higher rates until such time as it can retire the borrowings from future member rates. SIPC will be forced to pass along all costs of meeting these new requirements to its member-owners. SIPC's member-owners have "full requirement" wholesale power requirements contracts, which means they must buy 100% of their energy needs from SIPC. They cannot go to an alternative supplier for lower cost energy. To leave SIPC, member-owners would have to pay prohibitively significant exit costs. For decades, SIPC's reliable, affordable electricity has been one of the key drivers of economic growth and prosperity in these communities. Increased costs of electric energy, particularly in rural areas served by cooperatives, will have negative impacts on rural economic development and jobs. In cases where small businesses like SIPC are affected, Section 27(a) requires the Board to consider and apply economically reasonable ways to minimize pollution and also mitigate impacts to facilities that can least afford them. 415 Ill. Comp. Stat. 5/27(a).~~

~~Not only are the capital and operating costs associated with Part 845 compliance significant, compliance with Part 845 would not provide any meaningful benefit to human health or the environment because, as discussed above, the *de minimis* units do not present the magnitude of risk that warranted regulation under Part 257 and Part 845. This is especially true given that the units would remain subject to applicable NPDES permit and Part 620 standard requirements. Accordingly, any minimal benefit from layering on another set of onerous requirements under Part 845 would be dwarfed by the extreme costs of compliance for SIPC and its members.~~

~~Finally, there is nothing in the Part 845 rulemaking record to combat the conclusion that Part 845 is not economically reasonable as applied to current and former ponds at issue in this~~

petition. IEPA did not perform its own economic reasonableness analysis of the Part 845 rulemaking but instead relied on U.S. EPA's technical feasibility and economic reasonableness determination in Part 257. IEPA simply concluded because "owners and operators of CCR surface impoundments are already subject to 40 CFR 257, many of the technical and economic requirements applicable to owners and operators in the proposed Part 845 are already required under federal law." IEPA Statement of Reasons, Ex. 18 at 33–34. Part 257, however, only applies to CCR surface impoundments that contained a significant (not *de minimis*) amount of CCR and liquids as of October 19, 2015. U.S. EPA did not consider units such as the De Minimis Units in promulgating Part 257, and therefore, neither did IEPA's proposal or the Board in promulgating Part 845.[34] Moreover, because they are not subject to Part 257, the De Minimis Units are **not** already subject to "many of the technical and economic requirements applicable to owners and operators in the proposed Part 845." IEPA Statement of Reasons, Ex. 18 at 33–34. In other words, neither IEPA nor the Board determined that Part 845 was economically reasonable as applied to the De Minimis Units (or, as discussed below, the Former Fly Ash Holding Units).

In short, the costs of Part 845 compliance are significant, and any additional benefits to human health and the environment are minimal, if any. Compliance with the requested relief, alternatively, would allow SIPC to continue to manage plant discharges and storm water in the De Minimis Units without causing adverse impacts to human health or the environment and without incurring additional O&M or capital cost that will have to be passed along to SIPC's

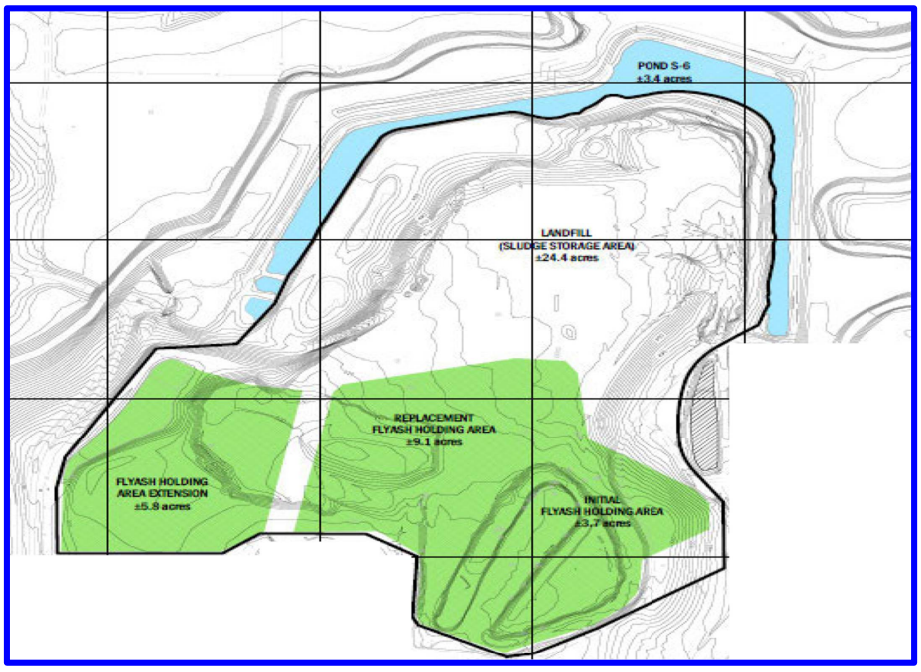
[34] The Board requested an analysis from the Department of Commerce and Economic Opportunity, but none was performed. Second Notice Opinion and Order at 8.

~~members. Compliance with Part 845 is economically unreasonable, and SIPC's request for an adjusted standard should be granted.~~

~~C~~E. The Former Fly Ash Holding Units and Pond 6

1. SIPC Requests an Adjusted Standard ~~Exempting~~For the Former Landfill Area (including the Former Fly Ash Holding Units) and Pond 6 ~~from all Provisions of Part 845~~.

~~To the extent the Board determines that~~SIPC proposes an adjusted standard that would apply to the Former Landfill Area (including the Former Fly Ash Holding Units) and Pond 6 ~~are "CCR Surface Impoundments" under Part 845, the Board should grant an adjusted standard from Section 845.100 exempting the~~ . Given the multiple units involved, below is a diagram (pulled from Ex. 3 of the initial Petition) depicting the area discussed in this Section for ease of reference.[32]



[32] As explained above, the Initial Fly Ash Holding Area, Replacement Fly Ash Holding Area, and Fly Ash Holding Extension make up the "Former Fly Ash Holding Units." The Former Landfill consists of the entire "Landfill" area outlined in bold. Pond 6, labeled as Pond S-6 on this diagram, is located to the north of the Former Landfill.

The Former Fly Ash Holding Units ~~and Pond 6[35] from the requirements of Part 845. The~~(which as explained above, consists of the Initial Fly Ash Holding Area, the Replacement Fly Ash Holding Area, and the Fly Ash Holding Area Extension) are within the footprint of the Former Landfill at Marion Station ~~and thus, are~~. The Former Landfill has been historically regulated as a permit-exempt landfill under Illinois landfill regulations and, thus, is required to be covered pursuant to the Part 811 ~~closure plan~~Closure Plan SIPC has already submitted to IEPA ~~for the~~. Former Landfill Closure Plan, Ex. 10. As discussed above, that ~~landfill closure plan~~Closure Plan was submitted to IEPA at IEPA's request in connection with IEPA's claims that the Former Landfill failed to have the permanent cover required by Part 811. ~~Pond 6 was built as, and under the~~That closure plan ~~will continue to operate as, a storm water~~involves closing the Former Landfill in place with a cover system (which would include the areas consisting of the Former Fly Ash Holding Units) while allowing De Minimis Unit Pond 6, located to the north of the Former Landfill, to serve as a stormwater pond to manage ~~landfill~~ runoff ~~and will be operated and maintained as part of SIPC's~~ .

~~Part 811 landfill closure and post-closure obligations. The Initial Fly Ash Holding Area, the Replacement Fly Ash Holding, the Fly Ash Holding Area Extension, and Pond 6 will continue also to be subject to all other applicable environmental laws and regulations, including the groundwater quality regulations set forth in 35 Ill. Admin. Code Part 620.~~The adjusted standard proposes to go beyond the Part 811 Closure Plan and close the entirety of the Former Landfill (including the Former Fly Ash Holding Units) and Pond 6 in accordance with Part 845

~~[35] An adjusted standard exempting Pond 6 from coverage under Part 845 is warranted both on the grounds that it is a *de minimis* unit and because it can and should be managed as part of the landfill closure pursuant to Part 811.~~

performance standards and subject to additional Part 845 requirements. Given the unique nature of this area (as further explained below), however, SIPC requests three categories of adjustment from Part 845 requirements for the Former Landfill (including the Former Fly Ash Holding Units) and Pond 6.

First, the adjusted standard provides deadlines for submittal of operating and closure construction permit applications. This adjustment is a necessity resulting from the fact that this area is not regulated under Part 257 and that Part 845 deadlines for permit applications have passed during the pendency of this adjusted standard proceeding. This adjustment also allows time to pursue the unique opportunity to close this area via removal while sending the CCR for beneficial use, as described below. The adjusted standard requests an 18-month period to submit a final operating permit application and closure construction permit application for this area.

Second, the adjusted standard provides an adjustment from the closure alternatives assessment requirements in Section 845.710. Rather than conduct a closure alternatives assessment, the adjusted standard would require this area to close via closure by removal with beneficial use of the CCR remaining in the area, if SIPC determines, with IEPA oversight, that this is a feasible closure option. If not, the Former Landfill (including the Former Fly Ash Holding Units) will be closed in accordance with 35 Ill. Admin. Code § 845.750's closure with final cover system requirements while Pond 6 will be closed in accordance with 35 Ill. Admin. Code § 845.740's closure by removal requirements.

Third, in the event closure by removal with beneficial use of CCR is a viable closure option for the Former Landfill area, the adjusted standard would allow Petitioner to request additional time, in two-year increments, from IEPA to complete closure, so long as CCR in the

area continues to be removed for beneficial use. The adjusted standard includes requirements for Petitioner to provide a narrative demonstration to IEPA explaining why the extension is needed, how it will allow for the continued "beneficial use of CCR," and the estimated date upon which "beneficial use of CCR" will be complete. No more than five two-year extensions will be allowed.

With the exception of these adjustments, the Former Landfill Area will be subject to any remaining applicable Part 845 requirements, including those related to permitting, location restrictions, design criteria, operating criteria, groundwater monitoring and corrective action, closure and post-closure care, and recordkeeping.

2. The Factors Relating to the Former Landfill, including the Former Fly Ash Holding Units, and Pond 6 Are Substantially and Significantly Different from the Factors and Circumstances the Board Relied on in Adopting Part 845.

The factors relating to the Former Landfill Area, including the Former Fly Ash Holding Units, and Pond 6 differ significantly from the factors that were considered and motivated the Board in adopting Part 845. As noted *supra* at Part IV.B.2, the legislature, IEPA, and the Board were all motivated to address the same risk that U.S. EPA sought to address in Part 257 for surface impoundments[~~36~~33]—the risk posed by CCR surface impoundments that contain large amounts of CCR managed with water under a hydraulic head. The Former Fly Ash Holding Units and the Former Landfill's ~~storm water~~stormwater pond, Pond 6, are different, in several important respects.

[~~36~~33] As mentioned above, the Former Landfill ceased receiving CCR prior to October 2015, and thus, it is not subject to Part 257's landfill requirements. Consistent with that assertion, in its Landfill VN, IEPA asserted that Illinois's landfill regulations, Part 811 *et seq.*, were applicable, not Part 257.

First, the Former Fly Ash Holding Units do not contain water and have not contained water for at least thirty years. Accordingly, any CCR remaining in the Fly Ash Holding Units is not under a hydraulic head and presents far less risk to groundwater than the units the Board sought to regulate in Part 845 (which the Board acknowledged when it declined to extend the Part 845 rulemaking to CCR landfills). *See* ~~Updated Bradley Op., Updated Ex. 28 at 21–22. As discussed above, Pond 6 contains *de minimis* amounts of CCR, and thus likewise does not present the risk targeted by Part 845.~~ Lewis Op., Ex. 36, at 11–14.

Second, the Former Fly Ash Holding Units are now covered by and a part of the Former Landfill, which operated and was regulated as a permit-exempt, on-site landfill for decades under Part 815~~, and which SIPC intends to close consistent with the Part 811 landfill regulations. As discussed below, current Illinois landfill regulations require that SIPC install a cover that is equally as protective as the cover that would be required by Part 845. *See* Updated Bradley Op., Updated Ex. 28 at 21; *see also* 35 Ill. Adm. Code §§ 314(a), (b), (c). The regulations also require post-closure care, maintenance, and monitoring for the entire landfill area which, in this case, includes Pond 6. *See* 35 Ill. Adm. Code § 811.302 (post-closure care), § 811.319 (groundwater monitoring), § 811.322 (final slope and stabilization). However, the~~. The Board clearly did not intend to regulate CCR landfills under the adopted Part 845 surface impoundment rules, and in fact, it opened a subdocket to address possible, future CCR landfill regulations. Second Notice Opinion and Order at 12; ~~IPCB Dkt.~~*see also* Illinois Pollution Control Board Docket No. R2020-19(A). ~~One would expect there to be many different requirements and considerations for landfills, which were never even addressed in the Part 845 rulemaking. *See, e.g.*, 40 C.F.R. §§ 257.70, .81, .84.~~Additionally, the Former Landfill, including the Former Fly

Ash Holding Units, make up one contiguous area, and Pond 6 is used to manage runoff from the Former Landfill. Thus, from a practical perspective, it makes sense to close the entire area together.

~~Third, there are significant legal, compliance, and fairness concerns inherent in suddenly and unexpectedly characterizing and regulating the Former Fly Ash Holding Units and Pond 6, and indeed the entire landfill area, as a CCR surface impoundment, when today and at the time Part 257 and Part 845 were adopted, the area was a landfill and had been managed and treated as a regulated landfill for decades. Indeed, as discussed above, under the same, key present tense definition language in both Part 257 and Part 845, the decision about whether a unit is a landfill or surface impoundment must be made at the time Part 257, or Part 845, respectively, was adopted. U.S. EPA had to address in Part 257 how to determine whether a unit should be considered a landfill or surface impoundment because Part 257 contains different requirements for landfills and surface impoundments. It did so based upon the status of the unit ***at the time Part 257 was adopted***. *See supra* at Part III.A.1. This made sense for multiple reasons, including for clarity of applicability and because the correct regulatory requirements should apply based upon the characteristics of the unit, and the related risks presented, at the time the rule went into effect. It makes no sense to apply landfill requirements wholesale to ponds to address landfill risks, or to apply pond requirements to landfills to address pond risks. But that is exactly what IEPA seems to be claiming here.~~

~~Worse~~Third, IEPA seems to be claiming that Part 845 surface impoundment requirements apply to the ~~whole~~entirety of the Former Landfill (not just the Former Fly Ash Holding Units) after having treated the ~~landfill~~Former Landfill as a landfill for years, including

by issuing the Landfill VN to SIPC in 2020. 2020 Landfill VN~~.~~, Ex. 16. SIPC operated the Former Landfill as a landfill, submitted landfill reports to IEPA, and ceased using the Former Landfill at a time that made Part 257 landfill requirements inapplicable. Unlike the other "CCR surface impoundments" regulated under Part 845, both SIPC and IEPA treated this area as a landfill under the Illinois regulations. IEPA continued to treat this area as a landfill after the promulgation of Part 257.

Having expected Part 257 to be inapplicable given the plain applicability language, reinforced by IEPA's prior view that the Former Landfill was subject to Illinois landfill requirements under Part 811, SIPC has not planned for Part 257 applicability, and it has not taken any Part 257 compliance actions. Indeed, if anyone had thought at the time it was adopted that Part 257 applied at all, it would have been anomalous, to say the least, for SIPC to have taken compliance action for its Former Landfill consistent with Part 257 surface impoundment requirements, but IEPA appears now to claim that Part 845's requirements, which are based on Part 257's surface impoundment requirements, apply to the Former Landfill.

~~This quixotic result, of course, was never contemplated by the Board in the Part 845 rulemaking. In fact, in~~In adopting Part 845, the Board included some very aggressive deadlines because, in its view, companies were already complying with Part 257 and ~~they~~ could use those actions to comply with Part 845. *See supra* Section IV.B.2. That is simply not true for the Former Landfill, including the Former Fly Ash Holding Units within the landfill footprint and related ~~storm water~~stormwater runoff Pond 6. No one could reasonably have expected that Part 257's (and later Part 845's) surface impoundment requirements would apply to the Former Landfill, especially when IEPA asserted as late as 2020 that the Former Landfill was a landfill

and regulated under Illinois landfill regulations. The Board did not consider or assess in its Part 845 rulemaking the application of Part 845's surface impoundment requirements to landfills, including the costs, feasibility, and necessity of compliance or the risks to be addressed. Applying Part 845 surface impoundment requirements to the Former Landfill area also would cause unfair surprise and retroactive change of regulatory status concerns.

Fourth, the Former Landfill, including the Former Fly Ash Holding Units, are unique because they contain CCR that is suitable for "beneficial use of CCR" as defined in 35 Ill. Admin. Code § 845.120. SIPC has been working with a third-party to evaluate additional uses of the CCR and to send samples to potential customers to gather additional data on demand and uses. SIPC will need some time to develop the market viability for third-party beneficial use of the landfill CCR, which this adjusted standard will allow. Potential end uses for the material include use as "green material" such as cement binder, sand, aggregate, and construction insulation.

Fifth, as discussed above, Pond 6 contains *de minimis* amounts of CCR and thus does not present the risk targeted by Part 845. *See* Section IV.B.2, *supra*. Pond 6 only ever accumulated small amounts of CCR compared to those CCR surface impoundments that were the subject of the risk assessment completed to justify promulgation of CCR surface impoundments in Part 257 and, correspondingly, Part 845. Pond 6 has only received incidental amounts of CCR through decanted overflow from other ponds or stormwater runoff from the Former Landfill. Additionally, Pond 6 serves the necessary operational function of capturing runoff from the Former Landfill. Thus, it makes sense for its closure to be tied to, and conducted with, the closure of the Former Landfill.

3. The Factors Relating to the Former Fly Ash Holding Units—which Differ from those Relied upon by the Board in Passing Part 845—Justify an Adjusted Standard.

The factors discussed above all justify granting the adjusted standard here, particularly where the units will be closed in accordance with Part 845 closure performance standards and in a manner that is protective of human health and the environment, as discussed below~~, the Former Fly Ash Holding Units will continue to be regulated and monitored as part of the Former Landfill closure and post-closure activities under Illinois landfill regulations and any exceedances of groundwater standards can be addressed pursuant to the landfill regulations and Part 620.~~.

4. The Requested Adjusted Standard Will Not Result in Adverse Environmental or Health Effects.

As an initial matter, the adjusted standard will require compliance with Part 845 closure performance standards and groundwater monitoring and corrective action requirements, so to the extent the units in this area are having an impact on groundwater, those impacts will be addressed in accordance with the Part 845 requirements.

~~As an initial matter~~Additionally, the Former Fly Ash Holding Units do not contain water and, therefore, do not pose the same risks to the environment as CCR surface impoundments that contain large quantities of CCR under a hydraulic head. *See* ~~Updated Bradley~~Lewis Op., ~~Updated~~ Ex. ~~28~~36 at ~~21–22~~14. Instead, they function as a landfill, which U.S. EPA, IEPA, and the Board have all recognized pose less of a threat to the environment than the units that the Board sought to regulate under Part 845. ~~Updated Bradley Op., Updated Ex. 28 at 20;~~ Final Rule, Second Amended Pet. Updated Ex. 17 at ~~21342~~21,342 ("As noted, EPA's risk assessment shows that the highest risks are associated with CCR surface impoundments due to the hydraulic head imposed by impounded water."); Lewis Op., Ex. 36 at 11–13. Further, Pond 6

is a landfill runoff, *de minimis* pond, and as discussed above, it too does not present a ~~risk that warrants~~human health or environmental risk warranting regulation under Part 845. Risk Assessment, Ex. 37; Lewis Op., Ex. 36.

Finally, there are significant environmental benefits to allowing the CCR to be removed for beneficial use. As U.S. EPA has explained

> The beneficial use of CCR is a primary alternative to current disposal methods. And as EPA has repeatedly concluded, it is a method that, when performed correctly, can offer significant environmental benefits, including greenhouse gas (GHG) reduction, energy conservation, reduction in land disposal (along with the corresponding avoidance of potential CCR disposal impacts), and reduction in the need to mine and process virgin materials and the associated environmental impacts. . . . Three of the most widely recognized beneficial applications of CCR are the use of coal fly ash as a substitute for Portland cement in the manufacture of concrete, the use of FGD gypsum as a substitute for mined gypsum in the manufacture of wallboard, and the use of CCR as a substitute for sand, gravel, and other materials in structural fill. Reducing the amount of cement, mined gypsum, and virgin fill produced by substituting CCR leads to large supply chain-wide reductions in energy use and GHG emissions. . . . CCR can be substituted for many virgin materials that would otherwise have to be mined and processed for use. These virgin materials include limestone to make cement, and Portland cement to make concrete; mined gypsum to make wallboard, and aggregate, such as stone and gravel for uses in concrete and road bed. Using virgin materials for these applications requires mining and processing, which can impair wildlife habitats and disturb otherwise undeveloped land. It is beneficial to use secondary materials— provided it is done in an environmentally sound manner—that would otherwise be disposed of, rather than to mine and process virgin materials, while simultaneously reducing waste and environmental footprints. . . . Beneficially using CCR instead of disposing of it in landfills and surface impoundments also reduces the need for additional landfill space and any risks associated with their disposal. . . . As discussed in the final rule RIA, the current beneficial use of CCR as a replacement for industrial raw materials (e.g., Portland cement, virgin stone aggregate, lime, gypsum) provides substantial annual life cycle environmental benefits for these industrial applications.

~~Moreover, SIPC intends the close and cover the Former Landfill consistent with the requirements of Part 811. SIPC's currently proposed landfill closure plan is consistent with Part~~

845 requirements for closure in place with a cover system. SIPC's plan, which has been submitted to IEPA, includes the following:

- Installation of a final cover system consisting of a 3.0 foot low permeability layer overlain by a 3.0 foot final protective layer or an alternate geosynthetic cap with a minimum thickness of 4.0 feet consisting from the bottom up: 1.0 foot thick low permeability layer, 40 mil linear low density polyethylene (LLDPE) geomembrane, a double-sided geocomposite drainage layer and a 3.0 foot final protective layer.[37] (*Compare* 35 Ill. Admin. Code § 811.314 *with id.* § 845.750.)

- Slopes that will be constructed to minimize wind and water erosion.
- Establishment of vegetation upon completion of the final cover placement and storm water and drainage features.
- Installation of additional monitoring wells, if needed, to meet the requirements of Part 811,[38] which requires, in part that "a network of monitoring points shall be established "at sufficient locations" downgradient with respect to groundwater flow and not excluding the downward direction, to detect any discharge of contaminants room from any part of a potential source of discharge. 35 Ill. Admin. Code § 811.318(b)(1).
- Post-closure monitoring and care consistent with SIPC's obligations under Part 811.

See Former Landfill Closure Plan, Final Rule, Second Amended Pet. Updated Ex. 10 17 at 3–8 21,329.

Compliance with these provisions will ensure that the Former Landfill (including the Former Fly Ash Holding Units) remains insulated from any water that could lead CCR to leach into nearby groundwater or runoff to Pond 6. In addition, ongoing groundwater monitoring under the landfill closure plan will ensure that any exceedances of groundwater standards attributable to the Former Landfill (of which the Former Fly Ash Holding Units are a part) or Pond 6 will be identified and corrected as necessary. As a result, there is no risk that the proposed adjusted

[37] Part 811 allows for such an "alternate" cover system design where "the performance of the low permeability layer is equal to or superior to the performance" to the default requirements set forth in Part 811.314 (b)(3)(A)(i) and (b)(3)(A)(ii). *See* 35 Ill. Adm. Code § 811.314 (b)(3)(A)(iii).

[38] SIPC has previously installed groundwater monitoring wells around the landfill and performed groundwater sampling and reported the results to IEPA.

~~standard will result in any harm to the environment, and Petitioner's requested adjusted standard "will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting" Part 845. 415 Ill. Comp. Stat. 5/28.1(c)(3); *see also* Updated Bradley Op., Updated Ex. 28 at 21–22.~~

Thus, the proposed adjusted standard will not have an adverse impact on human health or the environment, and in fact may result in environmental benefits.

5. The Requested Adjusted Standard is Consistent with Federal Law.

As discussed *supra*, the Former Fly Ash Holding Units and Pond 6 are not existing or inactive CCR surface impoundments under Part 257. Accordingly, excluding them from Part 845 is not inconsistent with federal law. *See* 35 Ill. Admin. Code § 104.406(i).

Further, Part 845 is not currently a federally designated program, thus Part 845 and Part 257 operate independently and concurrently. Owners and operators of CCR surface impoundments must comply with both sets of regulations and an adjustment from Part 845 has no impact on a requirement to comply with Part 257. Thus, the Board is free to grant an adjustment from Part 845 requirements without consideration of Part 257.

~~6. The Efforts Necessary to Require the Former Fly Ash Holding Units to Comply with Part 845 Are Not Economically Reasonable.~~

~~As is the case with the De Minimis Units, the costs of compliance with Part 845 are not reasonable when considered in conjunction with the minimal (if any) benefits to the environment. Andrews Engineering conservatively[39] estimates that the costs of closing and~~

~~[39] Mr. Liss's estimate is conservative, in part, because it assumes that IEPA will allow the landfill area to close as one impoundment, rather than requiring separate closure of each of the three Former Fly Ash Holding Units. It also assumes that IEPA will approve closure in place using a final cover system, rather than require SIPC to excavate the landfill and the Former Fly Ash Holding Units and dispose of the material offsite and in accordance with the comprehensive Part 845 transportation requirements. Supp. Liss Dec., Ex. 30 at ¶ 5.~~

managing the Former Landfill, including the Former Fly Ash Holding Units, pursuant to Part 845 is nearly $5.5 million in capital and other upfront costs, which includes the costs of permitting and documentation to support the necessary Part 845 permit applications. Supp. Liss Dec., Ex. 30 at ¶ 5. The O&M costs associated with managing the Former Landfill area, including the Former Fly Ash Holding Units, as a Part 845 surface impoundment would be at least $67,536 per year (without an inflation factor) for the first ten years of post-closure care, and $33,752 (without an inflation factor) for the remainder of the 30-year post closure care period required by Part 845.[40] *Id.* at ¶ 4. In contrast, the costs of closing and managing the Former Landfill pursuant to the Illinois landfill regulations is approximately $3.5 to $5.2 million in immediate capital costs with approximately $42,000 per year in O&M costs for a period of 5 years after the completion of closure activities, and $12,400 per year in annual O&M costs for the following 10-year period, assuming a 15-year post-closure care and monitoring period. *Id.* at ¶ 4. The Part 845 costs include costs to comply with requirements that were never intended to apply to landfills and were not enacted to address any risks actually presented by landfills.

As noted above, the Former Fly Ash Holding Units are not covered by Part 257. Therefore, neither U.S. EPA in promulgating Part 257 nor IEPA nor the Board in promulgating Part 845 found that it is economically reasonable to require former ponds like the Former Fly Ash Holding Units to comply with the requirements of Part 845. *See supra* Section IV.B.6. Further, as a not-for-profit cooperative, SIPC and its customers are uniquely sensitive to sudden, unexpected increases in capital and operating costs (and this cost is particularly unexpected

[40] This does not include the costs of expediting work to meet Part 845's stringent deadline, or alternate Board-approved compliance deadlines. This also does not include additional costs that may be incurred due to potential ambiguities in the rules, and does not include all plant personnel time.

~~given that, until earlier this year, SIPC and IEPA had been treating the Former Landfill as a landfill that was about to undergo closure under Part 811). Given that there will be no environmental benefit to managing the Former Fly Ash Holding Units pursuant to Part 845 rather than Part 811, the additional cost is not reasonable and the Petition should be granted.~~

~~D~~F. Proposed Language of Adjusted Standard.

See Appendix A.

~~SIPC proposes the following adjusted standard language (35 Ill. Admin. Code 104.406(a)):~~

~~1. Pursuant to Section 28.1 of the Environmental Protection Act, the Board grants Southern Illinois Power Cooperative ("SIPC") an adjusted standard from 35 Ill. Admin. Code § 845.100 for Ponds 3, including 3A, 4, 6, South Fly Ash Pond, Pond B-3, the Initial Fly Ash Holding Area, the Replacement Fly Ash Holding area, and the Fly Ash Holding Area Extension. 415 Ill. Comp. Stat. 5/28.1.~~

~~2. The adjusted standard applies to SIPC's Marion Station.~~

~~3. The Part 845 regulations do not apply to Ponds 3, including 3A, 4, 6, South Fly Ash Pond, Pond B-3, the Initial Fly Ash Holding Area, the Replacement Fly Ash Holding area, or the Fly Ash Holding Area Extension.~~

~~4. The adjusted standard is effective as of the date of this order.~~

~~E~~G. Part 845 Was Promulgated to Implement Section 22.59 of the Act and the Automatic Stay Applies.

Because SIPC filed its ~~original~~initial petition for an individual adjusted standard within 20 days after the effective date of Part 845 (April 21, 2021), the operation and application of Part 845 is automatically stayed as to the De Minimis Units and Former Fly Ash Holding Units pending the disposition of this petition. 415 Ill. Comp. Stat. 5/28.1(e).

The only exception to this automatic stay is for regulations "adopted by the Board to implement, in whole or in part, the requirements of the federal Clean Air Act, Safe Drinking Water Act or Comprehensive Environmental Response, Compensation and Liability Act, or the State RCRA, UIC or NPDES programs." 415 Ill. Comp. Stat. 5/28.1(e). Part 845 was promulgated to implement Section 22.59 of the Act and the federal Resources Conservation and Recovery Act, Section 4005. It was not promulgated to implement, in whole or in part, the requirements of the federal Clean Air Act, Clean Water Act Safe Drinking Water Act or Comprehensive Environmental Response, Compensation and Liability Act, or the State RCRA, UIC or NPDES programs. *See* 35 Ill. Adm. Code 104.406(b).

~~F~~H. Hearing Request.

SIPC requests a hearing for this adjusted standard pursuant to 35 Ill. Admin. Code § 104.406(j).

~~G~~I. Supporting Documentation.

Documents and legal authorities supporting the Petition are cited herein (and, where applicable, on the attached Index of Exhibits) when they are used as a basis for the Petitioner's proof. Relevant portions of updated or new documents and legal authorities, other than Board's final Order State regulations, statutes, and reported cases, are attached to this ~~amended petition~~Petition. *See* 35 Ill. Admin. Code § 104.406(k).

V. CONCLUSION.

SIPC respectfully requests that the Board grant its request for inapplicability or, in the alternative, an adjusted standard as set forth herein.

~~Respectfully Submitted,~~
~~Southern Illinois Power Cooperative~~

Respectfully Submitted,

SOUTHERN ILLINOIS POWER COORPERATION

/s/ *Bina Joshi*
~~By:~~ ~~*/s/ Katherine S. Walton*~~
One of its attorneys

Dated: ~~September 2, 2021~~December 20, 2024

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Exhibit 3	Site Map prepared by Andrews Engineering for SIPC (May 2021)
Exhibit 4	Lake Egypt Water District IL 1995200, Annual Drinking Water Quality Report (Jan. 1–Dec. 30, 2019)
Exhibit 5	IEPA Water Pollution Control Permit, No. 1977-EN-5732 (Nov. 14, 1977)
Exhibit 6	Letter from SIPC to IEPA (July 27, 1982)
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Exhibit 8	Letter from SIPC to IEPA (Sept. 16, 1993)
Exhibit 9	Declaration of Kenn Liss
Exhibit 10	Andrews Engineering, SIPC's Proposed Closure Plan for IEPA Site No. 199055505 (Dec. 16, 2020)
Exhibit 11	Hanson, Emery Pond Corrective Action and Selected Remedy Plan, Including GMZ Petition (Mar. 29, 2019)
Exhibit 12	IEPA Water Pollution Control Permit, No. 1989-EN-3064 (May 17, 1989)
Exhibit 13	IEPA Reissued National Pollutant Discharge Elimination System Permit, No. IL0004316 (February 1, 2007)
Exhibit 14	IEPA Water Pollution Control Permit, No. 1973-ED-1343-OP (June 1973)
Exhibit 15	Initial Facility Report – for On-Site Facilities (Sept. 18, 1992)
Exhibit 16	IEPA Violation Notice L-2020-00035 (Mar. 20, 2020
~~Updated~~ Second Amended Petition Updated Exhibit 17	Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (April 17, 2015) ~~(excerpted) ("Final Rule")~~
Exhibit 18	R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, IEPA's Statement of

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Exhibit 19	R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, SIPC Comments to Illinois Pollution Control Board (Sept. 25, 2020)
Exhibit 20	IEPA Violation Notice W-2020-00046 (July 28, 2020)
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Exhibit 23	R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, Hearing Transcript (Aug. 11, 2020)
Exhibit 24	R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, First Supplement to IEPA Pre-Filed Responses (Aug. 5, 2020)
~~**Updated**~~ Exhibit ~~**28**~~25	~~Updated Opinion of Lisa JN Bradley, Ph.D. (Sept. 1, 2021) ("Updated Bradley Op.")~~ U.S. EPA, Comment Summary and Response Document: Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities; Proposed Rule, Vol. 3 (Dec. 2014)
Exhibit 26	R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, IEPA Post-Hearing Comments (Oct. 30, 2020)
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