ILLINOIS POLLUTION CONTROL BOARD
March 20, 2025

IN THE MATTER OF:	)	
	)	
PETITION OF MIDWEST GENERATION,	)	AS 21-3
LLC FOR A FINDING OF	)	(Adjusted Standard - Land)
INAPPLICABILITY OF 35 ILL. ADM.	)	
CODE 845	)	

OPINION AND ORDER OF THE BOARD (by B.F. Currie):

On May 11, 2021, Midwest Generation, LLC (Midwest, MWG, or Petitioner) filed an adjusted standard petition under Section 28.1 of the Environmental Protection Act (Act) and Part 104 of the Board's procedural rules. *See* 415 ILCS 5/28.1 (2022); 35 Ill. Adm. Code 104 Subpart D. Midwest seeks an adjusted standard from Part 845, which contain the Board's standards for the disposal of coal combustion residuals in surface impoundments. 35 Ill. Adm. Code 845. Midwest subsequently amended its petition three times, filing its third amended petition on February 7, 2024. The third amended petition requests an adjusted standard finding that Part 845 is inapplicable to a 10-acre site at its Waukegan Station in Waukegan, Lake County. The Illinois Environmental Protection Agency (IEPA or Agency) recommends that the Board deny Midwest's request for an adjusted standard.

After reviewing the record, including the parties' arguments and public comments, the Board today denies Midwest's petition for an adjusted standard for the 10-acre site at its Waukegan station. In this order, the Board will first provide a brief procedural and regulatory background. Next, the Board will summarize the petition and IEPA's recommendation. Finally, the Board will discuss the reasons for denying the petition for an adjusted standard.

PROCEDURAL BACKGROUND

On May 11, 2021, Midwest filed a petition (Pet.) requesting an adjusted standard from Section 845.740(a) for the East Pond, and a finding of inapplicability for a 10-acre site. On May 14, 2021, notice of the adjusted standard petition was published in the *Lake County Daily Herald and Reflejos*. On May 21, 2021, IEPA filed a motion for an extension of time to file its recommendation. On June 3, 2021, the Board accepted Midwest's petition and granted IEPA's request for an extension of time to file its recommendation.

On June 7, 2021, several organizations, Clean Power Lake County, Earthjustice, the Environmental Law and Policy Center, Prairie Rivers Network, and Sierra Club (collectively, Environmental Groups) jointly filed a request for a public hearing.

On September 17, 2021, Midwest filed an amended petition (Amended Pet.). The amended petition noted that since the initial filing in this matter, Midwest had decided to close Waukegan Station as a coal-fired power plant, and West Pond would no longer be needed to manage CCR. Amended Pet. at 1. Instead, Midwest sought to close East Pond under Part 845

and seek an adjusted standard for reuse of the liner for the West Pond, which would be used as a low volume wastewater or stormwater retention basin as well as continuing to seek a finding of inapplicability as to the 10-acre site. *Id*. On September 23, 2021, notice of the amended petition was published in the *Lake County Daily Herald and Reflejos*.

On October 18, 2021, the Environmental Groups renewed their request for a public hearing. IEPA filed several motions for extensions of time to file its recommendation, all of which were granted by the hearing officer. On October 31, 2022, IEPA filed its recommendation regarding the West Pond and 10-acre site, recommending that the Board deny the petition (Rec.).

On July 28, 2023, Midwest filed a response to IEPA's recommendations (Resp.); a motion to stay proceedings (Mot); a memorandum in support of the motion (Memo); and a motion to incorporate certain exhibits and testimony. Additionally, Midwest amended its petition (Second Amended Pet.), withdrawing its request for an adjusted standard from 845.740(a) for the West Pond but continuing to seek an adjusted standard finding of inapplicability as to the 10-acre site. Midwest noted that it had determined it was no longer necessary to reuse the liner of the West Pond. Second Amended Pet. at 1. On August 4, 2023, notice of the amended petition was published in the *Lake County Daily Herald and Reflejos*.

On August 25, 2023, Environmental Groups renewed their request for a public hearing. On September 6, 2023, IEPA responded to Midwest's motion to stay the proceedings. On October 5, 2023, the Board denied the motion to stay and accepted the second amended petition.

On November 16, 2023, Midwest filed a motion *in limine* to exclude and strike from the record certain Agency exhibits. On November 30, 2023, IEPA responded, opposing the motion to strike. On February 5, 2024, the Hearing Officer issued an order denying Midwest's motion to strike the exhibits. On January 10, 2024, notice of the hearing was published in the *Lake County News-Sun*.

On February 7, 2024, Midwest filed a third amended petition (Third Amended Pet.) noting that the 10-acre site is the subject of a separate ongoing matter before the Board, Sierra Club, et. al v. Midwest Generation, LLC PCB 13-15. While Midwest continues to seek an adjusted standard finding of inapplicability concerning the 10-acre site, to be consistent with the requested remedy in PCB 13-15, Midwest proposes additional conditions for the Board to consider in granting the requested relief. Third Amended Pet. at 3-4. On February 9, 2024, notice of the third amended petition was published in the *Lake County Daily Herald and Reflejos*.

On February 7, 2024, the Board directed questions to the parties. On February 9, 2024, IEPA responded to these questions. (IEPA Resp.) Midwest responded to the questions at hearing and filed written answers to the remaining questions on April 3, 2024.

A hearing was held on February 13 and 14, 2024, in Waukegan. A portion of the hearing was devoted to oral public comment and 34 members of the public commented. A total of 51 written public comments were filed in this matter.

The February 13, 2024, hearing transcript was filed on March 4, 2024 (TR 1) and the February 14, 2024, hearing transcript was filed on March 12, 2024 (TR 2). Midwest filed motions to correct the transcripts. On June 28, 2024, the hearing officer granted both of Midwest's motions to correct the transcripts.

On May 14, 2024, Midwest and IEPA filed post hearing briefs (Midwest Final Brief; IEPA Final Brief). On June 27, 2024, Midwest and IEPA filed post hearing responses (Midwest Final Resp.; IEPA Final Resp.).

FACILITY DESCRIPTION

Midwest owns and operates a power generating facility at 401 East Greenwood Ave in Waukegan, Lake County. Pet. at 15. The facility, which began coal-fired operations around 1923, stopped using coal in June 2022 and Midwest reports that it plans to transition the plant to a battery storage facility. *See*, Pet. at 15, TR 1 at 32 and 102. The facility's southern border is a sewage treatment plant. TR 1 at 102. The western edge is adjacent to the former Griess-Pfleger tannery, since redeveloped by Commonwealth Edison as a switchyard. *Id*. The facility's northern boundary is the Johns-Manville Superfund site, a former asbestos-containing manufacturing facility. *Id*. Lake Michigan and a public beach form the eastern border of Midwest's site. *Id*.

The plant's operations have historically produced coal combustion residuals (CCR), or "coal ash," as a by-product. 415 ILCS 5/3.140 (2022), Pet. at 15. CCR includes fly ash, bottom ash, boiler slag, and flue gas desulfurization materials that are created when coal is burned at power plants to produce electricity. 415 ILCS 5/3.140 (2022). When Midwest took over operations of the Waukegan plant in 1999, the facility had two lined surface impoundments—East Pond and West Pond—which had been used since the late 1970s for sluiced CCR. Pet. at 6. In the context of Part 845, the term "sluicing" refers to transporting a mixture of CCR and water from production areas to a specific location (impoundment) for treatment, storage or disposal.

Adjacent to the West Pond lies a 10-acre area Midwest calls the "Grassy Field", which is the subject of this adjusted standard petition. MWG Final Resp. at 1. IEPA calls this area "Old Pond." Rec. at 5. This 10-acre area was one-third of the site's original CCR sluicing operations which the site's permit history has referred to with various names such as the "Slag-ash Field," "Settling Basin," and "Ash Pond." *See Id*. In a 1998 Phase II Environmental Site Assessment the area is called the "former slag/ fly ash storage area." Rec., Ex. 43 at 691.

The Board notes that the Waukegan facility is the subject of an ongoing citizen suit, Sierra Club et al. v. Midwest Generation, LLC, PCB 13-15, which is currently before the Board. Board orders in that case call the 10-acre area at issue in this adjusted standard the "Former Slag/Fly Ash Storage" area or FSFS area. Sierra Club et al. v. Midwest Generation, LLC, PCB 13-15, Interim Opinion and Order at 66-67 (June 20, 2019). To remain consistent, in this matter the Board will therefore call the 10-acre site the Former Slag/Fly Ash Storage area or FSFS area.

From the late 1940s to the 1970s, prior to Midwest purchasing the Waukegan Station, CCR was sluiced from the plant to the 30-acre area that now has three distinct names—East

Pond, West Pond, and FSFS area. Rec. Ex. 1, 4. A historical photograph from 1939 shows that the 30-acre area was originally composed of sand dunes. Rec. Ex. 1 at 41, TR 1 at 273-274. Later historical photographs from the 1940s through the 1970s also show that coal ash was deposited throughout the entire 30-acre area. Rec. Ex. 3-5, TR 1 at 274-278. Additionally, a 1998 environmental site assessment described the site's soil as "mostly sand and silty loams." Rec. Ex. 44 §2.3.

Between 1961 and 1974, historical photographs show that a berm was constructed along the southern and eastern border of the 30-acre area. Rec. Ex. 3, 4; TR 1. at 270-271. In 2023, Sargent & Lundy used a 1974 aerial photograph to create a topographic heat map that shows a ditch extending along the entire southern border of the 30-acre site. Midwest Final Brief at 16. In the 1970s, the 30-acre area was divided into its present-day three parts: East Pond, West Pond, and the FSFS area. Rec. Ex. 4. Each of these parts is approximately 10 acres in size. Following the construction of the East and West Ponds, the facility began sluicing CCR only to those two ponds. The FSFS area no longer received sluiced CCR. Rec. Ex. 41 at 4; Rec. Ex. 45 at 13. The two ponds were re-lined in 2003 and 2004, and now contain a high density polyethylene liner. Pet. at 7. Around 1980, the FSFS area was graded and currently grass grows on top of that 10 acre section. Rec., Ex. 5. The 10-acre FSFS area does not have a lining underneath it, nor does it have an impermeable cover in place above it. IEPA Final Brief at 14, 17.

In 2020, Midwest conducted a series of boring samples at the FSFA area. Midwest Ex. 43. Beginning with a rectilinear grid of 40 boring locations, equally spaced at 100 feet throughout the 10-acre FSFA Area, the sampling showed ash, slag, and wet ash throughout the 10 acres. *Id*. The 40 borings went to a depth of 15 feet and ash or slag was found at every boring location. *Id*. The ash and slag were found at a maximum depth of 15 feet below ground level, however, it is unclear as to whether the ash and slag continue to further depths as all boring samples stopped at a depth of 15 feet.

SUMMARY OF PUBLIC COMMENTS

This proceeding has generated substantial public interest, and the Board received 51 written comments and 34 oral comments at hearing. Public officials, such as the Mayor of Waukegan Ann Taylor, State Senator Adriane Johnson, and State Representative Rita Mayfield, have voiced their opposition to the issuance of an adjusted standard. Both oral and written public comments also strongly opposed the adjusted standard petition and cited ongoing environmental and health impacts on residents from the Waukegan plant.

Many commenters shared personal stories of their experiences living in Waukegan, an area of environmental justice concern. Dulce Ortiz, Waukegan Township Trustee and co-founder of Clean Power Lake County, emphasized the inequitable burden placed on environmental justice communities left to deal with the effects of pollution. PC 45. Waukegan's Mayor Ann Taylor expressed that "[Midwest] aims to do the bare legal minimum rather than prioritizing what's right or best for the residents of Waukegan. . . [who] cannot bear the financial cost of yet another environmental catastrophe caused by a private company." TR 1 at 148-150. Many commenters asked the Board to order Midwest to close the grassy field by requiring

Midwest to remove all remaining coal ash in the area. Clean Power Lake County Organizer Frank Pence said, "[w]e, the people, demand no free passes or exemptions for NRG Energy. We want all the coal ash removed from our lakefront." TR 1 at 154.

REGULATORY BACKGROUND

On April 15, 2021, the Board adopted new regulations regarding the storage and handling of coal combustion residuals in surface impoundments. *See* 35 Ill. Adm. Code 845. These regulations were adopted under the Coal Ash Pollution Prevention Act, which the General Assembly passed, and Governor JB Pritzker signed into law in 2019 as Public Act 101-171. 415 ILCS 5/22.59 (2022). As defined by the Environmental Protection Act (Act), "'[c]oal combustion residual' or 'CCR' means fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal and for the purpose of generating electricity by electric utilities and independent power producers." 415 ILCS 5/3.142 (2022).

Part 845 created Illinois' first statewide standards for the disposal of CCR in surface impoundments. The Act defines a 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." 415 ILCS 5/3.143 (2022). Disposal standards outlined by Part 845 apply "to owners and operators of new and existing CCR surface impoundments." 35 Ill. Adm. Code 845.100(b). Further, an "inactive CCR surface impoundment" is defined 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. Inactive CCR surface impoundments may be located at an active facility or inactive facility." 35 Ill. Adm. Code 845.120.

BOARD AUTHORITY

Both the Act and the Board's procedural rules provide that a petitioner may request, and the Board may grant, an environmental standard that is different from the generally applicable standard that would otherwise apply to the petitioner. This is called an adjusted standard. The general procedures that govern an adjusted standard proceeding are found at Section 28.1 of the Act and Section 104. Subpart D of the Board's procedural rules. 415 ILCS 5/28.1 (2022); 35 Ill. Adm. Code 104.400-104.428.

Once a petition for an adjusted standard is filed with the Board, the Agency must file its recommendation with the Board. *See* 415 ILCS 5/28.1(d)(3)(2022); 35 Ill. Adm. Code 104.416. An adjusted standard proceeding is adjudicatory in nature and not subject to the rulemaking provisions of the Act, or the Illinois Administrative Procedure Act (5 ILCS 100/1-1 et seq. (2022)). *See* 415 ILCS 5/28.1(a)(2022); 35 Ill. Adm. Code 101.202 (defining "adjudicatory proceeding").

Section 28.1(d)(1) of the Act (415 ILCS 5/28.1(d)(1)(2022)) and Section 104.408(a) of the Board's procedural rules (35 Ill. Adm. Code 104.408(a)) require the adjusted standard petitioner to publish notice of filing the petition by advertisement in a newspaper of general circulation in the area likely to be affected by the proposed adjusted standard. Publication must

take place within 14 days after the petition is filed. The newspaper notice must indicate that any person may cause a public hearing to be held on the proposed adjusted standard by filing a hearing request with the Board within 21 days after publication. *See* 415 ILCS 5/28/1(d)(1)(2022); 35 Ill. Adm. Code 104.408(b). Midwest satisfactorily published notification which each amended petition. On June 7, 2021, October 18, 2021, and August 25, 2023, the Environmental Groups requested that the Board hold a hearing on the petition.

Standard of Review and Burden of Proof for an Adjusted Standard

Midwest requests an inapplicability finding from Part 845 for the FSFS area. Third Amended Pet. at 4. The regulations in Part 845 do not specify the level of justification required for a petition for an adjusted standard. Therefore, in deciding whether to grant the requested adjusted standard, the Board must consider the factors outlined in Section 28.1(c) of the Act. The burden of proof in establishing these factors falls on Midwest as the petitioner. *See* 415 ILCS 5/28/1(b), (c)(2022); 35 Ill. Adm. Code 104.426.

In granting adjusted standards, the Board may impose necessary conditions to accomplish the purposes of the Act. Section 28.1(a) of the Act provides that the Board may grant an adjusted standard "for persons who can justify such an adjustment," consistent with Section 27(a) of the Act. 415 ILCS 5/27(a)(2022). Conditions for granting an adjusted standard include: the character of the area involved, surrounding land uses, zoning classifications, existing air quality, or receiving body of water, and the technical feasibility and economic reasonableness of measuring or reducing pollution. *Id*. Once granted, the adjusted standard applies to the petitioner—instead of the rule of general applicability. *See* 415 ILCS 5/28.1(a)(2022); 35 Ill. Adm. Code 101.202, 104.400(a).

In its recommendation, IEPA agrees with Midwest that, because Part 845 does not specify a level of justification for an adjusted standard, the applicable level of justification are the factors identified in Section 28.1(c) of the Act, 415 ILCS 5/28.1(c)(2022). Rec. at 20. Those factors are:

> If a regulation of general applicability does not specify a level of justification required of a petitioner to qualify for an adjusted standard, 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 the 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;

4) The adjusted standard is consistent with any appliable federal law. 415 ILCS 5/28.1(c)(2022).

Failure to prove any of the four elements mandates the denial of the adjusted standard, and the petitioner has the burden of proof in an adjusted standard case. 415 ILCS 5/28.1(c) (2022).

REQUESTED RELIEF

Midwest seeks an adjusted standard that makes Part 845.100 inapplicable to the FSFS area at the Waukegan Station. Third Amended Pet. at 4. Midwest's request is based on the argument that the FSFS area is an unconsolidated fill area, and was improperly classified as a CCR surface impoundment by IEPA. *Id*. Midwest requests an adjusted standard from Part 845.100, the Scope and Purpose section of the Rule. "Because the Grassy Field is not a CCR surface impoundment, MWG is requesting that the Board grant an adjusted standard from the Illinois CCR Rule stating that the Illinois CCR Rule is inapplicable to the Grassy Field." Pet. at 14.

Midwest disputes IEPA's classification of the FSFS area as a CCR surface impoundment, arguing that it does not meet the criteria outlined in the definition of CCR surface impoundment under Section 3.143 of the Act. Pet. at 2. Midwest looks to the definition of "surface impoundment" and analyzes each of the three parts of the definition. The criteria of a surface impoundment, by definition, are:

1. The unit is a natural topographic depression, man-made excavation, or diked area,
2. The unit is designed to hold an accumulation of CCR and liquids, and
3. The unit treats, stores or disposes of CCR. 415 ILCS 5/3.143 (2022).

Midwest argues that the FSFS area fails the second factor of the definition as it was not designed to hold an accumulation of CCR and liquids. Midwest Final Brief at 2. Midwest's expert, Thomas Dehlin, testified that the FSFS area "was originally part of a large slag field created decades ago." *Id*. When CCR was sluiced to the old slag field, Mr. Dehlin says that the natural sand floor and ditches worked to filter water away from the field. *Id*. "Because the original slag field was designed to separate liquid from CCR by draining the liquid out of it, the area was clearly <u>not</u> designed to 'hold' an accumulation of liquid." *Id*., emphasis in original.

Midwest maintains that the FSFS area is characteristically different from the definition of surface impoundment under Part 845. Next, Midwest argues that it has shown that applying Part 845 to the FSFS area is inappropriate due to its unique structure and function. Finally, Midwest argues that complying with both the Illinois CCR rule and federal coal combustion residual management unit (CCRMU) rule would create regulatory conflicts and logistical challenges. *Id*. at 14.

Mr. Dehlin explained the differences between two processes – sedimentation and infiltration – with respect to surface impoundments. Infiltration is defined in the federal CCR rule as "the migration or movement of liquid, such as surface water or ground water, into or

through a CCR unit from any direction, including from the surface, laterally, and through the bottom of the unit." 40 CFR 257.53. Sedimentation is not defined in the federal CCR rule, but is defined elsewhere in federal regulations as, "a process for removal of solids before filtration by gravity or separation." 40 CFR 141.2. Midwest argues that the site was originally designed to filter sluiced CCR through a permeable sandy floor. TR 2. at 40. Mr. Dehlin likened the site's operation to draining cooked pasta through a sieve, indicating a rapid flow of water out through the sandy floor, leaving CCR. *Id*. at 82 - 86. This, Midwest argues, indicates the process in the area is infiltration, and infiltration does not accumulate water because the sand floor is rapidly draining out water, leaving only CCR remaining. *Id*. "This meant that the station sluiced the liquid and CCR 'out to the sandy floor, understanding that [the] water was going to infiltrate through the sandy floor, the sand would filter out the CCR, keep[ing] that on top.'" Midwest Final Brief at 10. Sedimentation, rather, is the process commonly used in CCR surface impoundments, as the process lets solids settle out of a mixture of water and solids. Midwest argues that the term "accumulation", when applying the rules of statutory construction, must relate to the process of sedimentation, not infiltration. Midwest Final Brief at 23. Therefore, Midwest argues, an area in which water drained away from the CCR (like the FSFS area) is not an "accumulation".

As to whether the requested standard will result in environmental or health effects substantially and significantly more adverse than those considered by the Board when adopting Part 845, Midwest proposes that it will continue to perform quarterly groundwater monitoring and reporting as outlined in the amended standard and will submit those results to the IEPA's Groundwater Section. Midwest Final Brief at 36. Additionally, Midwest seeks to incorporate conditions similar to those it proposed as a remedy in PCB 13-15, Sierra Club et al. v. Midwest Generation, LLC. *Id*. These conditions include coordinating with IEPA for the installation of an engineered cap or other necessary actions if the federal CCRMU rules are not finalized by April 2025 or twelve months after the Board's final order in the related case. *Id*.

IEPA'S RECOMMENDATION

IEPA recommends denying Midwest's requests for an adjusted standard finding of inapplicability regarding the FSFS area. Rec. at 3. This recommendation stems from IEPA's interpretation that the FSFS area, East Pond, and West Pond were originally a settling basin for sluiced CCR and the FSFS area still contains historic CCR. *Id*. at 5 - 12.

IEPA argues that because it does not bear the burden of proof in adjusted standard petitions, it need not provide evidence or testimony for the Board to deny the Petitioner's request; rather, IEPA's filed recommendation is sufficient. IEPA Final Brief at 6. Through its recommendation, IEPA maintains that Midwest fails on factor 28.1(c)(1) to prove that the FSFS area is not a CCR surface impoundment, and because Midwest fails on this element, it also fails on the second factor regarding justification of the adjusted standard. *Id*.

In 2019, IEPA identified the 10-acre FSFS area as a CCR surface impoundment. IEPA, in reviewing historical photographs for the purpose of making its recommendation in this adjusted standard petition, maintains that the FSFS area is a CCR surface impoundment because it lies within the footprint of the facility's original 30-acre sand dune CCR depository. Rec. at 5.

Citing the area's reconstructed history, IEPA classified the FSFS area as a surface impoundment under Section 3.143 of the Act because it functioned at one time as a storage area for CCR and liquids. IEPA Final Brief at 16.

IEPA argues that infiltration and accumulation are not mutually exclusive. The Agency highlights that the CCR surface impoundment definition under Section 3.143 does not specify a duration of contact between CCR and liquid, nor does it specify the volume of liquid in the accumulation. IEPA Final Resp. at 6. Consequently, IEPA concludes that even brief contact before the filtration process or a residual volume of liquid post-filtration can meet the disputed second criterion of the Act's definition in Section 3.143. *Id*.

IEPA points to the 2018 *USWAG* decision, which interprets the term "is disposed of" to include both past and present conditions, supporting the IEPA's position. *Id*. at 11 (citing *Util. Solid Waste Activities Grp. V. EPA*, 901 F.3d 414, 438-42 (2018)). Even though Midwest has since graded and seeded the FSFS area, IEPA maintains that the area remains classified as a CCR surface impoundment because it was designed to contain CCR and liquids. Moreover, the classification of a CCR surface impoundment does not require that the FSFS area held liquids continuously but rather was designed to do so, which is consistent with its historical use. *Id*. at 11-12.

IEPA argues that Midwest has failed to demonstrate that the conditions at the FSFS area differ significantly from those considered by the Board when adopting Part 845. *Id*. at 35. Therefore, IEPA recommends denying Midwest's request for an adjusted standard finding of inapplicability from Part 845. *Id*. at 36. IEPA maintains its classification of the FSFS area as an inactive CCR surface impoundment and recommends its regulation under Part 845. IEPA Final Resp. at 10.

BOARD DISCUSSION AND FINDING

Below, the Board analyzes each part of the definition of "surface impoundment", evaluates the adjusted standard factors, and concludes that the FSFS Area is a CCR surface impoundment and therefore subject to the requirements of Part 845.

Evaluating the Adjusted Standard Factors

28.1(c)(1) – Whether factors relating to the petitioner are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to the petitioner

To evaluate this factor, the Board will first evaluate the definition of "surface impoundment" and whether the FSFS area fits that definition. A CCR surface impoundment is defined as: (1) a natural topographic depression, man-made excavation, or diked area, (2) which is designed to hold an accumulation of CCR and liquids, and (3) the surface impoundment treats, stores, or disposes of CCR. 415 ILCS 5/3.143. The Board will evaluate each of these factors separately, below, and concludes that the FSFS area was a CCR surface impoundment and is currently an inactive CCR surface impoundment.

Natural Topographic Depression, Man-Made Excavation, or Diked Area. Whether the area in question qualifies as a CCR surface impoundment first requires evaluating the area against the first criteria, whether it was "a natural topographic depression, a man-made excavation, or a diked area." 415 ILCS 5/3.143 (2022). This criterion is a disjunctive list; satisfying any of the three types will sufficiently fulfill the first part of the definition. As noted above, Midwest does not dispute that the FSFS area is a natural topographic depression, man-made excavation, or diked area. Midwest Final Brief at 2.

Natural Topographic Depression. A natural topographic depression refers to low-lying landforms surrounded by higher ground with no natural outlet for surface drainage[1] like basins, or sinkholes typically formed through geological processes like erosion or subsidence. These depressions are characterized by their concave shape, which allows them to collect and hold liquids or solids over time. The record indicates that the FSFS Area was originally composed of sand dunes, which are described as ridges, mounds, or hills likely formed through natural aeolian processes—the accumulation and shaping of granular material (sand) by wind. Rec. Ex. 1 at 41, TR 1 at 273-274. Unlike natural depressions, sand dunes are typically elevated landforms. Therefore, the original topography of sand dunes does not fit the classification of a natural topographic depression, because sand dunes represent a type of landform that contrasts with depressions.

Man-Made Excavation. If not a natural topographic depression, the area must be assessed to determine if it qualifies as a man-made excavation. This term refers to intentional human activity that involves the removal of earth materials for purposes such as mining, construction, or resource extraction. 35 Ill. Adm. Code 845.120. Examples include pits or quarries created for the extraction of "aggregate, minerals, or metals." *Id*. The record contains no evidence that the 10-acre site in its original history was excavated, therefore, it does not qualify as a man-made excavation.

Diked Area. The final possibility is whether the area qualifies as a diked area. A diked area, is defined in Part 845 as "an embankment, berm, or ridge of either natural or man-made materials used to prevent the movement of liquids, sludges, solids, or other materials." 35 Ill. Adm. Code 845.120. In this case, the naturally-formed sand dunes acted as natural ridges that were barriers to the flow of sluiced CCR. These naturally-formed barriers meet the core function of a dike as described in the statute—preventing the movement of CCR materials or liquids within the impoundment area. 35 Ill. Adm. Code 845.120. Pet. at 10. Therefore, the Board finds that the natural ridges formed by the sand dunes sufficiently satisfies the definition of a "diked area" and the first criterion requirement of a CCR surface impoundment.

Was the Area Designed to Hold an Accumulation of CCR and Liquids?

To determine whether the FSFS area qualifies as a CCR surface impoundment, the Board evaluates it against the definition's second criterion: whether it was "designed to hold an

[1] Bates, R.L. and Jackson, J.A. (1987) Glossary of Geology. 3rd Edition, American Geological Institute, Alexandria.

accumulation of CCR and liquids." 415 ILCS 5/3.143 (2022). This criterion is conjunctive; therefore, the area in question must be specifically designed to hold an accumulation, and this accumulation must include both CCR and liquids. Midwest contends that the FSFS area fails this factor because it was not designed to hold an accumulation of liquids (water).

Midwest argues that an accumulation of water is an important factor that must be considered to determine that FSFS area is CCR surface impoundment "because a CCR surface impoundment is used as a settling basin or sedimentation basin to promote the settling of CCR particles in ash sluice water within the pond area prior to that water being discharged to some other place." Midwest Final Brief at 9, *citing* TR 2 at 26-27. Midwest emphasizes that sedimentation requires "gravity and time to allow the CCR particles to settle out" and "a barrier at the bottom of the unit that holds the liquid and material [CCR]" to allow sedimentation to occur. *Id.* at 9-10, *citing* TR 2 at 28. Midwest contends that the CCR handling at the FSFS area involved "infiltration", which relies on the movement of liquids through a barrier rather than the retention of liquids. *Id.* at 10. Midwest argues that the purpose of the original 30-acre area, including the 10-acre FSFS area, was to receive the sluiced CCR and remove water efficiently by infiltration through the sandy floor or overflow via the surrounding ditches. *Id.* at 10, *citing* TR 2 p. 81. Thus, Midwest contends that the FSFS area is not a surface impoundment because it was not designed to hold an accumulation of water, but only an accumulation of CCR.

In contrast, IEPA argues that the original 30-acre area, which includes the 10-acre FSFS area, was designed to hold an accumulation of CCR and liquids. IEPA describes the process by which CCR was sluiced to the original 30-acre site from 1946 to 1974 as follows:

> As the CCR sluice water flowed into the depressions, the naturally sandy conditions allowed the water to slow down and ultimately infiltrate into the ground. Fast moving water, such as in the sluice lines, can carry a larger sediment load, in the instance of the Original Slag Field the sediment was CCR. When the water entered the Original Slag Field, it slowed down and lost energy, causing the CCR to settle out of the water as it flowed across the dunes and into the dune swales, thus treating the CCR sluice water and leaving CCR behind. The CCR was stored in the bottom of the natural depressions. IEPA Final Brief at 9.

Regarding Midwest's argument that FSFS area was not designed to hold an accumulation of water, IEPA notes that water could not have flowed into the ditches surrounding the site without first accumulating in the sand dunes of the original 30-acre area. IEPA Final Brief at 11. Thus, IEPA argues that the original 30-acre area functioned as a surface impoundment because it utilized the natural topographic depression design within the dune field to hold an accumulation of CCR and liquids. *Id.* at 12-13. Because the FSFS area was part of the original 30-acre site, it must also be considered as a surface impoundment. *Id.* at 13.

The Board applies the preponderance of the evidence standard to evaluating this portion of the definition. The facility's historical permits and photographs show that the entire 30-acre site was once designed to hold an accumulation of CCR and liquids. Historical permits indicate that the area was used for the management of CCR. Aerial photographs dating back to 1946 illustrate it is an accumulation of materials, and boring logs show the existence of wet ash and

slag underground. Rec. Ex. 32, 33, 2, 3, 4, Midwest Ex. 43. The fact that the sluiced CCR was conveyed into a "diked area" with the specific purpose of allowing accumulation of sluiced CCR (CCR and water) long enough to settle CCR satisfies the design requirement.

The Board appreciates Mr. Dehlin's explanation of the differences between infiltration and sedimentation and how those methods are used in dealing with CCR. Also, the Board agrees with Midwest that the rules of statutory construction come to play when interpreting the words of the definition of "surface impoundment" as some of the words within that definition are not defined in the Board's rules or in the Act. However, the Board disagrees with Midwest's interpretation of "accumulation" and finds IEPA's interpretation is acceptable in the context of how the FSFS area was used to manage CCR. While accumulation necessarily includes a temporal element, here there is no set amount of time associated with that time frame.

It is undisputed that both water and CCR were sluiced to the FSFS area from the 1940s to the 1970s. Though the Board's rules do not define "liquids", the federal CCR rule does provide a definition. Liquids are defined as:

> Any fluid (such as water) that has no independent shape but has a definite volume and does not expand indefinitely and that is only slightly compressible. This encompasses all of the various types of liquids that may be present in a CCR unit, including water that was sluiced into an impoundment along with CCR, precipitation, surface water, groundwater, and any other form of water that has migrated into the impoundment, which may be found as free water or standing water ponded above CCR or porewater intermingled with CCR. 40 CFR 257.53.

Midwest's argument rests on an implied time element contained in the definition "accumulation." The Board finds no such temporal requirement explicitly or implicitly in the statute or regulations. The CCR accumulation in the FSFS area indicates that the natural topographical features (sand dunes) of the original 30-acre area, including the FSFS area, provided adequate retention time to accumulate sluiced CCR and water to allow for the settling of CCR. In this regard, the Board agrees with IEPA that "a CCR surface impoundment need not 'hold' liquids during its entire active life to meet the definition of CCR surface impoundment. found at Section 845.120 Act or 40 C.F.R. 257.53." IEPA Final Brief at 14. The act of "holding" can be a temporary condition that serves a purpose, which in this case was to allow for the settling of CCR.

While the Board recognizes the distinction made between infiltration and sedimentation, the Board finds that the definition of "surface impoundment" does not account for this distinction. Moreover, "infiltration" is not inherently incompatible with "accumulation." As interpreted by the new CCRMU rule, "an impoundment 'contains' liquid if there is liquid in the impoundment, that is, it *has* water within it, even if water continues to leak from the unit." 89 FR 38950, at 38986 (May 8, 2024).

Therefore, the Board finds that because the sluiced material was conveyed into a diked area (the 30-acre site which included the FSFS area) that was designed to hold an accumulation of the sluiced material within its boundaries, and because that material was a combination of

CCR and liquids, the second criterion of the definition of CCR surface impoundment is satisfied for the FSFS area.

Did the Area Treat, Store, or Dispose of CCR?

To determine whether the area qualifies as a CCR surface impoundment, the Board finally evaluates it against the third criterion: whether it *"*treats, stores, or disposes of CCR.*"* 415 ILCS 5/3.143 (2022). The word "or" indicates a disjunctive list, meaning that satisfying any one of these conditions is sufficient to meet the requirement. As IEPA describes in its final brief, "[u]nderstanding that CCR was sluiced there is also important to our characterization of the Original Slag Field as a CCR surface impoundment because it is how we know that CCR *is* there. Part of the definition of a CCR surface impoundment 'treats, stores, or disposes of CCR.' … If CCR was sluiced to the Original Slag Field and that CCR has never been removed, then the Grassy Field presently stores CCR." IEPA Final Brief at 16, omitting internal citations. Midwest does not dispute the fact that CCR was stored in the FSFS area.

The Board agrees with IEPA that the FSFS area "stores" CCR at the site. As noted by IEPA, there is no evidence in the record that shows CCR was removed from the FSFS area. Moreover, a recent subsurface investigation, which involved 40 soil borings in the FSFS area indicate the presence of moist ash throughout the area. Midwest. Ex. 43. Therefore, the Board finds that the FSFS area meets the third criterion of the definition of surface impoundment.

Is the FSFS area an inactive CCR surface impoundment under Part 845, or is it a CCRMU?

USEPA, in adopting the new federal CCRMU rule, provides a relevant example of the differences between a CCR surface impoundment and a CCRMU. 89 FR 38993 (May 8 2024). USEPA says that when adopting the CCR rule, it did not specify a certain amount of water needed for an area to qualify as a CCR surface impoundment. "EPA did not limit the CCR surface impoundments regulated under the 2015 CCR Rule to those that contain a particular amount of water or degree of hydraulic head." *Id*. USEPA describes various examples of units that would fit the definition of a CCR surface impoundment, the last of which was a "diked area in which wet CCR is placed in order to remove the water for future transport to a CCR landfill or beneficial use." *Id*.

> "[t]he unit is accumulating CCR, while allowing for the evaporation or removal of liquid (no free liquids) to facilitate transport to a CCR landfill or for beneficial use. In this instance, the unit again meets all three definition criteria, it is a diked area (*i.e.,* there is an embankment), it is accumulating CCR for ultimate disposal or beneficial use; and it is removing any free liquids, (*i.e.,* treatment)." *Id*.

The Board finds this USEPA example mirrors the FSFS area's past and present use. Indeed, even if the Board were not to consider the infiltration and evaporation process of the sluiced material as treatment, the area meets the plain definition of "stores" because the CCR remained in place after evaporation. Midwest Ex. 43 at 121-161.

Moreover, the federal CCRMU rule classifies "inactive surface impoundments" as "those that contain both CCR and water, but no longer receive additional wastes." 80 Fed. Reg. 21,343 (Apr. 17, 2015). This definition distinguishes inactive surface impoundments from that of closed, CCRMUs, or legacy surface impoundments. The Board, like USEPA, recognizes the distinction between sites that may have ever contained CCR and liquids and those regulated under the new CCRMU rule. The Board finds that the distinguishing aspects of the FSFS area weigh in favor of concluding that the 10-acre site should be classified as an inactive CCR surface impoundment.

Substantially and significantly factors. Midwest argues that factors involving the FSFS Area are substantially and significantly different than those considered by the Board in in adopting the rule of general applicability under Part 845. Pet. at 26. Midwest maintains that the Board rulemaking focused on the conditions of active CCR surface impoundments, including their operations and construction. Given that the FSFA Area does not fit the definition of CCR surface impoundment, Midwest argues that the Grassy Field should not be regulated under Part 845. *Id.* IEPA argues that Midwest has not proven that the factors relating to the FSFS Area Field are substantially and significantly different from the factors relied upon by the Board in adopting the Part 845 closure requirements. Rec. at 20. IEPA maintains that the FSFS Area is subject to Part 845 because it is an inactive CCR surface impoundment. The Board agrees.

As discussed above, the FSFS Area meets the definition of a CCR surface impoundment. Further, the FSFS Area is an inactive surface impoundment, i.e., it contains both CCR and water, but no longer receive additional wastes. Thus, the Board finds that the FSFS Area is not substantially and significantly different from the factors the Board relied upon when adopting Part 845. Therefore, the Board finds that Midwest fails to adequately prove the "substantially and significantly different" factor under Section 28.1(c)(1) of the Act for granting an adjusted standard.

28.1(c)(2) – Whether the existence of those factors justifies an adjusted standard

By failing to prove the "substantially and significantly different" factor of the adjusted standard evaluation, the Board finds that the FSFS area necessarily fails the second. Therefore, the Board finds that Midwest failed to prove that substantially and significantly different factors justify the requested adjusted standard under Section 28.1(c)(2) of the Act.

28.1(c)(3) – Whether 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

Midwest argues that because the FSFS area is subject to the Act and Board regulations, "finding that the Illinois CCR Rule is inapplicable will not result in environmental effects substantially more adverse than the effects considered by the Board." Pet. at 26. IEPA disagrees, saying, "Petitioner's assertion that application of Part 845 to the Old Pond will not have any more favorable environmental impact than exempting it from Part 845 is disingenuous." Rec. at 19.

Looking to an ongoing case before the Board, PCB 13-15, IEPA notes that the Board's interim opinion and order found that the discharges from the FSFS area have caused a negative environmental impact by contributing to exceedances of the Board's Part 620 groundwater quality standards. Rec. at 19. IEPA argues that the Board found Midwest violated Sections 620.410(a), 620.301(a) and 620.405 at its Waukegan facility. In addition, IEPA is concerned that the FSFS area remains unlined. "Grassy Field is an inactive surface impoundment that has never been closed by removal, nor has any type of low permeability cover been installed on top of it. The detection of CCR related constituents in excess of the applicable groundwater protection standards show that Grassy Field presents the environmental and health risks." Rec. at 20.

The Board agrees with IEPA and finds that granting an adjusted standard for the FSFS area would result in environmental and health effects substantially and significantly more adverse than the effects considered by the Board when adopting Part 845. Part 845 provides specific procedures and methods for owners and operators of CCR surface impoundments, including "inactive surface impoundments" to properly retrofit or close their impoundments in a manner that does not impose adverse effects on human health or the environment. Therefore, the Board finds the petition fails to establish the adjusted standard factor in Section 28.1(c)3.

28.1(c)4 – Whether the adjusted standard is consistent with any appliable federal law

Finally, regarding the fourth element, Midwest argues that a finding of inapplicability, and reclassification would be consistent with the federal CCRMU rule. Further, Midwest argues that reclassifying the FSFA Area as a CCRMU under the new federal regulations would be the technically feasible and economically reasonable alternative to regulation under Part 845. Midwest Final Resp. at 15.

IEPA agrees that the proposed adjusted standard would be applicable to federal law. Rec. at 21. The Board finds that granting the adjusted standard would be consistent with federal law as the area would be regulated as either an open dump (*See*, 35 Ill. Adm. Code 845.100(b)) or a CCRMU. However, if an adjusted standard petition fails one criterion of Section 28.1(c), the Board must deny the petition.

CONCLUSION

Based on the record before it, the Board finds that Midwest has not provided sufficient justification that proves the requested relief satisfies the requirements of Section 28.1(c) of the Act. 415 ILCS 5/28.1(c) (2022). A petition needs to fail only one of those sections for the Board to deny the adjusted standard. Here, the Board found the petition failed three of the four factors, Section 28.1(c)(1), (2), and (3). 415 ILCS 5/28.1(c)(1), (c)(2), (c)(3) (2022). Therefore, the Board denies Midwest's petition for an adjusted standard from Part 845.

IT IS SO ORDERED.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2022); *See also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706.

Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statue, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motion for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *See also* 35 Ill. Adm. Code 101.902, 102.700, 102.702.

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I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on March 20, 2025, by a vote of 5-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board