

ILLINOIS POLLUTION CONTROL BOARD
November 20, 2025

ILLINOIS POWER GENERATING COMPANY,)	
)	
)	
Petitioner,)	
)	
v.)	PCB 24-43
)	(Alternative Source Demonstration)
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,)	
)	
)	
Respondent.)	

INTERIM OPINION AND ORDER OF THE BOARD (by A. Tin):

On December 15, 2023, Illinois Power Generating Company (IPGC) filed an appeal of the Illinois Environmental Protection Agency’s (IEPA or Agency) final decision of nonconcurrency with the Alternative Source Demonstration (ASD). IPGC submitted the ASD to IEPA under the Board’s coal combustion residuals (CCR) surface impoundment rules at 35 Ill. Adm. Code 845.650 to address an exceedance of the chloride groundwater protection standard near the Newton Primary Ash Pond (PAP) at IPGC’s Newton Power Plant in Jasper County.

IPGC’s ASD supports its position that a source other than the PAP had caused the chloride contamination and that the PAP had not contributed to it. IEPA did not concur with the ASD. It asserted that three gaps in the data submitted by IPGC prevented it from doing so. IPGC appeals the IEPA’s decision arguing that IEPA’s nonconcurrency requiring the information in its identified data gaps is not supported by the language of 35 Ill. Adm. Code 845 and that IEPA’s interpretation of it leads to absurd or unreasonable results.

On October 1, 2024, IPGC and IEPA each filed motions for summary judgment. IPGC argues its ASD is based on available facts and evidence gathered before the deadline to submit, and that IEPA’s nonconcurrency is not supported by the Board’s CCR rules. IPGC’s motion asks the Board to remand the ASD nonconcurrency to IEPA “to issue a new final written response concurring with the Newton ASD.” IEPA’s motion argues that IPGC did not meet its burden of proof and failed to demonstrate that an alternative source caused the contamination.

For the reasons described below, the Board denies the parties’ cross-motions for summary judgment, finding there are genuine issues of material fact, including site specific evidence, testing procedures, and required certifications. The Board directs the hearing officer and the parties to proceed expeditiously to hearing on the appeal of the ASD.

In this opinion and order, the Board first reviews the procedural history at pages 2-4. The Board then provides the legal background on pages 4-9 and discusses the parties’ disputes over

standard of review and burden of proof at pages 9-13.¹ Next the Board sets forth the factual background of this appeal, including IPGC's petition for review, at pages 13-17. The Board then discusses IPGC's Motion for Summary Judgment at pages 17-20, IEPA's Response at pages 20-27, and IPGC's Reply at pages 27-35. The Board then summarizes IEPA's Motion for Summary Judgment at pages 35-48, IPGC's Response at pages 48-62, and IEPA's Reply at pages 62-71. The Board then reaches its conclusions and issues its order at pages 71-72.

PROCEDURAL HISTORY

On December 15, 2023, IPGC filed a petition for review of IEPA's non-concurrence with its ASD for the PAP (Pet.). The petition included a request that the Board stay specified requirements. Pet. at 2, 16-20. Attached to IPGC's petition were five exhibits:

IPGC Exh. A	IEPA non-concurrence letter to IPGC (Nov. 7, 2023);
IPGC Exh. B	ASD prepared for Newton PAP by Ramboll Americas Engineering Solutions, Inc. (Oct. 6, 2023);
IPGC Exh. C	IPGC letter to IEPA re: ASD for Newton PAP (Nov. 3, 2023), including attachments;
IPGC Exh. D	IPGC's Declaration of Dr. Melinda Hahn (Dec. 15, 2023); and
IPGC Exh. E	IPGC's Declaration of Cynthia Vodopivec (Dec. 15, 2023).

On January 4, 2024, the Board accepted IPGC's petition for hearing but reserved ruling on the request for a partial stay. On January 18, 2024, the Board granted the unopposed request for a partial stay.

On January 22, 2024, the Board's hearing officer granted IEPA's unopposed motion to extend the deadline to file the administrative record and extended the deadline to March 21, 2024. On March 21, 2024, IEPA filed a motion to extend the deadline to March 28, 2024. On March 26, 2024, IEPA filed the administrative record (R. at 1-2214). In an order on April 15, 2024, the hearing officer stated that IEPA's second motion to extend the deadline was moot and that IPGC "agrees to consider the record timely filed."

In the same April 15, 2024 order, over IEPA's objection, the hearing officer granted IPGC's request for a 60-day discovery period. On June 17, 2024, over IEPA's objection, the hearing officer granted IPGC's request for additional discovery in response to depositions.

On July 1, 2024, IPGC filed a motion to supplement the record with 28 documents identified in the motion. On July 15, 2024, IEPA filed its response opposing the motion to

¹ Having found an issue of material fact the Board does not resolve the parties' disputes over issues like standard of review.

supplement. In an order on July 22, 2024, the hearing officer granted IPGC's motion for documents 1 and 26-28 and denied the motion for documents 2-25. On August 9, 2024, IEPA filed the supplemental record (R. at 2215-3652).

On August 1, 2024, IPGC filed the expert report of Dr. Melinda Hahn (Hahn Rpt.), including attachments.

On October 1, 2024, IPGC filed a motion for summary judgment (IPGC Mot.), attached to which were five exhibits:

IPGC Mot. Exh. A IEPA Responses to IPGC's First Set of Interrogatories (May 23, 2024);

IPGC Mot. Exh. B Excerpts from Depositions of Lauren Hunt and Heather Mullenax (May 28, 2024);

IPGC Mot. Exh. C Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Am. Code 845, R20-19 (Aug. 5, 2020) (excerpt from First Supplement to IEPA's Pre-Filed Answers);

IPGC Mot. Exh. D Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Am. Code 845, R20-19 (Oct. 30, 2020) (excerpt from IEPA's Final Post-Hearing Comments); and

IPGC Mot. Exh. E Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Mar. 30, 2020) (excerpt from IEPA Statement of Reasons and proposed Part 845).

Also on October 1, 2024, IEPA filed a motion for summary judgment (IEPA Mot.).

On October 31, 2024, IPGC filed its response to IEPA's motion for summary judgment (IPGC Resp.). Attached to the response were four exhibits:

IPGC Resp. Exh. A Declaration of Dr. Hahn (Oct. 31, 2024);

IPGC Resp. Exh. B Declaration of Brian Jennings of Ramboll Americas Engineering Solutions, Inc. (Oct. 31, 2024);

IPGC Resp. Exh. C Excerpts from Depositions of Lauren Hunt and Heather Mullenax (May 28, 2024); and

IPGC Resp. Exh. D Gavin Power, LLC v. USEPA, No. 2:24-cv-41 (S.D. Ohio) (Oct. 16, 2024) (USEPA Motion to Dismiss).

Also on October 31, 2024, IEPA filed its response to IPGC's motion for summary judgment (IEPA Resp).

On November 15, 2024, IPGC filed a reply in support of its motion for summary judgment (IPGC Reply), attached to which was one exhibit, excerpts of Hunt and Mullenax depositions (IPGC Reply Exh. A). Also on November 15, 2024, IEPA filed its reply in support of its motion for summary judgment (IEPA Reply). Under Section 101.500(e) of the Board's rules, parties are required to seek leave to file a reply. Because both parties filed replies and neither objected, and in interest of assembling a complete record, the Board on its own motion enters the replies into the record.

On November 21, 2024, Sierra Club, Earthjustice, and Prairie Rivers Network (collectively, Environmental Groups) submitted public comments on the parties' motions for summary judgment (PC 1).

In an order on November 26, 2024, the hearing officer granted IPGC's request for leave to respond to public comment by December 31, 2024. On December 19, 2024, the hearing officer granted IPGC's request to extend that deadline to January 10, 2025. On January 10, 2025, IPGC filed its response to the Environmental Groups' comment (PC 2).

On February 4, 2025, IEPA filed a motion for leave to file a response to PC 2, accompanied by its response. The Board grants the unopposed motion for leave to file and accepts the response into the record as PC 3. *See* 35 Ill. Adm. Code 101.500(d).

On February 25, 2025, IPGC filed a response to IEPA's comments in PC 3 (PC 4).

On March 5, 2025, Environmental Groups filed their second comments (PC 5) addressing responses filed by IPGC (PC 2) and IEPA (PC 3).

LEGAL BACKGROUND

The following sections summarize the statutory and regulatory framework governing CCR surface impoundments. This framework provides the foundation for understanding the requirements applicable to groundwater monitoring, public participation, and corrective measures.

Statutory Background

Section 22.59(g) of the Act establishes the Legislature's directives for the Board's adoption of rules governing CCR surface impoundments. The statute sets forth requirements related to permitting, design, public participation, groundwater monitoring, and corrective action.

Section 22.59(g) of the Environmental Protection Act (Act) provides in pertinent part that:

[t]he Board shall adopt rules establishing construction permit requirements, operating permit requirements, design standards, reporting, financial assurance, and closure and post-closure care requirements for CCR surface impoundments. . . The rules must, at a minimum:

- (1) be at least as protective and comprehensive as the federal regulations or amendments thereto promulgated by the Administrator of the United States Environmental Protection Agency in Subpart D of 40 CFR 257 governing CCR surface impoundments;
* * *
- (6) specify meaningful public participation procedures for the issuance of CCR surface impoundment construction and operating permits, including, but not limited to, public notice of the submission of permit applications, an opportunity for the submission of public comments, an opportunity for a public hearing prior to permit issuance, and a summary and response of the comments prepared by the Agency;
* * *
- (11) describe the process and standards for identifying a specific alternative source of groundwater pollution when the owner or operator of the CCR surface impoundment believes that groundwater contamination on the site is not from the CCR surface impoundment. 415 ILCS 5/22.59(g) (2024).

Regulatory Background

The Board's CCR rules in Part 845 set forth detailed requirements for groundwater monitoring, notification, corrective action, and alternative source demonstrations. The groundwater monitoring requirements begin with Section 845.650(a), which provides in its entirety that:

[t]he owner or operator of a CCR surface impoundment must conduct groundwater monitoring consistent with this Section. At a minimum, groundwater monitoring must include groundwater monitoring for all constituents with a groundwater protection standard in Section 845.600(a), calcium, and turbidity. The owner or operator of the CCR surface impoundment must submit a groundwater monitoring plan to the Agency with its operating permit application. 35 Ill. Adm. Code 845.650(a).

Section 845.650(d) of the Board's CCR rules provides in its entirety that,

[i]f one or more constituents are detected, and confirmed by an immediate resample, to be in exceedance of the groundwater protection standards in Section 845.600 in any sampling event, the owner or operator must notify the Agency which constituent exceeded the groundwater protection standard and place the

notification in the facility's operating record as required by Section 845.800(d)(16). The owner or operator of the CCR surface impoundment also must:

- 1) Characterize the nature and extent of the release and any relevant site conditions that may affect the remedy ultimately selected. The characterization must be sufficient to support a complete and accurate assessment of the corrective measures necessary to effectively clean up all releases from the CCR surface impoundment under Section 845.660. The owner or operator of the CCR surface impoundment must submit the characterization to the Agency and place the characterization in the facility's operating record as required by Section 845.800(d)(16). Characterization of the release includes the following minimum measures:
 - A) Install additional monitoring wells necessary to define the contaminant plumes;
 - B) Collect data on the nature and estimated quantity of material released, including specific information on the constituents listed in Section 845.600 and the levels at which they are present in the material released;
 - C) Install at least one additional monitoring well at the facility boundary in the direction of contaminant migration and sample this well in accordance with subsections (a) and (b); and
 - D) Sample all wells in accordance with subsections (a) and (b) to characterize the nature and extent of the release.
- 2) Notify all persons who own the land or reside on the land that directly overlies any part of the plume of contamination if contaminants have migrated off-site as indicated by sampling of wells in accordance with subsection (d)(1). The owner or operator must send notifications made under this subsection (d)(2) to the Agency and place the notifications in the facility's operating record (see Section 845.800(d)(16)).
- 3) Except as provided in subsection (e), within 90 days after the detected exceedance of the groundwater protection standard, initiate an assessment of corrective measures (see Section 845.660).

Section 845.650(e) of the Board's CCR rules, entitled "Alternative Source Demonstration (ASD)," provides in its entirety that

[t]he owner or operator of a CCR surface impoundment may, within 60 days after the detected exceedance of the groundwater protection standard, submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination, or that the exceedance of the groundwater protection standard resulted from error in sampling, analysis, statistical evaluation, natural variation in groundwater quality, or a change in the potentiometric surface and groundwater flow direction. Either type of ASD must include a report that contains the factual or evidentiary basis for any conclusions and a certification of accuracy by a qualified professional engineer.

- 1) The owner or operator must place the ASD on the facility's publicly accessible Internet site (CCR website) under Section 845.810 within 24 hours after the submission to the Agency.
- 2) Within two business days after receiving the ASD, the Agency must email a notice to its listserv for the facility that the ASD is available to view on the facility's CCR website.
- 3) Members of the public may submit to the Agency written comments on the ASD within 14 days after the Agency provides notice under subsection (e)(2).
- 4) The Agency must provide a written response to the owner and operator either concurring or not concurring with the ASD within 30 days after receiving the ASD. The Agency must also mail or email its response to each person who timely submitted a written public comment under subsection (e)(3) and supplied a mailing or email address.
- 5) If the Agency concurs with the ASD, the owner or operator must continue monitoring as required by this Section. The owner or operator must also include the ASD in the annual groundwater monitoring and corrective action report required by Section 845.610(e).
- 6) If the Agency does not concur with the ASD, the owner or operator must initiate the assessment of corrective measures under Section 845.660.
- 7) If the Agency does not concur with the ASD, the owner or operator may petition the Board for review of the Agency's non-concurrence under 35 Ill. Adm. Code 105. The filing of a petition for review under subsection (e)(7) does not automatically stay any requirements of this Part as to the owner or operator, including the 90-day deadline to initiate an assessment of corrective measures (see Section 845.660(a)(1)). 35 Ill. Adm. Code 845.650(e).

Summary Judgment

Summary judgment is appropriate when the pleadings, depositions, admissions, affidavits, and other items in the record show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Adames v. Sheahan, 233 Ill. 2d 276, 295, 909 N.E.2d 742, 753 (2009); Dowd & Dowd, Ltd. v. Gleason, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998); 35 Ill. Adm. Code 101.516(b).

A genuine issue of material fact precluding summary judgment exists when “the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 753; Adams v. N. Ill. Gas Co., 211 Ill. 2d 32, 43, 809 N.E.2d 1248, 1256 (2004). “It is well established that in deciding a motion for summary judgment the court may draw inferences from undisputed fact.” Makowski v. City of Naperville, 249 Ill. App. 3d 110, 119, 617 N.E. 2d 1251, 1258 (1993); Loyola Acad. v. S & S Roof Maint., 146 Ill. 2d 263, 272, 586 N.E.2d 1211, 1215 (2d Dist. 1992).

When determining whether a genuine issue of material fact exists, the record “must be construed strictly against the movant and liberally in favor of the opponent.” Adames, 233 Ill. 2d at 295-96, 909 N.E.2d at 754; Purtill v. Hess, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986).

Summary judgment “is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt.” Adames, 233 Ill. 2d at 296, 909 N.E.2d at 754; Purtill, 111 Ill. 2d at 240, 489 N.E.2d at 871. “Even so, while the nonmoving party in a summary judgment motion is not required to prove [its] case, [it] must nonetheless present a factual basis, which would arguably entitle [it] to a judgment.” Gauthier v. Westfall, 266 Ill. App. 3d 213, 219, 639 N.E.2d 994, 999 (2d Dist. 1994).

However, “[t]he mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate the Board to render summary judgment.” Prairie Rivers Network v. PCB, 2016 Ill. App. (1st) 150971 (¶24) (Feb. 26, 2016), *citing* Pielet v. Pielet, 2012 IL 112064 (¶28), 978 N.E.2d 10000, 365 Ill. Dec. 497.

IPGC argues that it “is entitled to summary judgment as a matter of law.” IPGC Mot. at 2; *see id.* at 13-14. It contends that its ASD complied with the plain language of Sect. 845.650(e) and that IEPA’s denial relied on alleged “Data Gaps” that are not required by the regulation. According to IPGC, the ASD provided a factual and evidentiary basis showing that a source other than the Primary Ash Pond caused the chloride exceedance, and it would have been impossible and unreasonable to collect the information identified by IEPA within the 60-day period for submission. IPGC maintains that interpreting Part 845 as requiring the “Data Gap” information would lead to absurd, unjust, and inconvenient results. IPGC further asserts that, at the summary judgment stage, the Board’s role is to determine whether a genuine issue of material fact exists, and that IEPA’s cross-motion improperly asks the Board to weigh the evidence.

IEPA asserts that “there is no genuine issue of material fact” that the ASD submitted by IPGC failed to meet the minimum requirements of the Board rule. IEPA Mot. at 10-11; *see id.* at 42. IEPA argues that IPGC’s ASD was “inadequate as a matter of law” under the Board’s rules and that it correctly determined as a matter of law not to concur in it. IEPA Reply at 1, *citing* 35 Ill. Adm. Code 845.650(e); *see* IEPA Mot. at 11. IEPA argues that, under the Board’s rules, the ASD must demonstrate, based on facts and evidence, that a source other than the CCR surface impoundment caused the exceedance, and that IPGC’s submission did not satisfy this standard. IEPA further asserts that IPGC’s arguments “cast issues of law as issues of fact and should therefore be rejected.” IEPA Reply at 1.

Standard of Review

IPGC Positions

IPGC notes that this appeal is the Board’s first review of an IEPA nonconcurrency under 35 Ill. Adm. Code 845.650(e). IPGC Mot. at 10.

IPGC asserts that “the Board has explained that it will not grant IEPA any special deference where IEPA issues a final agency decision without hearing and where no other ‘procedures, such as cross-examination, are available for the [petitioner] to test the validity of the information the Agency relies upon in [its decision]’” before the matter comes before the Board. IPGC Mot. at 11, *citing* EPA v. PCB, 115 Ill.2d 65, 70 (1986). IPGC argues that, rather than deferring to IEPA, the Board must “review the entirety of the record to determine (1) if the record supports the IEPA’s decision, and (2) that the procedures used by the IEPA are consistent with the Act and Board regulations.” IPGC Mot. at 11, *citing* Des Plaines River Watershed Alliance v. IEPA, PCB 04-88, slip op. at 12 (Apr. 19, 2007), *aff’d. sub nom* IEPA v. PCB, 386 Ill. App. 3d 375 (3rd Dist. 2008).

IPGC further argues that, when the Board must interpret a rule that the Board has not previously interpreted, “any prior interpretations made by the Agency are not binding on the Board,” and the “Board approaches the issue *de novo*.” IPGC Mot. at 11, *citing* Emerald Performance Materials v. IEPA, PCB 04-102, slip op. at 18 (Oct. 15, 2009). Similarly, IPGC asserts that “the Agency’s arguments are not considered with any greater or lesser weight than [Petitioner’s].” IPGC Mot. at 12, *citing* Atkinson Landfill Co. v. IEPA, PCB 13-08, slip op. at 8 (June 20, 2013). IPGC asserts that, because the Board’s determination hinges on interpreting whether 35 Ill. Adm. Code 845.650(e) requires an ASD to include particular data, the Board should review IEPA’s determination *de novo* without giving IEPA’s arguments any greater weight. IPGC Mot. at 12.

IPGC argues that “the Board has long held that the Agency’s denial must frame the review regardless of whether there exist ‘formal requirements’ because ‘principles of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases’ for IEPA’s denial.” IPGC Resp. at 7, *citing* Centralia Env’tl. Svcs. v. IEPA, PCB 89-170, slip op. at 7 (May 10, 1990); Pulitzer Cmty. Newspapers v. IEPA, PCB 90-142, slip op. at 5-6 (Dec. 20, 1990). IPGC asserts that it prepared its petition and evidence to appeal IEPA’s non-concurrence letter. It suggests that the Board should not accept IEPA’s argument on the scope of

review “simply because the exact contents of a denial letter were not spelled out in the regulation.” IPGC Resp. at 7.

IPGC disputes IEPA’s position that an ASD is an exception to the general standard and should be reviewed for abuse of discretion. IPGC Resp. at 4, citing IEPA Mot. at 6. IPGC argues that Illinois courts and the Board do not apply special deference when “IEPA issues a final decision without hearing and where no other ‘procedures, such as cross-examination, are available for the [petitioner] to test the validity of the information the agency relies upon in [its decision].” IPGC Resp. at 4-5, citing EPA v. PCB, 115 Ill.2d 65,70 (1986).

IPGC emphasizes that, when the contested issue “is a matter of law involving proper interpretation of a Board rule, the Agency’s interpretation is not binding upon the Board.” IPGC Resp. at 5, citing Emerald Performance Materials, slip op. at 18; Peoria Disposal Co., slip op. at 31. IPGC asserts that, because the Board has not previously interpreted the requirements of 35 Ill. Adm. Code 845.650(e), IEPA’s interpretations are not binding, and the Board applies the *de novo* standard. IPGC Resp. at 5.

IPGC also notes that the procedural context, such as IEPA’s 30-day deadline to respond to an ASD, precludes the Agency from conducting a full hearing to develop the issues. IPGC Resp. at 5, citing ESG Watts, Inc. v. PCB, 286 Ill. App. 3d 325, 331 (1997). IPGC asserts that these procedural constraints favor *de novo* review and that applying a more deferential standard “would essentially remove the procedural safeguards of the administrative appeal process.” IPGC Resp. at 6. IPGC asserts that *de novo* review is necessary because “due to the time restraints placed on the Agency, it cannot hold full hearing to develop the issues of the case.” IPGC Resp. at 5. IPGC discounts IEPA’s argument that procedural factors favor greater discretion. It argues that court have found “those exact factors weight heavily in favor of *less deferential* review.” *Id.* (emphasis in original).

Finally, IPGC argues that IEPA cites only U.S. Steel Corp. v. PCB, 384 Ill. App. 3d 457 (2008), to support its argument for more deferential review. IPGC Resp. at 6. IPGC asserts that that case considered IEPA’s determination of the subjective issue of whether there was “sufficient” public interest regarding the procedural matter of whether to hold a public hearing. In this case, IPGC asserts that the Board reviews IEPA’s objective determinations to issue a substantive decision on whether to concur in an ASD. IPGC Resp. at 6.

IEPA Positions

IEPA states that Part 105 of the Board’s procedural rules, which addresses appeals of final IEPA decisions, also governs an appeal of a nonconcurrency with an ASD. IEPA Mot. at 5, citing 35 Ill. Adm. Code 105.100(a), 845.650(e)(7). IEPA asserts that, in an appeal of final IEPA action, “[t]he hearing will be based exclusively on the Agency record before the Agency at the time the permit or decision was issued.” IEPA Mot. at 10, citing 35 Ill. Adm. Code 105.412.

IEPA asserts that in permit appeals the Board considers the information on which IEPA relied “and reviews the entire record *de novo* without deference to the agency’s findings.” IEPA Mot. at 5, citing Sierra Club, et al. v. IEPA and Midwest Generation, LLC, PCB 15-189, slip op.

at 15 (Jan 19, 2017); City of E. Moline v. IEPA, PCB 86-218, slip op. at 8 (Sept. 8, 1988). IEPA adds that “[d]e novo review also applies in other appeals of final actions, such as facility siting appeals.” IEPA Mot. at 5, *citing* Timber Creek Homes, Inc. v. Village of Round Lake Park, PCB 14-99, slip op. at 67 (Aug. 21, 2014). “Of the various standard of review, *de novo* review is the least deferential to the lower tribunal, while the abuse-of-discretion standard is the most deferential.” IEPA Mot. at 6, *citing* U.S. Steel v. IPCB, 384 Ill. App. Ed 457, 461-62 (2008).

IPGC agrees with IEPA that the “typical standard of review in Board appeals of final [IEPA] decisions is *de novo* based on the record before the agency.” IPGC Resp. at 4, *citing* IEPA Mot. at 5.

IEPA notes IPGC’s position that nonconcurrency with its ASD was “arbitrary and capricious.” IEPA Mot. at 5, *citing* Pet. at 9 (¶31), 12 (¶38), 14 (¶43), 15 (¶48), 16 (¶52), 19 (¶60). IEPA responds that “the Board does not apply the arbitrary and capricious standard to decisions made by the Agency. Rather, the Board reviews the information the Agency relied on in making its decision.” IEPA Mot. at 5, *citing* ESG Watts v. IPCB, 286 Ill. App. 3d 325, 331 (3rd Dist. 1997). IEPA asserts that “the arbitrary and capricious standard on which Petitioner relies is inapplicable to this appeal.” IEPA Mot. at 5.

IEPA asserts that “decisions committed to agency discretion are reviewed for an abuse of discretion.” IEPA Mot. at 6. IEPA argues that, although Board rules require it to respond to an ASD, the rules allow it to determine whether to concur. *Id.* IEPA cites U.S. Steel, in which the rule at issue required IEPA to hold a hearing if it determines that there existed “a significant degree of public interest.” *Id.*, *quoting* 35 Ill. Adm. Code 309.115(a). The Court held that the language of the rule provided IEPA discretion to determine whether it was appropriate to hold a hearing. *Id.*, *citing* U.S. Steel Corp. v. IPCB, 384 Ill. App. 3d 457, 461-63 (2008). IEPA argues that Part 845 uses “language that is mandatory in form but discretionary in substance.” *Id.* IEPA concludes that “[t]he Board should therefore review [IEPA’s] decision for an abuse of discretion.” IEPA Mot. at 6.

While IEPA asserts that the language of the rule and other factors support applying the abuse of discretion standard, the deficiencies in IPGC’s ASD “are fatal regardless of the standard applied,” and it directs its arguments “to a *de novo* standard of review.” IEPA Mot. at 7.

IEPA further argues that, even if the rule was ambiguous on the extent of its discretion, other factors support applying the abuse of discretion standard. IEPA Mot at 6. IEPA argues that 35 Ill. Adm Code 845.650(e) does not provide specific standards that IEPA applies to its determination. IEPA contrasts this with “permit appeals in which [IEPA] is required to detail specific grounds for denial.” *Id.*, *citing* 415 ILCS 5/39(a) (2024). IEPA asserts that, although a permit denial has a defined scope of review under which the denial letter frames the issues, “it does not appear that such narrow framing would be possible in a nonconcurrency appeal where the nonconcurrency is not subject to any formal requirements.” IEPA Mot. at 7, see Aqua Illinois v. IEPA, PCB 23-12, slip op. at 8² (Dec. 15, 2022)(concerning standard of review on permit denials).

² The Board notes that IEPA incorrectly listed the page number in its motion.

IEPA also argues that its 30-day deadline to respond to an ASD makes it less likely that IEPA would be able to “develop the kind of detailed record of decision” for *de novo* review by the Board in a permit appeal. IEPA Mot. at 7.

Burden of Proof

Part 105 of the Board’s procedural rules addresses appeals of final decision of state agencies. Section 105.112(a) establishes that the burden of proof is on the petitioner. 35 Ill. Adm. Code 105.112; *see* IEPA Mot. at 7; IPGC Mot. at 10. IEPA states that, in appeals of its final decisions, the Board has characterized the standard of proof as the “preponderance of the evidence.” IEPA Mot. at 7, *citing* Aqua Illinois v IEPA, PCB 23-12, slip op. at 14 (Dec. 15, 2022). IPGC states that “[a] proposition is proved by a preponderance of the evidence when it is more probably true than not.” IPGC Resp. at 8, *citing* Polchow v. Vill. of Rankin, PCB 15-57, slip op. at 3 (Feb. 28, 2019).

IEPA cites the Board rule providing that its “hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs.” 35 Ill. Adm. Code 101.626(a); *see* IEPA Mot. at 8. IEPA adds that admission of evidence by the Board’s hearing officer is generally governed by “the rules of evidence as applied in the civil courts of Illinois. . . .” 35 Ill. Adm. Code 101.626; *see* IEPA Mot. at 8. IEPA also asserts that factual inferences from circumstantial evidence “must be both reasonable and probable, not merely possible.” IEPA Mot. at 8, *citing* Westlake v. House Corp., 2011 IL App (1st) 100653, ¶18. IEPA adds that “fictional musings as to what might have happened” are “unreliable and totally irrelevant” even when the musing of an expert. IEPA Mot. at 8, *citing* Modelski v. Navistar Int’l. Transp. Corp., 302 Ill. App. 3d 879, 886 (1999).

IPGC adds that “[t]he factual basis for an expert’s opinion generally does not affect his standing as an expert; it is for the [fact finder] to determine the weight of the opinion. . . . While opinions based on sheer speculation should be stricken as irrelevant, testimony based on ‘expert analysis of the known physical facts’ is admissible.” IPGC Resp. at 8, *citing* Petraski v. Thedos, 382 Ill. App. 3d 22, 31 (2008).

IEPA asserts that IPGC “must show that, based on the record before [IEPA] at the time of the decision, it is more likely than not that the facts support reversal of [IEPA’s] decision.” IEPA Mot. at 7. IPGC argues that it is entitled to relief if it shows by a preponderance of the evidence that IEPA’s “reasons and regulatory and statutory bases for denial are inadequate to support [] denial.” IPGC Mot. at 7, *citing* Pulitzer Cmty. Newspapers v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990); *see* IPGC Mot. at 7, n.3.

However, IPGC argues that IEPA incorrectly frames the burden of proof and scope of review as applying to the ASD. IPGC Resp. at 7, n.3. IPGC counters that “the preponderance of the evidence standard applies to the issues being appealed, which in turn are framed by the reasons and bases provided in the Agency’s denial letter.” *Id.*

IEPA

IEPA asserts that the burden of proof is on IPGC “to prove that it is entitled to a permit and that the Agency’s reasons for denial are either insufficient or improper.” IEPA Mot. at 5, 7, *citing* ESG Watts, 286 Ill. App. 3d at 331; 35 Ill. Adm. Code 105.100(a), 105.112(a). IEPA asserts that IPGC “must show that the record before [IEPA] when it issued the nonconurrence decision showed that Petitioner’s ASD submittal met the minimum requirements of the Board rules.” IEPA Mot. at 10

IEPA argues that IPGC “must present sufficient evidence to outweigh and rebut the presumption that the APW15 monitoring well has done what it was designed to do: identify contamination coming from the impoundment.” IEPA Mot. at 10, n.1. IEPA asserts that IPGC “must prove (by at least a preponderance of the evidence) that a specific alternative source caused the chloride exceedance in APW15” and “must then also prove that none of the detected contamination came from Petitioner’s impoundment.” IEPA Mot. at 9-10, *citing* 35 Ill. Adm. Code 845.650(e); *see also* IEPA Mot. at 10.

IEPA further argues that requiring IPGC to rebut both elements of the demonstration “is consistent with USEPA practice in ASDs under the federal rules.” *Id.*, *citing* Final Decision: Denial of Alternative Closure Deadline for General James M. Gavin Plant, Cheshire, Ohio, EPA-HQ-OLEM-2021-0590-0100, *aff’d. sub nom* Electric Energy, Inc. v. EPA, 106 F.4th 31 (D.C. Cir. 2024). IEPA asserts that the Board adopted Part 845 under a statutory requirement that Illinois rules would be “at least as protective and comprehensive as the federal regulations” and that a lower burden of proof flouts this requirement. IEPA Mot. at 10, n.1, *citing* 415 ILCS 5/22.59(g)(1) (2024).

IPGC

IPGC acknowledges that it has the burden of showing “that the Agency’s reasons for denial are either insufficient or improper.” IPGC Mot. at 10-11, *citing* 35 Ill. Adm. Code 105.112; ESG Watts, Inc., 286 Ill. App. 3d at 331; ESG Watts, Inc. v. IEPA, PCB 94-243, PCB 94-306, PCB 94-307, PCB 94-308, PCB 94-309, PCB 95-133, PCB 95-134 (consol.), slip op. at 6 (Mar. 21, 1996).

However, IPGC argues that IEPA appears to have confused the standard for granting summary judgment with the burden of proof in the appeal. IPGC Resp. at 3, *citing* Estate of Gerald D. Slightom v. IEPA, PCB 11-25, slip op. at 15 (Apr. 19, 2012). According to IPGC, at this stage IEPA must affirmatively show that there is no genuine issue of material fact and that its right to judgment is clear and free from doubt. IPGC Resp. at 3, *citing* Estate of Gerald D. Slightom v. IEPA, PCB 11-25, slip op. at 3 (Jan. 19, 2017). IPGC argues that IEPA must either affirmatively demonstrate an element of the case must be resolved in its favor or that there is an absence of evidence supporting IPGC. IPGC Resp. at 3, *citing* Shaw v. U.S. Financial Life Ins. Co., 2022 IL App (1st) 21153, ¶ 27.

IPGC argues that, if IEPA asserts in its motion facts that are not in the record in this proceeding, those facts “must be supported by oath, affidavit, or certification.” IPGC Resp. at 3, *citing* 35 Ill. Adm. Code 101.504. IPGC further argues that, if an affidavit supports a motion for

summary judgment, it may not include unsupported “opinions and legal conclusions.” IPGC Resp. at 4, *citing Dorothy v. Flex-n-Gate Corp*, PCB 05-49, slip op. at 9 (Oct. 20, 2005). IPGC asserts that IEPA’s motion includes “unsupported opinions and conclusions not supported by oath, affidavit, or certification.” IPGC Resp. at 4.

FACTUAL BACKGROUND

Newton Power Plant and PAP

The Newton Power Plant is in Jasper County approximately seven miles southwest of the town of Newton. R. at 709, 1612. The Plant includes a CCR surface impoundment known as the PAP, which is regulated under 35 Ill. Adm. Code 845. *Id.* at 708, 1611. The PAP is an unlined surface impoundment constructed in 1997. It has a surface area of 404 acres and design capacity of 9,715 acre-feet. *Id.* at 708, 710, 1612. “The PAP currently receives bottom ash, fly ash, and low-volume wastewater from the plant’s two coal-fired boilers.” *Id.* “The PAP was not excavated during construction, except for native borrow materials used to build the containment berms.” *Id.* at 1612; *see id.* at 710. “In 2014, three areas along the interior berm were re-graded and covered with riprap.” *Id.* at 710.

The PAP discharges to the Secondary Pond, which clarifies process water before it is discharged under the plant’s National Pollutant Discharge Elimination System (NPDES) permit. R. at 708. The Secondary Pond has a surface area of 9.3 acres and a volume of 83.6 acre-feet. *Id.* at 710.

Hydrogeology

Near the PAP, unconsolidated deposits include the following units. Below the CCR and fill material, the Upper Drift is composed of clays and silts, including the Peoria Silt in upland areas underlain by the Sangamon Soil, at thicknesses up to approximately 46 feet. R. at 714, 715-16, 1612.

Where present, the potential migration pathway of the Hagerstown Member consists of discontinuous sandy deposits between the Upper Drift and the layer below it. R. at 714, 716, 1612. It forms one of the two water-bearing zones at the PAP. *Id.* at 719. Although encountered at thicknesses up to approximately 6.9 feet, it is generally less than two feet thick where present. *Id.* at 716.

Below the Upper Drift, the Upper Confining Unit consists of low permeability clay and silt of the Vandalia Member. “This unit is a laterally continuous layer between the base of the Upper Drift and the top of the Uppermost Aquifer.” R. at 1611; *see id.* at 714, 716-17. Although encountered at thicknesses up to 59 feet, it has an average thickness of 26 feet. *Id.* at 716.

Below the Upper Confining Unit is the Uppermost Aquifer composed of the Mulberry Grove Member, the second of the two water-bearing zones at the PAP. R. at 719. It “has been classified as poorly graded sand, silty sand, clayey sand, and gravel.” R. at 1613. “These sandy deposits are the first laterally continuous sands observed beneath the PAP.” *Id.* at 714.

Although encountered at thicknesses up to 30 feet, the average thickness is approximately 10 feet. *Id.* at 717.

Below the Uppermost Aquifer is the Lower Confining Unit “comprised of low permeability silt and clay of the Smithboro Till Member and Banner Formation.” R. at 1613. Although encountered at thicknesses up to 36 feet, the average thickness is 32 feet. *Id.* at 717.

Bedrock underlying the PAP is the Pennsylvanian Age Mattoon Formation, “which consists of a complex sequence of thin limestones, coals, black fissile shales, underclays, thick gray shales, and several well-developed sandstones.” R. at 718.

Groundwater Flow

In the uppermost aquifer, groundwater generally flows north to south. R. at 710. Wells in the uppermost aquifer “also display flow converging towards a former surface drainage feature located west of the PAP.” *Id.*; *see id.* at 778 (Figure 2-9: Bottom of Ash Map), 1613.

Groundwater Monitoring

On October 25, 2021, IPGC submitted to IEPA under 35 Ill. Adm. Code 845 an application for an operating permit for the PAP. R. at 564-1588. The application included a groundwater monitoring plan. *Id.* at 1242-63. The plan proposed a monitoring network consisting of two background monitoring wells (APW05 and APW06), 16 compliance monitoring wells (APW02, APW03, APW04, APW05S, APW07, APW08, APW09, APW10, APW11, APW12, APW13, APW14, APW15, APW16, APW17, and APW18) and two temporary water level only surface water staff gages (XSG01 and SG02) to monitor potential impacts from the PAP. *Id.* at 1257; *citing id.* at 1277 (Figure 2-1: Proposed Monitoring Well Network); *see id.* at 725-26 (Section 4.1: Summary of Groundwater Monitoring Activities).

Monitoring wells APW02, APW03, APW04, APW05S, and APW12 are located around the perimeter of the PAP and are screened in the Upper Drift. Monitoring wells APW05, APW06, APW07, APW08, APW09, APW10, APW11, APW13, APW14, APW15, APW16, APW17, and APW 18 are also located around the perimeter of the PAP and are screened in the uppermost aquifer. R. at 1257; *see id.* at 1277 (Figure 2-1). Also, four leachate monitoring wells (XPW01, XPW02, XPW03, and XPW04) were installed within the PAP to characterize CCR materials and leachate. *Id.* at 1252; *see id.* at 1276 (Figure 1-3). Monitoring well APW15 is located near the southern edge of the PAP. *Id.* at 779 (Figure 3-1: Monitoring Well Locations).

Under the groundwater monitoring plan, IPGC during the second quarter of 2023 conducted a round of quarterly groundwater monitoring. *See* Hahn Rpt. (Document 14). On August 7, 2023, IPGC submitted to IEPA groundwater monitoring analysis for the second quarter of 2023 at the PAP. *Id.*; *see* R. at 1611. The monitoring report identified the following exceedances of the groundwater protection standards: chloride at monitoring well APW15; lithium at monitoring well APW02; sulfate at monitoring wells APW04, APW05, and APW10; and total dissolved solids (TDS) at monitoring wells APW02, APW04, and APW05S. R. at

1611. IPGC reported that exceedances of the lithium, sulfate, and TDS standards would be addressed through assessing corrective measures under 35 Ill. Adm. Code 845.660. R. at 1611.

ASD

For the chloride exceedance at monitoring well APW15 identified in its monitoring report for the second quarter of 2023, IPGC on October 6, 2023, submitted to IEPA an ASD under 35 Ill. Adm. Code 845.650(e). R. at 1606-39. IPGC's ASD was the first ASD reviewed by IEPA under 35 Ill. Adm. Code 845. *See* Hahn Rpt. (Document 3 at 66) (Hunt deposition).

The ASD identified three lines of evidence (LOEs) to demonstrate that sources other than the PAP had caused the chloride exceedance at monitoring well APW15. R. at 1615.

As the first LOE, the ASD states that

separation between the UA [uppermost aquifer] and the base of ash is approximately 60 feet, which represents the thickness of the low permeability glacial till that comprises the UCU [upper confining unit]. Based upon these observations, there is no complete pathway for transport of CCR constituents to APW15, and the PAP is not the source of the chloride exceedance at the well. R. at 1615, *citing id.* at 1626-34 (Exhibit B: Supporting Materials for LOE #1).

As the second LOE, the ASD notes that “[b]oron and sulfate can be indicators of CCR impacts to groundwater due to their leachability from CCR and mobility in groundwater.” R. at 1615. The ASD asserts that, “[i]f the groundwater in APW15 had been impacted by CCR from the unit, boron and sulfate concentrations would be expected to be elevated above their respective background Upper Tolerance Limits (UTLs). The UTL is an upper bound on background concentrations calculated for the purpose of comparing compliance measurements to background.” *Id.* The ASD added that, “[i]f groundwater downgradient of the PAP was being affected by CCR but boron and sulfate did not yet exceed background concentrations, boron and sulfate concentrations would be expected to be increasing.” R. at 1615.

The ASD reported that “[t]he concentration of boron in compliance well APW15 (0.13 mg/L) is less than the boron UTL (0.26 mg/L) and the concentration of sulfate in APW15 (0.40 mg/L) is less than the sulfate UTL (35.84 mg/L), and the lack of increasing trends in boron and sulfate concentrations at monitoring well APW15 indicate that this well has not been affected by CCR impacts” from the PAP. R. at 1616, *citing id.* at 1635-39 (Appendix C: Supplemental Analytical Data).

For the third LOE, the ASD provided summary chloride concentrations in monitoring well APW15 and PAP porewater collected from XPW01, XPW02, XPW03, and XPW04. R. at 1616 (Table A). The ASD stated that, “[i]f the PAP was the source of chloride in the downgradient groundwater, chloride concentrations in the PAP porewater would be expected to be greater than the groundwater concentrations.” *Id.* The ASD asserts that “the median chloride concentration observed in compliance groundwater monitoring well APW15 is greater than the median chloride concentrations observed [in] porewater indicating that chloride concentrations

are not related to the PAP.” *Id.*, *citing id.* at 1635-39 (Appendix C: Supplemental Analytical Data).

In addition, the ASD stated that it reviewed regional literature to identify an alternative source. R. at 1617. Based on that literature, the ASD indicates that “elevated chloride concentrations (ranging from 100 to 5,000 mg/L) are present in bedrock at concentrations above those detected in APW15.” *Id.*, *citing id.* at 1613 (Section 2.3.2: Regional Bedrock Geology).

The ASD cited three reasons to conclude that “chloride concentrations in bedrock groundwater are a likely source of chloride observed in APW15.” *Id.* at 1617. First, the ASD asserts that “[c]hloride is present in Pennsylvanian shale in Jasper County at concentrations ranging from 100 to 5,000 mg/L.” R. at 1617. Second, it states that “[u]pward vertical hydraulic gradients and fractures near geologic features provide conduits for these chloride-rich waters to migrate.” *Id.* Third, the ASD indicates that “[w]ell APW15 is located in close proximity to bedrock and screened at a lower elevation than other wells monitoring the UA which could explain why this is the only affected well.” *Id.* It added that “[t]he high hydraulic conductivity of the UA relative to the low hydraulic conductivity of underlying bedrock at this location provides a potential pathway for interaction with upward-migrating chloride-containing bedrock groundwater.” *Id.*

The ASD concluded that a source other than the PAP was responsible for the chloride exceedance at monitoring well APW15 and that the PAP did not contribute to the exceedance. The ASD further concluded that chloride concentrations in bedrock groundwater are a likely source of the chloride exceedance at APW15. R. at 1617.

On October 24, 2023, IEPA provided notice to its listserv that it has received an ASD for the Newton Power Plant, setting a deadline of 14 days to submit comments on the ASD under 35 Ill. Adm. Code 845.650(e)(3). R. at 1758.

DISCUSSION OF IPGC’S MOTION FOR SUMMARY JUDGMENT

Motion

IPGC asserts that its ASD is based on available facts and evidence and additional information gathered before the deadline to submit it. IPGC Mot. at 1. It argues that IEPA’s nonconurrence is not supported by the Board’s CCR rules. *Id.* at 2. IPGC asserts that IEPA “does not take issue with any of the facts or evidence” in the ASD but instead lists three data gaps that IEPA argues had to be included in the ASD. *Id.* IPGC argues that these gaps are not based on the Board’s rules “and instead were developed through backroom conversations and interpretations at IEPA, of which IPGC had no notice.” *Id.* IPGC asserts that requiring it to fill these gaps would result in an absurd application of the Board’s rules by requiring compliance with a standard of which it did not have notice “and with which it would be impossible or unfair to comply.” *Id.* IPGC argues on these bases that it “is entitled to summary judgment as a matter of law.” IPGC Mot. at 2.

In the following subsections of the opinion, the Board summarizes the arguments in IPGC's motion.

Part 845

IPGC argues that IEPA's determination that the ASD must include information addressing three data gaps "is not supported by the law." IPGC Mot. at 13. It further argues that Part 845 does not require it to collect information described in the data gaps or to include that information in its ASD. *Id.* at 13, 17. IPGC asserts that it "cannot be expected to comply with data 'requirements' that are not clear from the plain language of the regulations." *Id.* at 17.

For purposes of its summary judgment motion, IPGC asserts that, "even if this information was useful to conducting the ASD, there is no requirement, as a matter of law, that its ASD *must* include this information." IPGC Mot. at 13, n.4 (emphasis in original). IPGC further asserts that the information IEPA seeks is not relevant or necessary to support its ASD. *Id.*

Information Requirements for ASD

IPGC acknowledges that the CCR rules require an owner or operator to "submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination" and to "include a report that contains the factual or evidentiary basis for any conclusions and a certification of accuracy by a qualified professional engineer." IPGC Mot. at 15, *citing* 35 Ill. Adm. Code 845.650(e). However, IPGC asserts that 35 Ill. Adm. Code 845.650(e) "does not specify what information must be included" in an ASD and "does not specify what the factual and evidentiary basis must consist of." *Id.* IPGC argues that subsection (e) does not require an ASD to include the information IEPA lists as data gaps and does not refer to "a need to collect or develop *any particular* information." IPGC Mot. at 15 (emphasis in original).

IPGC further argues that subsection (e) does not refer to other information collection requirements in Part 845, and provisions that include those requirements do not cross reference subsection (e). IPGC Mot. at 15. IPGC asserts that no other provision of Part 845 requires collecting the information listed in the data gaps. *Id.* at 16.

Data Gap 1

IEPA's nonconcurrency first determined that "[s]ource characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with [SW-846]." R. at 1965. IPGC argues that the plain language of the CCR rules do not refer to "total solids sampling" and do not require conducting it. IPGC Mot. at 17. IPGC further argues that, even if the rules required total solids sampling, they do not require it to be conducted "in accordance with [SW-846]." *Id.* Although IPGC acknowledges that 35 Ill. Adm. Code 845.150 incorporates SW-846 by reference, that incorporation "does not create an obligation to use [SW-846] for all activities conducted under Part 845." *Id.*

IPGC concludes that it was not legally required to collect the information under data gap 1 as part of its ASD or to have had that information available when it discovered the chloride exceedance at APW 15. IPGC Mot. at 1.

Data Gaps 2 and 3

Second, IEPA’s nonconcurrency determined that “[h]ydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and presented with hydrogeologic characterization of the bedrock unit.” R. at 1965. Third, it determined that “[c]haracterization to include sample and analysis in accordance with 35 Ill. Adm. Code 845.640 of the alternative source must be provided with the ASD.” *Id.*

IPGC asserts that Part 845 addresses “potential groundwater contamination from the CCR surface impoundments regulated under that program.” IPGC Mot. at 18, *citing Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845*, R 20-19, slip op. at 1 (Apr. 15, 2021). IPGC further asserts that Part 845 does not require collecting hydraulic conductivities to be presented with a hydrogeologic characterization of potential alternate sources. IPGC Mot. at 18, 19. It also argues that Part 845 does not require characterizing an alternate source through sampling and analysis in accordance with 35 Ill. Adm. Code 845.640. *Id.* at 18. IPGC asserts that that provision addresses groundwater sampling and analysis that owners and operators must submit with an initial application for an operating permit. *See id.* at 19, n.9.

IPGC argues that IEPA explained in the rulemaking proceeding that adopted Part 845 why an ASD does not need to identify any alternate source and its impact:

[w]hile mitigation of the impacts of [other sources] are important, that task does not fall within the purview of Part 845. The key factor to ascertain from the ASD is that it is not the CCR surface impoundment responsible for the contamination and therefore no action relative to the CCR surface impoundment is required. Other sources of groundwater contamination should be addressed under other remedial programs. *Id.* at 19, *citing* IPGC Exh. D.

IPGC argues that, by determining that Part 845 requires characterizing alternate sources, “IEPA is changing its previous interpretation regarding the scope of Part 845 and the requirements of ASDs.” IPGC Mot. at 18.

Nonconcurrency Would Lead to Absurd, Unreasonable, Unjust, or Inconvenient Results

IPGC argues that interpreting the Board’s CCR rules to require collecting information addressing the data gaps listed in the nonconcurrency “would result in a legally impermissible interpretation of Part 845 because it would produce ‘absurd, unreasonable, unjust, or inconvenient’ results.” IPGC Mot. at 13-14, 19-20, *citing Midwest Sanitary Serv., Inc. v. Sandberg, Phoenix & Von Gontard, P.C.*, 2022 IL 127327, ¶24.

IPGC also asserts that IEPA's interpretation would require it to comply with requirements "of which it had no notice and with which it would be unfair or impossible to comply." IPGC Mot. at 20.

Data Gap 1 Arguments

IPGC first notes that an owner or operator must submit an ASD "within 60 days after the detected exceedance of the groundwater protection standard." IPGC Mot. at 20, *citing* 35 Ill. Adm. Code 845.650(e). IPGC argues that it "presented evidence that it would have taken approximately 21-42 weeks" to collect information IEPA seeks under data gap 1. IPGC Mot. at 20, *citing* R. at 2213 (Vodopivec affidavit). It further argues that IEPA has not presented contrary evidence and that IEPA witnesses agreed that it would require 21-42 weeks to gather this information. IPGC Mot. at 20-21, *citing* IPGC Mot. Exh. B (excerpts of Hunt, Mullenax depositions). IPGC concludes that requiring information listed in data gap 1 within the 60 days to compile and submit an ASD is absurd.

Next, IPGC argues that it could have included the information identified in data gap 1 in its ASD only by collecting that information "well before the detection of the chloride exceedance in APW15." IPGC Mot. at 21. IPGC asserts that it became aware of IEPA's interpretation that an ASD requires a source characterization of CCR and total solids sampling in accordance with SW-846 only after it had submitted its ASD. *Id.* Without notice of this interpretation, IPGC argues that it should not be required to collect data supporting an ASD before an exceedance indicating that an ASD may be necessary. *Id.* IPGC concludes that it is unjust for IEPA to determine that it "must have prospectively collected" information identified in data gap 1.

Finally, IPGC asserts that data gap 1 is absurd "because there is no [SW-846] solids sampling methodology for chloride." IPGC Mot. at 21. While IPGC acknowledges that SW-846 includes total solids sampling techniques for metals, it argues that the nonconcurrency "does not specify which [SW-846] methodology IEPA believes could have or should have been used to conduct total solids sampling of chloride (or its related constituent chlorine) at the PAP." *Id.* at 21-22. IPGC asserts that no SW-846 method includes chloride or chlorine as an analyte in a solid sample, so IEPA's request in data gap 1 "is not possible as written." *Id.* at 22, *citing* Hahn Rpt. at 18; R. at 2244-2333. IPGC concludes that IEPA cannot base its nonconcurrency on a request that is impossible. IPGC Mot. at 22.

Data Gaps 2 and 3 Arguments

IPGC first argues that it would also have been impossible to collect information sought under data gaps 2 and 3 within the 60-day period for submitting an ASD. IPGC Mot. at 22, *citing* Hahn Rpt. at 21; R. at 2213. It asserts that characterizing bedrock "would take approximately 20-30 weeks" and that IEPA's witnesses agree that it would take at least this long to perform an ASD including information sought in these data gaps. IPGC Mot. at 22, *citing* R. at 2213; IPGC Mot. Exh. B (excerpts of Hunt, Mullenax depositions).

Second, IPGC argues that the only way its ASD could have included the information in data gaps 2 and 3 was to start collecting that information before detecting the chloride

exceedance in APW15. IPGC Mot. at 23. It asserts that this could “have required IPGC to forecast any and all potential alternative sources that might impact its groundwater samples and to complete a physical characterization of each of those sources before even knowing there had been an exceedance.” *Id.* IPGC concludes that it is “an absurd interpretation of Part 845” to require the information in data gaps 2 and 3 and that this requirement reads into Part 845 a requirement that is outside its scope. *Id.*, *citing* IPGC Exh. D at 12-13.

IEPA Response

IEPA argues that the entire argument in IPGC’s motion focuses on the three data gaps in its non-concurrence. IEPA Resp. at 1, *citing* IPGC Mot. at 13-23. IEPA asserts that, even if it conceded each of IPGC’s positions and struck the three data gaps, its determination would still state that “[IEPA] does not concur with the Newton Primary Ash Pond Alternative Source Demonstration (ASD) dated October 6, 2023.” IEPA Resp. at 1-2, *citing* R. at 1965. IEPA argues that this nonconcurrence would still be sufficient under the Board rule that requiring only that it concur or not concur in the ASD. IEPA Resp. at 1-2, *citing* 35 Ill. Adm. Code 845.650(e)(4).

IEPA argues that IPGC has not satisfied the requirements in the Board’s rules for an ASD and has not shown that it is entitled to summary judgment. IEPA Resp. at 1-2, *citing* 35 Ill. Adm. Code 845.650(e). The Board reviews the arguments in IEPA’s response in the following subsections of this opinion.

ASD Rules

IEPA argues that IPGC apparently relies on a single-element or first-element interpretation of the ASD rule, “under which a demonstration that the Newton PAP did not contribute to the contamination in APW15 is also sufficient to show that this contamination was caused by *some* other source, which [IPGC] is not required to identify.” IEPA Resp. at 3 (emphasis in original), *citing* IPGC Mot. at 15, 19, 39-41; *see* 35 Ill. Adm. Code 845.650(e). IEPA asserts that this interpretation is incorrect and contradicted by the rules of interpretation on which IPGC relies. IEPA Resp. at 3.

Plain Language of Rules. IEPA asserts that IPGC implies that it is “not required to identify an alternative source or prove that this particular source caused the contamination at issue.” IEPA Resp. at 4. IEPA argues that IPGC has also implied that “by filing a report that meets the formal requirements of the ASD rule, . . . it has done all that is required for its ASD.” *Id.*, *citing* IPGC Mot. at 15.

IEPA argues that the plain and ordinary meaning of the ASD rule requires that IPGC demonstrate both “that some particular source other than the Newton PAP actually caused the chloride exceedance in APW15” and that “the Newton PAP did not contribute to the exceedance.” IEPA Resp. at 5, *citing* 35 Ill. Adm. Code 845.650(e).

IEPA asserts that the rule requires that these two elements be “demonstrated,” which is synonymous with “proven.” IEPA Resp. at 5 (citation omitted). IEPA argues that these

elements must be proven by at least the preponderance of the evidence, which is the ordinary standard in Illinois civil courts and before the Board. *Id.*, *citing Aqua Illinois v. IEPA*, PCB 23-12, slip op. at 8 (Dec. 15, 2022).

Interpretation of Rules. IEPA suggests that the parties’ dispute over the meaning of the ASD rule stems from the requirement that an ASD must demonstrate that “a source other than the CCR surface impoundment caused the contamination.” IEPA Resp. at 6 (emphasis added), *citing* 35 Ill. Adm. Code 845.650(e). IEPA asserts that IPGC apparently interprets this to require only that it “show that the source was not the impoundment and was therefore something else, but not to demonstrate what that ‘something else’ is.” IEPA Resp. at 6, *citing* R. at 1788. IEPA challenges this interpretation, arguing that “[t]he indefinite article ‘a’ is commonly used to introduce a specific entity that is new to the reader. Once the new entity has been introduced, the definite article ‘the’ is used.” IEPA Resp. at 6 (citation omitted). IEPA further argues that requiring a demonstration that “the alternative source caused the contamination would be nonsensical if the source was not required to be a particular, identifiable source.” *Id.* at 7.

IEPA asserts that the plain meaning of the ASD rule is clear and a rule “is not ambiguous simply because the parties disagree as to its meaning.” IEPA further asserts that unambiguous regulations “must be applied as written.” IEPA Resp. at 6, *citing OSFM v. IPCB*, 2022 IL App (1st) 210507, ¶33.

IEPA argues that, even if the ASD rule was ambiguous, rules of interpretation would resolve any ambiguity. IEPA asserts that rules must be “construed so that no part is rendered meaningless or superfluous.” IEPA Resp. at 7, *citing People v. Lloyd*, 2013 IL 113501, ¶25. IEPA argues that IPGC’s interpretation conflicts with this rule because it renders the first element of an ASD superfluous. IEPA Resp. at 7. IEPA asserts that “[a]ny submitter that shows that its impoundment did not contribute to an exceedance has necessarily shown that *something* else caused the exceedance.” *Id.* (citation in original).

IEPA also argues that, by effectively striking the first ASD element, IPGC violates the principle that rules may not be amended by interpretation. IEPA Resp. at 7. IEPA notes that the rule includes a second type of ASD requiring a demonstration “that the exceedance of the groundwater protection standard resulted from error in sampling, analysis, statistical evaluation, natural variation in groundwater quality, or a change in the potentiometric surface and groundwater flow direction.” *Id.*, n.5, *citing* 35 Ill. Adm. Code 845.650(e). IEPA argues that, if an owner or operator could demonstrate simply that its impoundment was not the cause of an exceedance, there would be no reason to demonstrate that the exceedance resulted from factors such as natural variation in groundwater quality. IEPA Resp. at 7, n.5.

Avoiding Absurd Results. IEPA discounts IPGC’s position that upholding the nonconcurrency would result in an “absurd, unreasonable, inconvenient, or unjust” interpretation of the Board’s rule. IEPA Resp. at 7, *citing* IPGC Mot. at 2. IEPA argues that “avoiding inconvenient results guides the interpretation of rules, not their application.” IEPA Resp. at 7. IEPA asserts that the data gaps in its nonconcurrency are case-specific applications of those rules and not interpretations of them. *Id.* at 7-8; *see* IPGC Mot. at 19-20.

IEPA argues that IPGC cites cases that do not support its position that it should not have to identify a specific alternative source. IEPA Resp. at 8-9, 10. IEPA asserts that these cases instead address the basic interpretation of statutory and regulatory requirements. *Id.* at 8. IEPA asserts that the cited cases do not hold that a regulation “should be construed to avoid consequences that are absurd, unreasonable, unjust, or inconvenient *for an individual party.*” *Id.* (emphasis in original). IEPA suggests that IPGC argues only that it would be difficult to fill the data gaps by gathering information, much of which it collected for permit applications. *Id.* at 8. IEPA adds that other ASDs may not require the data listed in this nonconcurrency. *Id.*

IEPA argues that the Act requires the Board to “describe the process and standards for *identifying a specific alternative* source of groundwater pollution. IEPA Resp. at 10 (emphasis in original), *citing* 415 ILCS 5/22.59(g)(11) (2024). IEPA also suggests that identifying a specific alternative source is consistent with the purpose of the Act and Board rules “to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them.” IEPA Resp. at 10, *citing* Midwest Generation, LLC v. IPCB, 2024 IL App (4th) 210304, ¶182. IEPA adds that a rule that did not require demonstrating a particular alternative source would be less protective than the federal rules and contrary to statutory requirements for the Board’s rules. IEPA Resp. at 10, *citing* 415 ILCS 5/22.59 (2024); IEPA Mot. at 36, 37, 40.

Whether Non-Concurrence Amends Rules. IEPA also discounts IPGC’s position that upholding the nonconcurrency “would unlawfully amend the Board Rules through interpretation.” IEPA Resp. at 10-11, *citing* IPGC Mot. at 14, 24. IEPA first suggests that its determination does not amend the rules because the plain language of 35 Ill. Adm. Code 845.650(e) requires IPGC to demonstrate two distinct elements. IEPA Resp. at 11. IEPA further argues that its case-specific listing of data gaps “cannot reasonably be construed as amending the ASD rule.” *Id.*

IEPA further asserts that authorities cited by IPGC do not support its position. IEPA Resp. at 11, *citing* Continental Grain Co. v. PCB, 131 Ill. App. 3d 838, 840 (5th Dist. 1985); Cent. Ill. Pub. Serv. Co. v. IEPA, PCB 86-147, slip op. at 6 (Mar. 19, 1987). IEPA indicated that those cases decided only that, even if the plain language of the rule was contrary to the Board’s intent, it could not amend the rule through an interpretation in an adjudicatory case. IEPA Resp. at 11-12.

Data Gaps

IEPA asserts that it identified three data gaps for which IPGC “failed to provide sufficient evidence that a source besides the Newton PAP was responsible for the chloride exceedance in APW15.” IEPA Resp. at 12, *citing* R. at 1965. IEPA characterizes the gaps as areas in which IPGC’s data did not support its conclusions that the chloride exceedance was caused by a particular source other than the PAP and that the PAP did not contribute to the exceedance. IEPA Resp. at 12, *citing* 35 Ill. Adm. Code 845.650(e). IEPA asserts that, although IPGC proposed a possible cause for the exceedance, the data gaps represent “three particular ways it failed to provide the necessary information to support its explanation.” IEPA Resp. at 13, *citing* R. at 1611-17, 1965.

In the following subsections of the opinion, the Board summarizes IEPA's positions on the data gaps listed in its nonconurrence.

Requirements of Rules. IEPA disputes IPGC's position that "the plain language of Part 845 does not require IPGC to have collected the information described in 'Data Gap 1,' 'Data Gap 2,' or 'Data Gap 3' during the 60-day period to prepare an ASD or prior to that period." IEPA Resp. at 13, *citing* IPGC Mot. at 13. IEPA asserts that IPGC misunderstands the purpose of an ASD and how it functions. IEPA Resp. at 13.

IEPA asserts that owners and operators are required to identify a specific alternative source of contamination so it "can protect public health and the environment from the substantial dangers CCR impoundments create." IEPA Resp. at 14, *citing* 415 ILCS 5/22.59(a) (2024). IEPA argues that the ASD process is organized to determine the source of contamination and allow remediation. IEPA Resp. at 14. It further argues that information missing from the three data gaps "introduced doubt as to the true source of the contamination" and prevented it from concurring with IPGC's ASD. *Id.*

Data Gap 1. IEPA asserts that the second element of an ASD requires demonstrating that "the CCR impoundment did not contribute to the contamination." IEPA Resp. at 13, *citing* 35 Ill. Adm. Code 845.650(e). It argues that, "[w]hen a monitoring well is designed specifically to detect contamination flowing from a CCR surface impoundment, it raises a reasonable presumption that groundwater protection standard exceedances in that well are at least partly caused by the impoundment." IEPA Resp. at 13, *citing* IEPA Mot. at 10, n.1, 18. IEPA suggests that an ASD must rebut the presumption to earn concurrence. IEPA Resp. at 13. IEPA asserts that Data Gap 1, requiring additional information including "total solids sampling in accordance with [SW-846]," is directed to meeting this requirement. *Id.*; *see* R. at 1965.

IEPA discounts IPGC's argument that "the plain language of the Part 845 regulations makes no reference to 'total solids sampling' or a requirement to conduct 'total solids sampling.'" IEPA Resp. at 14, *citing* IPGC Mot. at 17. IEPA asserts that demonstrating the second ASD element - showing the PAP did not contribute to the chloride contamination in APW15 - requires source characterization of the CCR in the PAP, which requires total solids sampling. IEPA Resp. at 14.

IEPA also discounts IPGC's position the "SW-846 is inapplicable to the ASD process." IEPA Resp. at 15. In addition to the incorporation by reference in 35 Ill. Adm. Code 845.150, SW-846 applies to "[a]ll groundwater samples taken under this Subpart [F]," which includes the ASD rule. *Id.* at 16, *citing* 35 Ill. Adm. Code 845.640(j); IEPA Mot. at 26. Because the ASD rule concerns groundwater, even if samples themselves are not groundwater, IEPA argues that it should be analyzed with comparable methods when determining the source of groundwater contamination. IEPA Resp. at 16. IEPA also disputes IPGC's argument the SW-846 is "a guidance document and not a legal authority." IEPA Resp. at 14, n.6, *citing* IPGC Mot. at 18, n.8. Whatever its nature, IEPA asserts that USEPA guidance on data necessary for these determinations is entitled to significant weight. IEPA Resp. at 14, n.6. IEPA argues that it reasonably required sampling in accordance with SW-846. *Id.* at 16. Because IPGC did not use

this methodology, IEPA concluded that it was “missing crucial information,” had “doubts regarding the quality of submitted data,” and was “unable to concur with the ASD.” *Id.*

IEPA states that site-specific data are crucial for an ASD to determine with certainty what is causing contamination at a site. IEPA Resp. at 15. IEPA adds that data must be representative, “a mandatory data quality indicator under SW-846,” which defines it as “a measure of the degree to which data accurately represent a characteristic of a population, a parameter variation at a sampling point, a process condition, or an environmental condition.” *Id.*, *citing* R. at 2225. IEPA asserts that IPGC was required to submit this site-specific and representative data with its operating permit application. IEPA Resp. at 15, *citing* 35 Ill. Adm. Code 845.230(d)(2)(C). It argues that these data are necessary for it to determine whether IPGC has demonstrated the second element of an ASD. IEPA Resp. at 15. IEPA concludes that IPGC lacked data it needed for the required demonstration and that it appropriately declined to concur in the ASD. *Id.*

IEPA also disputes IPGC’s position that data gap 1 “is an absurdity because there is no [SW-846] sampling methodology for chloride.” IEPA Resp. at 16, *citing* IPGC Mot. at 21. IEPA states that “SW-846 methods can be and are used for evaluating chloride in CCR solids.” *Id.*, n.7 (citation omitted). IEPA asserts that IPGC “did not include *any* solids sampling data from the Newton PAP in its submittal.” IEPA Resp. at 16, *citing* R. at 1616, 1636-39. IEPA further asserts that IPGC relied on limited porewater data which it analyzed with non-peer-reviewed methods and for which it did not include sampling logs or chains of custody until just before motions for summary judgment were due. IEPA Resp. at 16, *citing* R. at 1621; IEPA Mot. at 23, n.7; Hahn Rpt. Attachment B. IEPA adds that, even if it accepted porewater data and IPGC’s methods, “such incomplete data from unrepresentative samples could not have been enough to meet [IPGC’s] burden of rebutting the presumption that the chloride concentration in APW15 came from the PAP.” IEPA Resp. at 17. IEPA concludes that IPGC’s argument effectively reverses this burden contrary the Board’s general appeal rules and the specific ASD rules. *Id.*, *citing* 35 Ill. Adm. Code 105.112(a), 845.650(e).

Data Gaps 2 and 3. IEPA asserts that the first element of an ASD requires demonstrating that “a source other than the CCR surface impoundment caused the contamination.” IEPA Resp. at 13, *citing* 35 Ill. Adm. Code 845.650(e). IEPA cites the Act, which requires that the Board’s rules must “describe the process and standard for identifying a specific alternative source of groundwater pollution.” IEPA Resp. at 13, *citing* 415 ILCS 5/22.59(g)(11) (2024). IEPA asserts that Data Gaps 2 and 3, requiring characterization of the alternative sources, are directed to meeting this requirement. IEPA Resp. at 13.

IEPA disputes IPGC’s position that the plain language of 35 Ill. Adm. Code 845 does not support data gaps 2 and 3. IEPA Resp. at 17, *citing* IPGC Mot. at 21. IEPA first asserts that the ASD relies on arguments relating to hydraulic conductivity. IEPA cites the ASD’s first line of evidence that “the PAP is separated from the UA at APW15 by a thick layer of low permeability glacial till.” IEPA Resp. at 17, *citing* R. at 1615. IEPA also cites the second and third lines relying on hydraulic conductivity to support bedrock groundwater as the source of chloride. IEPA Resp. at 17-18, *citing* R. at 1617. Without data that form the heart of IPGC’s arguments, IEPA argues that the ASD was missing crucial information supporting the existence of an

alternative source. IEPA Resp. at 18, *citing* 35 Ill. Adm. Code 845.650(e). IEPA concluded that it needed the information in data gaps 2 and 3 “before it could concur in a purported demonstration based so heavily on hydraulic conductivity and hydrogeology.” IEPA Resp. at 18.

IPGC’s Positions and Arguments

IEPA argues that IPGC raises “arguments that do not appear to be grounded on any particular regulations, statute, or legal principle.” IEPA Resp. at 18, *citing* IPGC Mot. at 18-19, 20-21, 21-23. IEPA asserts that these arguments lack merit and “betray a fundamental misunderstanding of the purpose of the limited ASD exception.” IEPA Resp. at 18.

Purpose and Context of Rules. IEPA discounts IPGC’s position “that it was not required to identify or characterize the alternative source” and argues that it lacks foundation in the text of the Board’s ASD rules. IEPA Resp. at 18. IEPA argues that, even if that text was ambiguous and principles of interpretation could not resolve that ambiguity, the background of the rule would resolve that ambiguity in IEPA’s favor. *Id.*

IEPA asserts that “[r]elated statutes and regulations must be read together as an integrated whole.” IEPA Resp. at 19, *citing* Office of the State First Marshal v. IPCB, 2022 IL App (1st) 210507, ¶34. IEPA notes that Section 22.59 of the Act requires the Board’s CCR rules to “describe the process and standards for identifying a specific alternative source of groundwater pollution when the owner or operator of the CCR surface impoundment believes that groundwater contamination on the site is not from the CCR surface impoundment.” IEPA Resp. at 19, *citing* 415 ILCS 5/22.59(g)(11) (2024). IEPA adds that the Act states a purpose of protecting public health and the environment and requires the Board’s rules to be at least as protective as the corresponding federal rules. IEPA Resp. at 19, *citing* 415 ILCS 5/22.59(a), (g)(1) (2024). IEPA argues that strictly construing the ASD exception and requiring ASDs to meet their burden are consistent with this statutory and regulatory background. IEPA Resp. at 19.

Whether IPGC Had Notice of Requirements. IEPA disputes IPGC’s position that it did not receive sufficient notice to collect data it needed for a successful ASD. IEPA Resp. at 19, *citing* IPGC Mot at 20, 21, 22. IEPA argues that 35 Ill. Adm. Code 845 requires owner and operators to collect comprehensive information. IEPA Resp. at 20, *citing* 35 Ill. Adm. Code 845610(b)(1)(A), 845.620, 845.630. IEPA adds that information in the three data gaps “is all required under Part 845 as part of the CCR impoundment permitting process.” IEPA Resp. at 20.

IEPA also discounts IPGC’s position that requiring it to characterize the alternative source “would conceivably have required IPGC to forecast any and all potential alternative sources that might impact its groundwater samples and to complete a physical characterization of each of those sources before even knowing there has been an exceedance.” IEPA Resp. at 20, *citing* IPGC Mot. at 23. IEPA responds that the ASD process is an optional exception to the general corrective action requirements, and ASD rules do not require any action on IPGC’s part. IEPA Resp. at 20-21. IEPA asserts that following permitting requirements would have generated “most if not all of the information required by [IEPA].” *Id.* at 21.

Whether IEPA’s Interpretation of Rules Changed. IEPA disagrees with IPGC’s argument that “IEPA is changing its previous interpretation regarding the scope of Part 845 and the requirements of ASDs” by “suggesting that Part 845 requires characterization of an alternative source.” IEPA Resp. at 21, *citing* IEPA Mot. at 18. Although IPGC cites IEPA’s post-hearing comment in the proceeding that adopted the CCR rules, IEPA argues that its comment is consistent with requiring an ASD to identify the alternative source. IEPA Resp. at 21, *citing* IPGC Mot., Exh. D at 12-13. IEPA asserts that the comment did not address “whether the alternative source must be identified and proven to be responsible for the contamination, but whether it must be affirmatively located and mitigated.” IEPA Resp. at 22, n.8. IEPA’s comment added that “[t]he key factor to ascertain from the ASD is that it is not the CCR surface impoundment responsible for the contamination and *therefore no action relative to the CCR surface impoundment is required.*” IEPA Resp. at 22, n.8 (emphasis in original), *citing* IPGC Mot. Exh. D at 13. IEPA further comments that “[o]ther sources of groundwater contamination should be addressed under other remedial programs. IPGC Mot. Exh. D at 13. IEPA argues that the record in the CCR rulemaking shows that other potentially affected entities recognized that a successful ASD requires demonstrating another source. IEPA Resp. at 22, *citing* Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 12 (June 23, 2020) (Midwest Generation questions). IEPA adds that, even hypothetically if it had opposed requiring an ASD to identify the alternative source, its comment could not change what the proposed rule already required. IEPA Resp. at 21-22.

Whether IPGC Relied on Information Outside IEPA Record. IEPA argues that IPGC’s motion for summary judgment improperly used deposition testimony, discovery responses, and technical documents. IEPA Resp. at 22, *citing* IPGC Mot. at 20-23. IEPA asserts that Board review of final agency action is “based exclusively on the Agency record before the Agency at the time the . . . decision was issued.” IEPA Resp. at 23, *citing* 35 Ill. Adm. Code 105.412. IEPA argues that IPGC introduces information that was not before it at the time it considered the ASD and is “totally irrelevant to the decision before the Board and cannot be considered.” IEPA Resp. at 23.

IEPA asserts that, even if depositions of Lauren Hunt and Heather Mullenax were relevant, IPGC deposed them “months after the nonconcurrency decision.” IEPA Resp. at 23. IEPA argues that IPGC did not seek to have it designate a representative for deposition. *Id.*, *citing* S. Ct. Rule 206(a)(1). IEPA adds that, although they were involved in the ASD decision-making process in this case, they could not speak for IEPA and spoke only for themselves. IEPA Resp. at 23-24. IEPA concludes that IPGC’s argument relying on their deposition testimony and any other information outside the agency record should be disregarded. IEPA Resp. at 24.

Whether IPGC Was Entitled to Concurrence. IEPA argues that the Board’s ASD rules provide an optional exception in broad terms that reflect the range of circumstances that might arise at CCR surface impoundments. IEPA Resp. at 24. It further argues that the rules therefore do not “closely specify either the particular evidence required for an ASD or the grounds on which [IEPA] might elect to concur or not concur in the ASD.” *Id.* IEPA asserts that that information identified in its three data gaps was necessary to meet the requirements of

the rule. *Id.* at 25. It further asserts that, even if the rule did not categorically require it, “requiring such data would be well within [IEPA’s] reasonable discretion.” *Id.* IEPA concludes that it correctly required IPGC to show that it met the requirements for an ASD “rather than treating the ASD as something to which [IPGC] was automatically entitled.” *Id.* at 24.

IPGC REPLY

Scope of the Appeal

Burden of Proof and Scope of Review

IPGC argues that IEPA’s response misunderstands the scope of the appeal and the burden of proof. IPGC Reply at 2, 3. IPGC states that it challenges *IEPA’s Denial* of the ASD, and IEPA’s denial letter frames the scope of the appeal. *Id.* at 2 (emphasis in original), *citing Aqua Illinois v. IEPA*, PCB 23-12, slip op. at 8 (Dec. 15, 2022); *Pulitzer Cmty. Newspapers v. IEPA*, PCB 90-142, slip op. at 5-6 (Dec. 20, 1990). IPGC asserts that its “burden of proof is to show by a preponderance of the evidence that the Agency’s reasons for Denial do not warrant affirmation.” IPGC Reply at 2, *citing Cassens and Sons, Inc. v. IEPA*, PCB 01-102, slip op. at 10 (Nov. 18, 2004). IPGC argues that “IEPA appears to believe that a nonconcurrency under [35 Ill. Adm. Code] 845.650(e) is an exception and that it is entitled to re-examine any and all issues related to the Newton ASD at this review stage.” IPGC Reply at 3.

IPGC disputes as incorrect and unsupported IEPA’s position that IPGC “must make the case to the Board that, as a matter of law, [IEPA] was required to concur in its ASD submittal.” IPGC Reply at 3, *citing IEPA Resp.* at 1. IPGC notes that IEPA cites *Aqua Illinois* to argue that prevailing before the Board requires IPGC to “prove each ASD element to the applicable standard.” IPGC Reply at 3, *citing IEPA Mot.* at 5; *Aqua Illinois v. IEPA*, PCB 23-13, slip op. at 8 (Dec. 15, 2022). IPGC argues that the Board in that case clarified that “the *denial letter* frames the issues on appeal and that the burden of proof on appeal is ‘to demonstrate that the reasons for denial detailed by the Agency *in its denial letter* are inadequate.” IPGC Reply at 3 (emphasis in original), *citing Aqua Illinois v. IEPA*, PCB 23-123, slip op. at 8 (Dec. 15, 2022). IPGC asserts that IEPA has confused its “burden when submitting the ASD with IPGC’s burden at summary judgment and hearing *in this appeal*.” IPGC Reply at 3 (emphasis in original). IPGC concludes that, as in *Aqua Illinois*, the Board does not review the entire ASD and each of its elements but instead reviews only the issues framed by IEPA’s denial letter. IPGC Reply at 2-4, *citing Aqua Illinois v. IEPA*, PCB 23-13, slip op. at 8-9 (Dec. 15, 2022).

Denial Letter

IPGC disputes IEPA’s position that, “because [35 Ill. Adm. Code] 845.650(e) does not enumerate specific elements that must be in a nonconcurrency, ‘even if all three data gaps were stricken out, leaving only the statement that “[IEPA] does not concur with the [Newton ASD],” Illinois IEPA’s nonconcurrency would still be sufficient under the Board Rules.’” IPGC Reply at 4, *citing IEPA Resp.* at 1-2.

IPGC first responds that this position is irrelevant to this case because IEPA's denial letter provides reasons for its nonconcurrency. IPGC Reply at 4, *citing* R. at 32. IPGC argues that it is also inconsistent with longstanding caselaw holding that a denial letter must frame the issues for appeal because "[p]rinciples of fundamental fairness require that an applicant be given notice of the statutory and regulatory bases" for IEPA's decisions. IPGC Reply at 4 (citations omitted). IPGC argues that these principles have particular importance in an appeal of an agency decision in which "the burden of proof is on the petitioner to prove that the Agency's denial letter was insufficient to warrant affirmation." *Id.*, *citing* Cassens and Sons, Inc. v. IEPA, PCB 01-102, slip op. at 10 (Nov. 18, 2004). IPGC argues that these appeals provide an opportunity to challenge the reasons IEPA provides for its nonconcurrency. IPGC Reply at 5 (citations omitted). It asserts that a petitioner cannot challenge those reasons unless IEPA provides them. IPGC Reply at 5. It concludes that "IEPA's interpretation would render the right to appeal meaningless." *Id.* at 4-5.

IPGC further argues that IEPA's interpretation would allow it to "summarily issue a nonconcurrency without conducting any review of the ASD whatsoever." IPGC Reply at 5. If an owner or operator appealed such a summary nonconcurrency, IPGC argues that "IEPA could retroactively develop justifications for its denial." *Id.* IPGC asserts that "IEPA cannot infer this absurd result simply because the rules do not spell out the exact elements that it must include in its denial." *Id.*

Scope of Relief Requested

IPGC states that its appeal seeks a Board determination that IEPA's nonconcurrency was improper as a matter of law because a plain reading of the applicable authority does not require that an ASD include the information listed in the three data gaps. IPGC also appeals because requiring those data "would result in absurd, unreasonable, inconvenient, or unjust consequences." IPGC Reply at 6, *citing* IPGC Mot. at 23.

IPGC asserts that, in appeals of final agency decisions, the relief granted by the Board typically falls into two general categories. When the Board has determined that IEPA issued a denial an improper basis, it has remanded "with instructions for the Agency to reverse its decision" or "with instructions for the Agency to reconsider a decision in light of the Board's decision on the appeal." IPGC Reply at 6 (citations omitted). When the Board has determined that the denial letter was inadequate "but lacked sufficient information to order a reversal of the Agency's decision, it has remanded back to the Agency on a *specific basis* for re-review in light of the Board's decision." *Id.* at 7 (emphasis in original) (citations omitted).

IPGC argues that the Board has discretion to grant its motion for summary judgment based on a finding that IEPA's nonconcurrency was inadequate as a matter of law. IPGC Reply at 7. IPGC adds that, if the Board denies its motion, it "is prepared to proceed to hearing on the issue of whether the Agency's stated reasons were sufficient to support its Denial." *Id.* at 6, n.2.

Avoiding Absurd, Unreasonable, Inconvenient, or Unjust Results

IPGC asserts that its motion for summary judgment is based on the issue of whether the three data gaps IEPA lists as the bases for its nonconcurrency are inappropriate as a matter of law. IPGC Reply at 2, *citing* R. at 1965; IPGC Reply at 8. IPGC stresses that the nonconcurrency “provides no additional reasons or bases for IEPA’s decision.” *Id.* at 2.

IPGC argues that “IEPA does not dispute that the Data Gaps are not required under the plain letter of the law.” IPGC Reply at 7. IPGC argues that, although IEPA raised the issue that the Board’s rule requires identifying an alternative source, IEPA’s nonconcurrency does not list failure to do so as a basis for the nonconcurrency. *Id.* IPGC adds that, in any event, its ASD identified bedrock underlying APW 15 as the source of the chloride exceedance there. *Id.* at 2, 7-8. IPGC asserts that there are various factual reasons why the nonconcurrency was inappropriate, including that the information in the three data gaps is “irrelevant and unnecessary to support the ASD.” *Id.* at 3. However, IPGC argues that, aside from those factual issues, the nonconcurrency “is also not appropriate as a matter of law.” *Id.* IPGC argues that IEPA has not refuted its position that nonconcurrency based on the three data gaps would lead to absurd, unreasonable, inconvenient, or unjust results. *Id.*

IPGC argues that 35 Ill. Adm. Code 845.650(e) does not identify specific data that an ASD must include. IPGC Reply at 8. It further argues that “the rule necessarily requires the application of judgment in determining what facts and evidence to include and consider and how those facts inform a conclusion.” *Id.* IPGC asserts that any nonconcurrency by IEPA should be reasonable and should be based on requirements an owner or operator could meet. *Id.* It concludes that IEPA should not be able to base its nonconcurrency on absurdities, impracticalities, and impossibilities. *Id.*

IEPA Positions

IPGC characterizes as unsupported IEPA’s position that avoiding inconvenient results guides the interpretation of rules and not their application. IPGC Reply at 8, *citing* IEPA Resp. at 7, 8. IPGC questions whether there is any distinction between the two, arguing that the results of the interpretation of a rule can only be absurd, unreasonable, inconvenient, or unjust through the application of the rule. IPGC Reply at 8.

IPGC asserts that IEPA has not disputed that it would have been impossible to provide the information listed in the nonconcurrency before the deadline to submit an ASD. IPGC Reply at 8. IPGC disputes IEPA’s apparent belief that its nonconcurrency “is permissible because the absurd and unjust results in this specific instance may not apply in every situation.” IPGC Reply at 9; *see id.*, n.3, *citing* IEPA Resp. at 8. IPGC argues that Illinois courts have not shared this view. IPGC Reply at 9, *citing* People ex rel. Cmty. High Sch. Dist. No. 231 v. Hope, 2 Ill. 2d 434, 447-48 (1954). IPGC suggests that similar results may apply in other situations. It stresses that similarly situated owners and operators have also appealed nonconcurrences based on similar data gaps. IPGC Reply at 9, n.4 (citations omitted).

Case Law

IPGC states that its response to IEPA's motion cited cases recognizing the principle of avoiding absurd results. IPGC Reply at 9, *citing* IPGC Resp. at 8-10. IPGC argues that IEPA distinguishes these cases from this appeal "by raising superficial distinctions." IPGC Reply at 9, *citing* IEPA Resp. at 8-10.

IPGC discounts IEPA's position that Bank of N.Y. Mellon v. Laskowski, 2018 IL 121995, does not apply to this appeal "because the proposed reading of the statute at issue in that case would have resulted in an impossibility." IPGC Reply at 9, *citing* IEPA Resp. at 8. IPGC stresses its argument that IEPA's interpretation of the Board's rule would result in an impossibility. IPGC Reply at 9. IPGC adds that "a result can easily be 'absurd' or 'inconvenient' without being impossible." *Id.* IPGC asserts that the case law shows that the principle of avoiding absurd results does not require impossibility. *Id.* at 10 (citations omitted).

IPGC also discounts IEPA's position that Midwest Sanitary Serv. v. Sandberg, 2022 IL 127327, merely recited this principle without applying it. IPGC Reply at 9, n.5, *citing* IEPA Resp. at 9. IPGC states that it cited this case "to demonstrate the rule against absurd results is a basic tenet of statutory interpretation currently used by the highest court in the state." IPGC Reply at 9, n.5.

IPGC asserts that IEPA attempts to distinguish People v. Wilhelm, 346 Ill. App. 3d 206 (2004), and Vill. of Fox River Grove v. IPCB, 299 Ill. App. 3d 869 (1998), by arguing that "the court first found ambiguity in the relevant statutes." IPGC Reply at 10, *citing* IEPA Resp. at 9. IPGC argues that this distinction is not relevant because "the rule against absurdity is an exception to the usual rule that courts must adhere to the plain language of a statute." IPGC Reply at 10, *citing* Bank of N.Y. Mellon, 2018 IL 121995, ¶12. IPGC further argues that, regardless of whether the rule is ambiguous, the Board "may always consider the consequences of construing the law one way or another and may always consider whether a particular interpretation of a statute will lead to absurd, inconvenient, or unjust results." IPGC Reply at 10, *citing* People v. Brown, 2020 IL 124100, ¶30.

IPGC also notes IEPA's suggestion that McMahan v. Indus. Comm'n., 183 Ill.2d 499 (1998), is "based on the stated purpose of the applicable statute, not on the rule against absurdity." IPGC Reply at 10, *citing* IEPA Resp. at 9. IPGC characterizes this analysis as "incomplete." IPGC Reply at 10. IPGC asserts that, after the court determined a literal reading would be contrary to the statutory purpose, and the court added that its decision was also supported by "the principle that no statute should be construed in a manner that will lead to consequences which are absurd, inconvenient, or unjust." *Id.*, *citing* McMahan, 183 Ill.2d at 513-14.

IPGC also argues that IEPA fails to distinguish caselaw when reading requirements into the plain meaning of the law. IPGC Reply at 11, n.6. It characterizes as "false and misleading" IEPA's position that a quotation from Cent. Ill. Pub. Serv. Co. (Merodosia Unit 3) v. IEPA, PCB 86-147, slip op. at 6 (March 19, 1987), is merely a "blockquote from an earlier appellate decision." IPGC Reply at 11, n.6, *citing* IEPA Resp. at 10-11. IPGC asserts that it "quoted the Board's own language and reasoning," and IEPA refers to a quote supporting the Board's conclusion. IPGC Reply at 11, n.6. IPGC further argues that the Merodosia Unit 3 opinion

supports its position. It interpreted a regulation that referred to the requirements of another rule. *Id.*, citing Cent. Ill. Pub. Serv. Co. (Meredosia Unit 3) v. IEPA, PCB 86-147, slip op. at 3-5 (March 19, 1987). IPGC asserts that, although the petitioner in that case argued “that the Board had intended to refer only to a specific subsection,” the Board held that the text referred to the entire rule, and it could not read into the rule the specificity sought by the petitioner. IPGC Reply at 11, n.6., citing Cent. Ill. Pub. Serv. Co. (Meredosia Unit 3) v. IEPA, PCB 86-147, slip op. at 6-7 (March 19, 1987). IPGC concludes that this caselaw “contradicts any suggestion by IEPA that the ‘Data Gap’ information is required as a matter of law, as it is inappropriate to read in a legal requirement to use specific information, procedures, and methods” when the rule does not include this specificity. IPGC Reply at 11, n.6.

Statutory Language

IPGC also discounts IEPA’s reliance on the plain language of the Act, which requires the Board to “describe the processes and standards for identifying a specific alternative source of groundwater pollution.” IPGC Reply at 11, citing 415 ILCS 5/22.59(g)(11) (2024); IEPA Resp. at 9-10. IPGC responds that IEPA has misunderstood both the ASD, which identified an alternative source, and its motion, which does not argue that it was not required to do so. IPGC Reply at 11, citing R. at 1613, 1617. IPGC adds that the principle of avoiding absurd results is an exception to the plain meaning. IPGC Reply at 11.

IPGC dismisses as “conclusory” IEPA’s position that concurring in the ASD would be contrary to the purpose of the Act because it “would fail to protect the public health and environment of Illinois and would be less protective than the federal rules.” IPGC Reply at 11, citing IEPA Resp. at 10. IPGC stresses that it has not asserted that any nonconurrence cannot stand or that it need not make the demonstrations required by the Board’s rule. IPGC Reply at 11-12. IPGC asserts that it argues that the nonconurrence based on the three data gaps identified by IEPA would yield absurd, unreasonable, inconvenient, or unjust results and is therefore unlawful. *Id.* at 12.

Data Gap 1

Data gap 1 states that “[s]ource characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with [SW-846].” R. at 1965; *see* IPGC Reply at 12. IPGC argues that IEPA’s motion asserts that the information in data gap 1 is “necessary to evaluate the second ASD element, namely whether the impoundment contributed to the contamination” and also asserts that IPGC “failed to conduct representative waste characterization of the PAP pursuant to the Board’s rules.” IPGC Reply at 123, citing IEPA Resp. at 15.

IPGC argues that IEPA does not cite any plain language requirement in 35 Ill. Adm. Code 845 that an ASD must include total solids sampling in accordance with SW-846. IPGC Reply at 12. IPGC asserts that it has submitted evidence including site-specific porewater data on the issue of whether the PAP may have contributed to the chloride exceedance at APW15. *Id.*, n.7. IPGC argues that the type of characterization for demonstrating impact to groundwater “is one of fact, subject to differing expert opinions.” *Id.* IPGC argues that it has presented

evidence that the information in data gap 1 “is irrelevant from a factual standpoint.” *Id.* Its motion, however, argues whether it can as a legal matter serve as a basis for IEPA’s nonconcurrency. *Id.* IPGC asserts that it explained that requiring the sampling in data gap 1 would lead to absurd, unreasonable, inconvenient, and unjust results. IPGC Reply at 12.

IPGC stresses its position that conducting this sampling is not possible “because there is no [SW-846] total solids sampling methodology for chloride (or chlorine).” IPGC Reply at 12-13, *citing* IPGC Mot. at 21-22. IPGC notes that IEPA cites Method 9056A, an SW-846 method for aqueous samples. IPGC Reply at 13, *citing* IEPA Resp. at 16, n.7. IPGC argues that “[t]his is not what IEPA has asked for in Data Gap 1.” IPGC Reply at 13., *citing* Hahn Rpt. at 18. IPGC concludes that IEPA has not persuasively disputed that “[t]here is no [SW-846] method that allows for total solids sampling for chloride/chlorine.” *Id.*

IPGC also disputes IEPA’s suggestion that its ASD did not include any total solids sampling data. IPGC Reply at 13, *citing* IEPA Resp. at 16. IPGC asserts that this suggestion is factually incorrect it collected and provided IEPA “with total solids sampling data from the PAP for metals regulated under [35 Ill. Adm. Code] 845.600 (for which there are [SW-846] total solids sampling methodologies).” IPGC Reply at 13, *citing* R. at 738.

IPGC notes that IEPA questions porewater data included in its ASD. IPGC Reply at 14. It argues that authorities, including USEPA, consider porewater sampling to be “the most trusted and accurate methodology to determine what contaminants may be leaching from a CCR surface impoundment.” *Id.*, *citing* Hahn Rpt. at 6-9, 19-20. IPGC asserts that this issue is not relevant because its porewater data are not the subject of data gap 1 or a basis for IEPA’s nonconcurrency. IPGC Reply at 14.

IPGC argues that IEPA has not persuasively disputed its position “that it would be impossible to collect the information in ‘Data Gap 1’ within the 60 days an owner or operator has to prepare an alternative source demonstration.” IPGC Reply at 14. IPGC notes IEPA’s position that it “should have included the ‘Data Gap 1’ information with its ASD and was provided ‘notice’ regarding the need for that information in an alternative source demonstration because ‘Petitioner was already required to collect and provide such data’ under 35 Ill. Adm. Code 845.230(d)(2)(C).” *Id.*, *citing* IEPA Resp. at 16. IPGC counters that that rule addressing operating permit applications requires “[a]n analysis of the chemical constituents of all waste streams, chemical additives and sorbent materials entering or contained in the CCR surface impoundment.” IPGC Reply at 14, *citing* 35 Ill. Adm. Code 845.230(d)(2)(C). IPGC asserts that this requirement plainly does not include “total solids sampling in accordance with [SW-846].” IPGC Reply at 14. IPGC also asserts that the statute does not require that an ASD include these data. *Id.* IPGC also argues that, because there is no SW-846 total solids sampling methodology that includes chlorine, IEPA appears to argue that it “had ‘notice’ to do the impossible.” *Id.* Finally, IPGC adds that, if data gap 1 is based on total solids sampling in accordance with SW-846 for constituents other than chloride, then “no data gap exists because IPGC did provide such data in its operating permit application (which is incorporated by reference into its ASD).” *Id.* at 15, *citing* R. at 738, 1618.

IPGC argues that IEPA has persisted with a position that 35 Ill. Adm. Code 845 “somehow contains a legal requirement that *all* sampling used in support of an alternative source demonstration be conducted using an SW-846 methodology.” IPGC Reply at 15, n.9. IPGC asserts that its response explained that Part 845 does not include this requirement. *Id.*, *citing* IPGC Resp. at 36. IPGC further argues that IEPA has suggested that the incorporation by reference of SW-846 in 35 Ill. Adm. Code 845.640(j) for groundwater samples applies to all samples, including solids samples. IPGC discounts IEPA’s position that, “even if a sample itself is not of groundwater, it needs to be analyzed by commensurable methods.” IPGC Reply at 15, n.9, *citing* IEPA Resp. at 15-16. IPGC argues that 35 Ill. Adm. Code 845.650(j) applies to groundwater samples, which do not include a solids sample. IPGC Reply at 15, n.9.

Data Gaps 2 and 3

As for data gap 2, IEPA’s nonconcurrency states that “[h]ydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and presented with hydrogeologic characterization of the bedrock unit.” R. at 1965.

As for data gap 3, IEPA’s nonconcurrency states that “[c]haracterization to include sample and analysis in accordance with 35 Ill. Adm. Code 845.640 of the alternative source must be provided with the ASD.” R. at 1965.

IPGC first asserts that IEPA’s arguments on these points indicate factual disputes. IPGC Reply at 15. To further this point, IPGC notes IEPA asserted that the information in these two data gaps is necessary to evaluate IPGC’s argument supporting bedrock as the alternative source of chloride. *Id.*, *citing* IEPA Resp. at 17-18.

IPGC also argues that IEPA has not rebutted its position that nonconcurrency based on data gaps 2 and 3 would lead to “absurd, unreasonable, inconvenient, and unjust results.” IPGC Reply at 15. IPGC asserts that IEPA has not disputed that the information sought in data gaps 2 and 3 “could not have been collected in the 60-day period for compiling an alternative source demonstration.” *Id.* IPGC argues that IEPA merely discounts as “hyperbole” its suggestion that the information in data gaps 2 and 3 would require owners and operators “to forecast any and all potential alternative sources before detecting an exceedance.” *Id.*, *citing* IEPA Resp. at 20.

IPGC discounts IEPA’s argument that it “should have collected this information as part of the CCR surface impoundment permitting process.” IPGC Reply at 16, *citing* IEPA Resp. at 20. IPGC first responds that, although IEPA supports its position by *citing* provisions of 35 Ill. Adm. Code 845, “none of the citations support IEPA’s contention that the information must have been collected under a permitting requirement.” IPGC Reply at 16.

Second, IPGC responds that IEPA “cites no requirement that this information must be collected for consideration or inclusion in an alternative source demonstration.” IPGC Reply at 16. IPGC argues that, although IEPA cites provisions related to the hydrogeologic site characterization that owners and operators must include in an operating permit application, these provisions do not require determining “the hydraulic conductivity of and conduct sampling and analysis of every potential alternative source.” *Id.*, *citing* 35 Ill. Adm. Code 845.610(b)(1)(A),

845.620. Although IPGC acknowledges that 35 Ill. Adm. Code 845.620(b)(16) requires hydrogeological characterization including hydraulic conductivities for “the geologic layers identified as migration pathways and geologic layers that limit migration,” it asserts that the bedrock is neither of these and that IEPA does not contend that they are. IPGC Reply at 16-17, *citing* R. at 711-24. IPGC also notes that IEPA cited 35 Ill. Adm. Code 845.620(b), which requires an owner or operator to include in a hydrogeologic site characterization “[a]ny other information requested by the Agency that is relevant” to the characterization. IPGC Reply at 17. IPGC responds that, even if the information sought in the data gaps is relevant, IEPA’s “first request for this information came *after* IPGC submitted the ASD.” *Id.* (emphasis in original). IPGC notes that IEPA cites 35 Ill. Adm. Code 845.630, which addresses “where and how background wells should be positioned for a CCR surface impoundment’s groundwater monitoring system.” *Id.*, n.11. IPGC argues that “[t]his provision has nothing to do with physically characterizing an alternative source including through collecting its hydraulic conductivity data or sampling and analyzing that alternative source.” *Id.* IPGC concludes that none of the provisions cited by IEPA “would have made it reasonable for IPGC to have had this information prior to the start of its ASD process.” *Id.*

Scope of Evidence

IPGC challenges IEPA’s position that it is “improper for the Board to consider deposition testimony, expert reports, and other proofs and information obtained through discovery in an appeal of a final agency decision.” IPGC Reply at 17; *see* IEPA Resp. at 22-24. IPGC asserts that “the Board routinely considers these types of information in appeals of final agency decisions, even if not part of the record before the Agency.” IPGC Reply at 17 (citations omitted). IPGC argues that this allows it to challenge the reasons for IEPA’s nonconurrence and to provide testimony testing the validity of the information on which IEPA relied. *Id.* at 18 (citations omitted). IPGC asserts that IEPA challenges depositions and expert reports that “directly relate to cross examining the reasons given by the Agency for denial of the ASD and test the validity of the information the Agency relied upon for that denial.” *Id.* IPGC concludes that the example cited by IEPA refutes the validity of the data gaps in IEPA’s nonconurrence, “which is what frames the proceeding.” *Id.*

Scope of IEPA Discretion to Review ASD

IPGC notes IEPA’s position that 35 Ill. Adm. Code 845 “does not closely specify either the particular evidence required for an ASD or the grounds on which [IEPA] might elect to concur or not concur in the ASD.” IPGC Reply at 18, *citing* IEPA Resp. at 24. IPGC argues that IEPA lacks support for its claim that “this entitles their decision to be reviewed under an abuse of discretion standard.” IPGC Reply at 18. IPGC asserts that IEPA’s position is contrary to settled law. *Id.*, *citing* Atkinson Landfill Co. v. IEPA, PCB 13-8, slip op. at 8 (June 20, 2013); Emerald Performance Materials, slip op. at 18; IPGC Resp. at 4-6.

IPGC also disputes IEPA’s position that any impossibility or difficulty in obtaining data during the period for submitting an ASD does not prevent it from a nonconurrence based on a lack of those data. IPGC Reply at 18, *citing* IEPA Resp. at 24. IPGC challenges IEPA’s suggestion that an owner or operator experiencing this difficulty need not submit an ASD. IPGC

Reply at 18-19. IPGC argues that “USEPA, IEPA, and the Board knew that a CCR surface impoundment groundwater monitoring network may be impacted by sources other than CCR surface impoundments and that the CCR surface impoundment may not be contributing to groundwater exceedances.” *Id.* at 19. It further argues that IEPA’s position would require owners and operators to perform “corrective action to stop contamination from a CCR surface impoundment” that it may not have caused. *Id.* IPGC suggests that this is the reason the Board adopted ASD rules. *See id.*

DISCUSSION OF IEPA’S MOTION FOR SUMMARY JUDGMENT

IEPA argues that this appeal hinges largely on the parties’ interpretations of the Board’s rule governing ASDs. IEPA Mot. at 8, *citing* 35 Ill. Adm. Code 845.650(e). IEPA asserts that, “[b]ecause administrative regulations have the force and effect of law, the familiar rules that govern construction of statutes also apply to the construction of administrative regulations.” IEPA Mot. at 8, *citing* Haage v. Zavala, 2021 IL 125918 ¶43. IEPA asserts that, “[w]hen the language of the regulation is clear and unambiguous, we must apply it as written, without resort to extrinsic aids of statutory construction.” IEPA Mot. at 9, *citing* People ex rel. Madigan v. Ill. Commerce Comm’n., 231 Ill. 2d 370, 373 (2008). IEPA further asserts that “[a] statute is not ambiguous simply because the parties disagree as to its meaning.” IEPA Mot. at 9, *citing* Office of the State Fire Marshal v. PCB, 2022 IL App (1st) 210507 ¶33.

In the following subsections of the opinion, the Board summarizes the arguments in IEPA’s motion.

IPGC’s ASD Was Inadequate

IPGC Failed to Demonstrate that an Alternative Source Caused Contamination

IEPA cites the Act, which requires the Board’s CCR rules to describe a process for identifying “a specific alternative source of groundwater pollution when the owner or operator of the CCR surface impoundment believes that groundwater contamination on the site is not from the CCR surface impoundment.” IEPA Mot. at 11, *citing* 415 ILCS 5/22.59(g)(11) (2024). IEPA also cites the Board rule that an ASD must demonstrate that “a source other than the CCR surface impoundment caused the contamination.” IEPA Mot. at 11, *citing* 35 Ill. Adm. Code 845.650(e). IEPA argues on various grounds that IPGC’s ASD did not meet this requirement. IEPA Mot. at 11. IEPA further argues that its nonconcurrence is “justified as a matter of law.” *Id.*

In the following subsections, the Board addresses IEPA’s arguments on this requirement.

ASD as Submitted. IEPA acknowledges that IPGC’s ASD includes a required certification of accuracy signed by a professional engineer and a professional geologist. IEPA Mot. at 11; *see* 35 Ill. Adm. Code 845.650(e); R. at 1608. IEPA notes that IPGC’s ASD concludes that “[t]his information serves as the written ASD prepared in accordance with 35 I.A.C. § 845.650(e), demonstrating that the chloride exceedance observed at APW15 during the

E001 sampling event was not due to the PAP. Therefore, assessment of corrective action measures is not required at the PAP.” R. at 1617; *see* IEPA Mot. at 11.

IEPA argues that the certified ASD does not claim that it “demonstrated that a specific alternative source caused the exceedance.” IEPA Mot. at 11. IEPA asserts that the ASD by its own terms does not demonstrate that “a source other than the CCR surface impoundment caused the contamination” and fails to meet the first requirement of the Board rule for an ASD. IEPA Mot. at 11; *see* 35 Ill. Adm. Code 845.650(e).

IEPA argues that IPGC’s petition for review sought to address this by asserting that its “use of site-specific information and identification of a specific geological feature and likely hydraulic connection between the affected well and chloride-containing bedrock” are “more than sufficient” to make the required demonstration. IEPA Mot. at 12, *citing* Pet. at 13-14 (¶43); R. at 1983-84. IEPA asserts that the petition is not certified as accurate by a professional engineer or professional geologist and was not part of its record when it made its determination. IEPA Mot. at 12, *citing* R. at 1990.

ASD Conclusions on Likely Alternative Source. IEPA argues that, although the ASD did not provide the required demonstration that a specific alternative source caused chloride contamination at APW15, it offered three conclusions related to this requirement. IEPA Mot. at 12, *citing* R. at 1617. IEPA notes IPGC’s position that these three conclusions show that bedrock beneath the PAP is “a likely source” of the exceedance. IEPA Mot. at 12, *citing* Pet. at 6 (¶17); R. at 1976. IEPA argues that these three conclusions provide “at most a speculative possibility of an alternative source.” IEPA Mot. at 12.

Presence of Chloride. First, IEPA notes the ASD’s conclusion that “[c]hloride is present in Pennsylvanian shale in Jasper County at concentrations ranging from 100 to 5,000 mg/L.” IEPA Mot. at 12, *citing* R. at 1617. IEPA argues that this conclusion distorts its source, which uses this range “as the lowest concentration band for classifying groundwater observations.” IEPA Mot. at 12 (citation omitted). IEPA asserts that “[t]he source notes only two observations in Jasper County groundwater, both within this lowest band” and that it provides no reason to conclude that either was near 5,000 mg/L. IEPA Mot. at 13. IEPA disputes IPGC’s position that chloride is present at elevated levels in the bedrock throughout Jasper County.” *Id.*, *citing* Pet. at 13 (¶42); R. at 1983.

IEPA also challenges IPGC’s expert report, which states that the isoconcentration line for chloride concentrations of 1,000 mg/L is “present at the top of the Pennsylvanian shale” across an area including Jasper County. IEPA Mot. at 13, *citing* Hahn Rpt. at 16. IEPA argues that a cross section in the report “shows that the line is some distance from the top” and that “both of the dots representing Jasper County are located *above* this line.” IEPA Mot. at 13 (emphasis in original), *citing* Hahn Rpt. at 17 (Figure 7). IEPA argues that concentrations measured there “are probably less than 1,000 mg/L” and that IPGC’s source “would be consistent with both Jasper County measurements being *below* the 270 mg/L measured at APW15.” *Id.* (emphasis in original).

In addition, IEPA argues that “this data is not site-specific” and does not show that specific concentrations exist near APW15. IEPA Mot. at 13. IEPA asserts that these data do not show that specific chloride concentrations “are more likely than not to exist at the top of the bedrock near APW15, or to have caused the contamination in that well.” *Id.* at 13-14. IEPA further asserts that the data “cannot rebut the site-specific information provided by the groundwater monitoring results for APW15.” *Id.* at 14. IEPA suggests that IPGC shows only that bedrock somewhere in Jasper County may contain elevated chloride concentrations. *Id.* IEPA argues that “the nonexistence of the fact to be inferred appears to be just as probable as its existence” and that IPGC’s position “cannot support an inference of causation.” *Id.*, citing Keating v. 68th & Paxton L.L.C., 401 Ill. App. 3d 456, 473 (2010). IEPA concludes that, even taking IPGC’s conclusion at face value, it “provides no non-speculative basis for attributing the chloride exceedance in APW15 to an alternative source.” IEPA Mot. at 14.

Hydraulic Gradients and Fractures. Second, IEPA notes the ASD’s conclusion that “[u]pward vertical hydraulic gradients and fractures near geologic features provide conduits for these chloride-rich water to migrate. The Clay City Anticline is present east of the PAP and a saline spring has been mapped adjacent to this anticline approximately 10 miles south of the PAP in Clay County.” IEPA Mot. at 14, citing R. at 1617.

IEPA responds that IPGC’s conclusion is based on two assertions, the first of which is the presence of an anticline somewhere to the east of the PAP. IEPA Mot. at 14. IEPA argues that IPGC has not asserted that the anticline is near the PAP and suggests that they may be 20 miles from one another. *Id.*, citing R. at 773. IEPA also argues that IPGC has not shown that there are cracks near APW15 through which brine could migrate or has migrated. *Id.* IEPA further argues that IPGC presents no “site-specific data to show that such cracks or upwelling, if they exist, are relevant to chloride levels at the Site.” *Id.* IEPA asserts that IPGC’s position is not sufficient to show that these potential cracks are the actual source of the chloride in APW 15. *Id.*

IEPA adds that IPGC’s position is based in part on the existence of a saline spring within 10 miles from the PAP. IEPA Mot. at 14. IEPA argues that this single distant spring does not demonstrate that “a similar upswelling of brine contributed to the chloride exceedance at the APW15 monitoring well.” IEPA Mot. at 15. IEPA suggests that, without evidence that upwelling occurs less than 10 miles from the PAP, it is not likely to be occurring beneath APW15. *Id.*

IEPA concludes that, even if construed in IPGC’s favor, IPGC’s position does not make it more likely that the chloride exceedance in APW 15 “is caused by the Clay City Anticline or by hypothetically cracked bedrock.” IEPA Mot. at 15.

Proximity to Bedrock. Third, IEPA notes the ASD’s conclusion that

[w]ell APW15 is located in close proximity to bedrock and screened at a lower elevation than other wells monitoring the UA [uppermost aquifer] which *could* explain why this is the only affected well. The screened interval is estimated to be 10 to 15 feet lower than the top of the bedrock in adjacent wells. The high hydraulic conductivity of the UA relative to the low hydraulic conductivity of the

underlying bedrock (Mehnert, *et al.*, 1990) at this location provides a *potential* pathway for interaction with upward-migrating chloride containing bedrock groundwater. IEPA Mot. at 16 (emphasis in original), *citing* R. at 1617.

IEPA also notes that, although the engineer certifying the ASD characterized the location of APW15 as a “potential” pathway, IPGC’s petition characterized it as likely:

the Newton ASD evaluated the site-specific groundwater and geologic data to note that the specific location of APQ15 made it *likely* that it would be impacted by chloride in the bedrock, explaining the otherwise anomalous fact that APW15 was the only monitoring well affected by a chloride exceedance. IEPA Mot. at 16 (emphasis in original), *citing* R. at 1983.

IEPA first suggests that the chloride exceedance at APW15 is not genuinely anomalous, as IPGC “has accepted the need for corrective action for a single-well exceedance for lithium at APW02.” IEPA Mot. at 16, *citing* R. at 1611. IEPA next argues that, because a layer of glacial till separates APW15 from bedrock, IPGC’s position requires “assuming without evidence not only that the vertical hydraulic gradient is reversed only at APW15, but *also* that the Lower Confining Unit is for some reason less effective at confining groundwater than the Upper Confining Unit.” IEPA Mot. at 16 (emphasis in original), *citing* R. at 776. Third, IEPA discounts IPGC’s argument about proximity to bedrock as “speculative, because no bedrock was detected in the APW15 boring and Petitioner’s submitted drawings portray at least 25 feet of till between the APW15 screen and bedrock.” IEPA Mot. at 16-17, *citing* R. at 776. IEPA concludes that, because the ASD’s third conclusion relies on a speculative pathway without specific evidence that it exists, “it cannot support an inference that an alternative source caused the groundwater exceedance in APW15.” IEPA Mot. at 17.

IEPA’s Summary. IEPA asserts that IPGC’s conclusions amount only to speculative possibilities for explaining an elevated chloride level at APW15. IEPA Mot. at 17. IEPA argues that “‘fictional musings about what might have happened’ are ‘unreliable and totally irrelevant’ even when mused by an expert.” *Id.*, *citing* Modelski v. Navistar Int’l. Transp. Corp., 302 Ill. App. 3d 879, 886 (1999). IEPA further argues that IPGC’s conclusions “do not even begin to rebut the presumption that the APW15 monitoring well did what Petitioner designed it to do: detect contamination coming from the Newton PAP.” IEPA Mot. at 17. IEPA concludes that, after drawing every reasonable inference in IPGC’s favor, the ASD does not demonstrate that “a source other than the CCR surface impoundment caused the contamination” in APW15. *Id.*, *citing* 35 Ill. Adm. Code 845.650(e). IEPA asserts that it correctly determined not to concur with the ASD. IEPA Mot. at 17.

IPGC Failed to Demonstrate that PAP Did Not Contribute to Contamination

IEPA cites the Board rule that the ASD must also demonstrate that “the CCR surface impoundment did not contribute to the contamination.” IEPA Mot. at 18, *citing* 35 Ill. Adm. Code 845.650(e). IEPA argues that the ASD must rebut the presumption that “[a]n exceedance of a groundwater protection standard, in a monitoring well designed and sited to detect contamination flowing from a CCR surface impoundment,” shows that the impoundment at least

contributed to the contamination even if it was not the only cause. IEPA Mot. at 18. IPGC offered three lines of evidence that the PAP did not contribute to chloride contamination in APW15, but IEPA argues that IPGC fails to show by a preponderance of the evidence that it meets this element of the demonstration. *Id.*

Existence of Complete Pathway. IEPA notes that IPGC’s first line of evidence is “[t]he PAP is separated from the UA [uppermost aquifer] at APW15 by a thick layer of low permeability glacial till (UCU) [upper confining unit].” IEPA Mot. at 18, *citing* R. at 1615. IEPA notes that this till is identified as the Vandalia Till Member of the Glasford Formation, which boring logs show extending 60 feet below the PAP. IEPA Mot. at 18, *citing* R. at 1613, 1627-32. IEPA first questions why IPGC “would build a monitoring well where no contamination from the PAP would ever reach it.” IEPA Mot. at 18. IEPA also questions “how thick or permeable that clay layer might be in other parts of the PAP, or whether there might be joints or sand lenses through which contaminants could travel from the PAP to APW15.” *Id.* at 19. IEPA notes that IPGC’s application for an operating permit describes this layer as “[s]andy/silty till with thin discontinuous lenses of silt, sand, and gravel.” *Id.*, *citing* R. at 712. IEPA concludes that this first line of evidence “provides no basis for assuming that leachate from the PAP could not reach APW15, and therefore does not support Petitioner’s conclusion that the PAP did not contribute to the contamination in APW15.” IEPA Mot. at 19.

CCR Indicators. IEPA notes that IPGC’s second line of evidence is that “[c]oncentrations of primary CCR indicators in APW15 do not exceed background limits and are not increasing.” IEPA Mot. at 19, *citing* R. at 1615. IEPA also notes IPGC’s position that

[b]oron and sulfate can be indicators of CCR impacts to groundwater due to their leachability from CCR and mobility in groundwater. Porewater in the NPP [Newton Power Plant] PAP is elevated in both boron and sulfate, indicating that these parameters are site-specific key indicators for CCR. If the groundwater in APW15 had been impacted by CCR from the unit, boron and sulfate concentrations would be expected to be elevated above their respective Upper Tolerance Limits (UTLs).

Mann-Kendall (M-K) trend analysis tests were performed to determine whether there are trends in the boron and sulfate concentrations in each well. If groundwater downgradient of the PAP was being affected by CCR but boron and sulfate did not yet exceed background concentrations, boron and sulfate concentrations would be expected to be increasing. No trends in boron or sulfate concentrations were identified by the M-K tests in compliance well APW15. IEPA Mot. at 19-20, *citing* R. at 1615.

IEPA counters that IPGC has not asserted that “that chloride is always less mobile in groundwater than boron or sulfate, or that CCR leachate invariably contains elevated concentrations of boron and sulfate.” IEPA Mot. at 20. Because boron and sulfate have higher mobilities than chloride, IEPA surmises that after many years of the PAP’s existence, chloride originating from it “might separate from the boron and sulfate simply by virtue of being less mobile.” *Id.* In addition, IEPA argues that considering boron and sulfate as site-specific

indicators of CCR “relies on porewater samples from one corner of the PAP,” which may not be representative of the entire PAP. *Id.* IEPA concludes that the lack of an upward trend in concentrations of boron and sulfate at APW15 provides no reason to infer that the PAP did not contribute to the chloride exceedance there. *Id.* IEPA adds that, even after drawing every reasonable inference in favor of IPGC, this second line of evidence fails to make the required demonstration. *Id.*

Porewater Concentrations. IEPA notes that IPGC’s third line of evidence is that “[c]oncentrations of chloride at APW15 are greater than source concentrations.” IEPA Mot. at 20, *citing* R. at 1616. IPGC compares composite results of sampling porewater at locations XPW01, XPW02, XPW03, and XPW04 within the PAP. *Id.*

IEPA asserts that “[w]aste characterization requires an analysis of the chemical constituents found within the CCR, an analysis of the CCR itself, as well as all waste streams or additive entering the surface impoundment.” IEPA Mot. at 22, *citing* 35 Ill. Adm. Code 845.230(a)(16), 845.230(d)(2)(B), 845.230(d)(2)(C). IEPA argues that Part 845 neither defines nor regulates porewater and does not mention it “in the context of groundwater monitoring or waste characterization.” IEPA Mot. at 23. IEPA further argues that “[p]orewater data alone cannot characterize the CCR or non-CCR waste streams at the PAP” and “would not accurately show” whether a CCR waste stream causes or contributes to contamination. *Id.* IEPA adds that, although IPGC cites federal documents supporting the use of porewater measurements, “the federal CCR rule is risk-based and therefore relies on risk modeling. In contrast, the portions of Part 845 that are relevant here are not risk-based, but apply the strict numerical groundwater protection standards listed in 35 Ill. Adm. Code 845.600.” *Id.*, n.7.

IEPA acknowledges that IPGC’s reported porewater concentrations “are, indeed, much lower than the groundwater concentrations measured in APQ15.” IEPA Mot. at 20; *see* R. at 1616. However, IEPA asserts that IPGC has not provided information providing an informed comparison between them. IEPA Mot. at 20-21. It argues that the ASD does not analyze “possible chemical differences that might affect solubility” or “possible pH variations over time and space.” *Id.* at 21. IEPA cites the observation by IPGC’s expert that “[d]istinctive patterns in leaching behavior have been identified over a range of pH values that would plausibly be encountered for CCR management.” *Id.*, *citing* Hahn Rpt. at 8.

IEPA further asserts that the ASD does not show that IPGC obtained porewater and groundwater results through techniques that can be compared with one another. IEPA Mot. at 21. IEPA argues that porewater results do not document “the sampling techniques used, chain of custody, or extraction techniques.” *Id.* It adds that, although IPGC’s August 1, 2024 expert report attached this information, it “was not part of the record before the Agency.” *Id.*, n.5.

IEPA argues that, even if it could have meaningfully compared these porewater and groundwater results, IPGC’s third line of evidence “falls short.” IEPA Mot. at 21. IEPA notes that the PAP has a surface area of more than 400 acres and contains various wastes deposited over more than 40 years. *Id.* IEPA stresses that porewater samples were drawn from the north end of the PAP, while APW15 is near its south end. *Id.* IEPA questions whether this small number of geographically concentrated wells is representative of the entire PAP. *Id.*

IEPA further argues that, even if IPGC had provided sufficient information to use porewater results to analyze groundwater, it still would not have concurred because IPGC “failed to adequately document or source its findings.” IEPA Mot. at 23. IEPA asserts that IPGC submitted its ASD without information required by SW-846. *Id.* IEPA states that SW-846 “provides three methods for extracting porewater from a solid sample,” “a method for collecting porewater samples,” and methods to analyze samples. *Id.* at 23-24, *citing* R. at 33-62, 64-100, 102-21, 1560-1604. IEPA argues that IPGC appears not to have used any of these methods and the ASD did not document sampling. IEPA Mot. at 24. IEPA acknowledges that IPGC included some of this information with its expert’s report on August 1, 2024, but it was not included in the ASD and was not before IEPA when it issued its non-concurrence. *Id.* at 23, n.7, *citing* R. at 1898-1901, 1929.

IEPA also cites the Hydrogeologic Site Report submitted with IPGC’s permit applications. IEPA notes that porewater wells in the north end of the PAP “were on much higher ground” and “the lower-lying parts of the PAP are likely to contain older and potentially distinct waste streams.” *Id.* at 21-22, *citing* R. at 778. IEPA adds that “rainwater percolating downward through the ash would tend to percolate toward the lower, southern area of the PAP.” IEPA Mot. at 22. IEPA also notes IPGC’s expert, who recognized that “research on CCRs has shown that ‘[t]here is great variability in both the range of total constituent concentration values and in leaching values (orders of magnitude).’” *Id.*, *citing* Hahn Rpt. at 8. IEPA discounts that expert’s position that porewater data represent “the range of leachate quality potentially leaving the PAP.” IEPA Mot. at 22. IEPA concludes that the ASD provides no reason to assume that porewater results obtained at the northern edge of the PAP reflect concentrations near APW15. *Id.* IEPA asserts that IPGC’s third line of evidence does not persuasively support the “conclusion that the PAP did not contribute to the contamination in APW15.” *Id.*

IEPA’s Summary

IEPA argues that, even if these three lines of evidence are considered together, they “cannot rebut the presumption that when contamination is detected in a monitoring well that was set up to detect contamination leaking from the PAP, the PAP is likely to be at least a contributing source of that contamination.” IEPA Mot. at 24. IEPA therefore asserts that the ASD failed to demonstrate that the PAP did not contribute to the contamination. *Id.*, *citing* 35 Ill. Adm. Code 845.650(e). IEPA concludes that it correctly determined not to concur with the ASD and is entitled to summary judgment in its favor. IEPA Mot. at 25.

IEPA Grounds for Rejecting ASD

IEPA argues that it can concur in an ASD only if it is “satisfied that no critical piece of data is missing from the evidence submitted.” IEPA Mot. at 25. IEPA further argues that it identified three “data gaps” on which IPGC “failed to provide sufficient evidence to demonstrate that the Newton PAP did not contribute to the chloride exceedance in APW15.” *Id.* IEPA asserts that each of these three is sufficient for it to determine not to concur in the ASD. *Id.*

IEPA notes IPGC's position that "Part 845 would be impossible for owners and operators to comply with if the Agency has significant internal data requirements that are not spelled out in the rule." IEPA Mot. at 25, *citing* Hahn Rpt. at 18, n.56. IEPA dismisses this position, arguing that the ASD "failed because it fell short of satisfying the elements of an ASD under 35 Ill. Adm. Code 845.650(e)." IEPA Mot. at 25. IEPA asserts that its nonconurrence merely describes ways in which the ASD fell short of these requirements. *Id.*

In the following subsection, the Board summarizes IEPA's position that its data gaps are justified.

Source Characterization Methods

As its first data gap, IEPA listed that the "[s]ource characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with SW-846." IEPA Mot. at 26, *citing* R. at 1965. IEPA argues that it is necessary to characterize the CCR in the PAP "to demonstrate that that the PAP did not contribute to the chloride contamination in APW15." IEPA Mot. at 26, *citing* 35 Ill. Adm. Code 845.650(e). IEPA asserts that this evidence "must use methods that are consistent and comparable with groundwater sampling and analysis." IEPA Mot. at 26. IEPA argues that Part 845 governs groundwater methods through SW-846. *Id.*, *citing* 35 Ill. Adm. Code 845.640(j). IEPA concludes that IPGC did not provide complete data, and it did not have information it needed to concur in the ASD. IEPA Mot. at 26.

IEPA notes IPGC's position that SW-846 does not apply to ASDs. IEPA Mot. at 26. IPGC asserted that the only substantive requirement to conduct analysis using SW-846 is 35 Ill. Adm. Code 845.640(e), "which applies to analyzing groundwater samples under a groundwater monitoring program and is not at issue here." *Id.*, *citing* R. at 1980. IEPA counters that, under 35 Ill. Adm. Code 845.640(j), SW-846 applies to "[a]ll groundwater samples taken under this Subpart," which includes 35 Ill. Adm. Code 845.640 and 845.650. IEPA Mot. at 26. IEPA asserts that IPGC had to analyze all sampling conducted for the ASD under SW-846, "and any analysis conducted by other methods was unusable in Agency determinations." IEPA Mot. at 26.

IEPA asserts that, under SW-846, representativeness is a mandatory indicator of data quality. IEPA Mot. at 27, *citing* R. at 2225. SW-846 defines representativeness as "a measure of the degree to which data accurately represent a characteristic of a population, a parameter variation at a sampling point, a process condition, or an environmental condition." *Id.* IEPA argues that sampling performed under SW-846 "must be site-specific and include assurances that the data accurately represent the CCR in question." IEPA Mot. at 27, *citing* 35 Ill. Adm. Code 845.230(a)(16), 845.230(d)(2)(C). IEPA further argues that, without a representative waste characterization, it would not be able to evaluate whether the PAP contributed to the chloride exceedance at APW15. IEPA Mot. at 27. IEPA asserts that, because IPGC did not conduct a representative waste characterization, it reasonably declined to concur in the ASD. *Id.*

IEPA also discounts IPGC's argument that SW-846 methods are not mandatory. IEPA Mot. at 27, *citing* R. at 1980; Pet. at 10-11 (¶34). IEPA asserts that it is not mandatory in response to federal testing requirements. IEPA Mot. at 26, *citing* R. at 2247. IEPA argues that

the PAP is subject to state requirements that “specifically require the use of SW-846 in relation to groundwater samples.” IEPA Mot. at 26, *citing* 35 Ill. Adm. Code 845.640(j).

IEPA also discounts IPGC’s position that its ASD used methodology that “included a direct analysis of porewater to determine what constituents are actually leaching from the PAP.” IEPA Mot. at 27-28, *citing* R. at 1981. IEPA argues that it “must weigh the possibility that the CCR in the Newton PAP *could* release higher levels of chloride than observed to date in the four porewater wells clustered at one end of the PAP” and require IPGC to show that “that the putative alternative source is *actually* and not just potentially responsible.” IEPA Mot. at 28 (emphases in original), *citing* 415 ILCS 5/22.59(a) (2024). IEPA asserts that IPGC did not present sufficient evidence on these points, and it concludes that it “reasonably declined to concur in an ASD submittal that did not include total solids sampling of CCR in accordance with SW-846.” IEPA Mot. at 27.

Hydraulic Characterization and Hydraulic Conductivity

As a second data gap, IEPA listed that “[h]ydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and presented with hydrogeologic characterization of bedrock unit.” IEPA Mot. at 28, *citing* R. at 1965. IEPA argues that it is reasonable to require this from IPGC because its first line of evidence is that “the PAP is separated from the UA at APW15 by a thick layer of low permeability glacial till.” IEPA Mot. at 28, *citing* R. at 1615. IEPA further argues that IPGC’s data supporting bedrock groundwater as the source of chloride are based on hydraulic conductivity. IEPA Mot. at 28-29, *citing* R. at 1617. IEPA asserts that, without hydrogeologic characterization and hydraulic conductivity of the bedrock, it could not concur in the ASD. IEPA Mot. at 29.

IEPA discounts IPGC’s position that “[c]ollecting and analyzing hydraulic conductivity data with a hydrogeologic characterization of the bedrock unit or conducting groundwater sampling and analysis of the bedrock would not change the conclusion of the Newton ASD.” IEPA Mot. at 29, *citing* R. at 1983. IEPA acknowledges that “[t]his would be true if the data support the ASD,” but it suggests that it cannot accept this position without that data. IEPA Mot. at 29.

IEPA argues that 35 Ill. Adm. Code 845.650(e) presumes that IEPA decides whether to concur in an ASD “with reference to comprehensive information that other provisions of Part 845 require the owners of CCR surface impoundments to collect.” IEPA Mot. at 29, *citing* OSFM v. PCB, 2011 IL App (1st) 210507, ¶34. IEPA further argues that the information in the second data gap “is information that all owner or operators of CCR surface impoundments are required to collect at some point.” IEPA Mot. at 29-30, *citing* 35 Ill. Adm. Code 845.610(b)(1)(A), 845.620, 845.630.

IEPA states that IPGC “submitted a proposed hydrogeologic site characterization and groundwater monitoring system as part of its operating permit application.” IEPA Mot. at 30, *citing* R. at 564-1587. IEPA argues that IPGC’s positions in the ASD suggest that its monitoring wells are inadequate in at least two respects: “that APW15 is so poorly placed that it can never receive contamination from the PAP and was therefore incorrectly characterized as downgradient

from the PAP, and that APW15 is also somehow the only well to accurately reflect the local background concentration of chloride.” IEPA Mot. at 30. IEPA asserts that, because IPGC’s arguments cast doubt on its hydrogeologic data, it correctly requested additional data. *Id.*

IEPA discounts IPGC’s position that IEPA’s request for characterization of the bedrock is unfounded. IEPA Mot. at 30, *citing* R. at 1984. IEPA notes that Board rules require a petitioner to provide “information requested by the Agency that is relevant to the hydrogeologic site characterization.” IEPA Mot. at 30, *citing* 35 Ill. Adm. Code 845.620(b)(18). IEPA asserts that these characterizations, “including conductivity data, are a standard part of the initial operating permit application that all similarly situated owners and operators must submit for an existing CCR impoundment.” IEPA Mot. at 30, *citing* 35 Ill. Adm. Code 845.610(b)(1)(A).

IEPA argues that IPGC’s permit application and ASD lack “site-specific bedrock information characterized for fracture flow, *i.e.* hydraulic conductivity,” and the PAP “does not have any wells screened within the bedrock confining unit.” IEPA Mot. at 31, *citing* R. at 720. Although IEPA acknowledges that IPGC in 2021 drilled wells, including APW15, to meet the requirements on 35 Ill. Adm. Code 845, it asserts that “no field or laboratory tests of bedrock hydraulic conductivity were performed at that time.” IEPA Mot. at 31, *citing* R. at 722-23. IEPA adds that “[n]o bedrock samples were collected for geotechnical testing or chemical analysis.” IEPA Mot. at 31, *citing* R. at 718. IEPA argues that Board rules require validating “site-specific geology to a minimum depth of 100 feet, ‘including lithology and stratigraphy’ and ‘chemical and physical properties of the geologic layers.’” IEPA Mot. at 31, *citing* 35 Ill. Adm. Code 845.620(b)(13), (18). IEPA argues that IPGC opted not to collect this information that might have supported its position on bedrock chloride. Without that information, IEPA concluded that it could not concur in the ASD. IEPA Mot. at 31.

IEPA acknowledges that IPGC’s comment letter submitted additional information after the 60-day deadline set in Board rules. IEPA Mot. at 31, *citing* 35 Ill. Adm. Code 845.650(e). IEPA argues that – even if it considered that information – it did not provide further characterization of the bedrock unit, “leaving out information that would have been critical to the issuance of a concurrence.” IEPA Mot. at 31, *citing* R. at 1787, 2015.

IEPA concluded that it reasonably declined to concur in the ASD because IPGC did not timely provide “adequate characterization for both hydraulic conductivity and a bedrock source for the chloride contaminations” as required by Board rules. IEPA Mot. at 31, *citing* 35 Ill. Adm. Code 845.650(e).

Characterization of Alternate Source

As a third data gap, IEPA listed that “[c]haracterization to include sample and analysis in accordance with 35 Ill. Adm. Code 845.640 must be provided with ASD.” IEPA Mot. at 32, *citing* R. at 1965.

IEPA asserts that supporting bedrock chloride as the source of contamination in APW15 requires both showing “that the source exists and that it has the properties that Petitioner claims.” IEPA Mot. at 32. It further asserts that, to show these, IPGC was required to document the

groundwater monitoring program under 35 Ill. Adm. Code 845.640. *Id.* IEPA argues that IPGC failed to provide that documentation and “did not provide any site-specific documentation showing the existence of the alternative source at all.” *Id.* IEPA asserts that IPGC’s failure to provide that documentation casts doubt on “whether its data was consistent, complete, or accurate.” *Id.* at 33.

IEPA discounts IPGC’s position that there is no “requirement to conduct groundwater monitoring of an alternative source in accordance with Section 845.640 as part of an ASD.” IEPA Mot. at 32, *citing* Pet. at 12 (¶39); R. at 1982. IEPA argues that “it is difficult to imagine how Petitioner could show that a specific alternative source is responsible for the contamination without characterizing that source.” IEPA Mot. at 33. Without that documentation, IEPA concludes that it “reasonably declined to concur in an ASD that did not adequately characterize the alternative source.” *Id.*

IPGC’s Arguments on Data Gaps

IEPA asserts that IPGC’s ASD submitted on October 6, 2023, was required to include “the factual or evidentiary basis for any conclusions.” IEPA Mot. at 33, *citing* 35 Ill. Adm. Code 845.650(e); R. at 1979. IEPA discounts IPGC’s position that the data gaps in the non-concurrence letter are similar to points raised in IPGC’s comment submitted on November 3, 2023. IEPA Mot. at 33, *citing* R. at 1979. IEPA argues that IPGC’s comment was untimely and failed to address those data gaps. IEPA Mot. at 33.

IEPA states that the Board’s rules establish an ASD procedure with a quick series of deadlines, including a deadline for submitting public comments. IEPA Mot. at 33-34, *citing* 35 Ill. Adm. Code 845.650(e). IEPA argues that, if an owner or operator used public comments to supplement a proposed ASD, it would effectively supersede its original submission and other comments. IEPA Mot. at 34. IEPA asserts that this would thwart legislative intent to ensure meaningful public participation and would also limit IEPA’s review under the deadlines in the Board’s rules. *Id.*, *citing* 415 ILCS 5/22.59(a)(5) (2024). IEPA further asserts that its review of the submitted ASD was limited to the original October 6, 2023 submission and that the Board’s rules limit IEPA’s review to the information in that submission. IEPA Mot. at 34-35, *citing* 35 Ill. Adm. Code 105.412 (Board Hearing). IEPA concludes that IPGC’s comment supplementing its submitted ASD was not proper and that the Board should give it no weight. IEPA Mot. at 34.

IEPA disputes IPGC’s position that it is not required to submit additional information and that “[t]he information would not lead to a different result.” IEPA Mot. at 35, *citing* Pet. at 9 (¶ 32); R. at 1979. Describing this position as tautological, IEPA argues that it shows only that the ASD “would have been sufficient if it was sufficient.” IEPA Mot. at 35. IEPA argues that IPGC did not submit information on its lines of evidence before the applicable deadline and left data gaps in the record. *Id.* IEPA states that it therefore “cannot know whether additional information would have fixed the ASD submittal’s insufficiencies.” *Id.* IEPA concludes that these gaps left it “no choice but to issue a nonconcurrence.” *Id.*

IEPA’s Policy Considerations

In addition to its arguments based on the ASD submitted by IPGC, IEPA argues that its nonconcurrency is also supported by considerations of policy, which the Board reviews in the following subsections.

Legislative and Regulatory Background

IEPA notes that Section 22.59 of the Act includes a legislative finding that “CCR generated by the electric generating industry has caused groundwater contamination and other forms of pollution at active and inactive plants throughout the State.” IEPA Mot. at 36, *citing* 415 ILCS 5/22.59(a) (2024). It also notes that Section 22.59 includes the purpose of promoting “a healthful environment, including clean water, air, and land, meaningful public involvement, and the responsible disposal and storage of coal combustion residuals, so as to protect public health and to prevent pollution of the environment of this State.” *Id.* Section 22.59 also includes the direction that it “shall be liberally construed to carry out the purposes of this Section.” *Id.*

IEPA stresses that the General Assembly in Section 22.59 directed the Board to adopt rules that, at a minimum, “describe the process and standards for *identifying a specific alternative source* of groundwater pollution when the owner or operator of the CCR surface impoundment believes that groundwater contamination on the site is not from the CCR surface impoundment.” IEPA Mot. at 36 (emphasis in original), *citing* 415 ILCS 5/22.59(g)(1) (2024). IEPA argues that “[a]ny interpretation of [35 Ill. Adm. Code] 845.650(e) that presumes that the Board flouted its statutory mandate, or that a regulation and statute governing the same subject matter should be given opposite interpretations, would be highly questionable.” IEPA Mot. at 36. IEPA asserts that it was justified to require IPGC to identify missing data “to show that a specific alternative source was responsible for the contamination” at APW15. *Id.*

IEPA argues that the process of adopting 35 Ill. Adm. Code 845 also supports its position. It cites the Board’s statement that an ASD “is not a mandatory step upon confirming a groundwater exceedance but rather an exception for which the owner or operator might qualify.” IEPA Mot. at 36-37, *citing* Standard for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 81 (Feb. 4, 2021). IEPA disputes IPGC’s position that its interpretation renders the rule meaningless. It argues that “an optional exception for which an owner/operator *might* qualify is not ‘meaningless’ simply because Petitioner does not qualify for it.” IEPA Mot. at 37; *see* R. at 1985. IEPA asserts that it was correct to require IPGC to show that it qualified for ASD. *Id.*

Federal CCR Rules

IEPA asserts that the Act requires the Board to adopt CCR rules “at least as protective and comprehensive” as the federal rules. IEPA Mot. at 37, *citing* 415 ILCS 5/22.59(g)(1) (2024). IEPA argues that the burden of proof on an ASD submission must be “at least as heavy” as under the federal rules. IEPA Mot. at 37.

IEPA asserts that the United States Environmental Protection Agency (USEPA) in 2022 issued its first and only decision on an ASD under the federal rules. IEPA Mot. at 37, *citing* Denial of Alternative Closure Deadline for James M. Gavin Plant, EPA-HQ-OLEM-2021-0590-

0100 (Nov. 21, 2022), *aff'd sub nom. Elec. Energy, Inc. v. EPA*, 106 F.4th 31 (D.C. Cir. 2024). IEPA cites USEPA's explanation that

[a] successful ASD must be sufficient to rebut the presumption that the CCR unit is the source of the SSI [statistically significant increase] in a downgradient well of a properly designed groundwater monitoring network by demonstrating that a source other than the CCR unit is responsible for the SSI. An ASD requires conclusions that are supported by site-specific facts and analytical data in order to rebut the site-specific monitoring data and analysis that resulted in an SSI. Speculative or theoretical bases for the conclusions are insufficient. IEPA Mot. at 37-38, *citing Denial of Alternative Closure Deadline for James M. Gavin Plant*, EPA-HQ-OLEM-2021-0590-0100 (Nov. 21, 2022) at 48-49.

In Gavin, IEPA asserts that USEPA rejected a claim that exceedances of contaminants including chloride resulted from bedrock concentrations of those contaminants because the owner had not submitted site-specific data showing discharges from bedrock. IEPA Mot. at 38, *citing Elec. Energy, Inc.* 106 F.4th at 59. IEPA argues that IPGC in this case similarly “provided no site-specific data to substantiate the existence of bedrock discharges of chloride, and did not analyze any samples of the bedrock.” IEPA Mot. at 38. IEPA asserts that, under Gavin, the federal CCR rules require an ASD to provide “site-specific, *non-speculative* support.” *Id.* (emphasis in original). IEPA concludes that interpreting the Board's rules to “impose a lower proof requirement under the Illinois rule than the federal one risks falling short of the Board's statutory mandate.” *Id.*

Regulatory Interpretation

IEPA asserts that an ASD must show “(1) that an identified alternative source caused the contamination, and (2) that the impoundment did not contribute to the contamination.” IEPA Mot. at 39, *citing* 35 Ill. Adm. Code 845.650(e). IEPA cites IPGC's position that requiring both elements is “arbitrary and capricious and also ignores reality.” IEPA Mot. at 39, *citing* Pet. at 15 (¶47); R. at 1985. IEPA also notes IPGC's position that this requirement “make[s] the entire ASD provision meaningless, as it would be impossible for any owner or operator to submit a sufficient ASD.” IEPA Mot. at 39, *citing* Pet. at 15 (¶47); R. at 1985.

IEPA characterizes IPGC's interpretation as requiring that it “only needs to show that its impoundment did not cause or contribute to the contamination, and is not required to identify an alternative source.” IEPA Mot. at 39, *citing* Pet Exh. C at 10; Pet Exh. D at 10; R. at 2034, 2202. IEPA first argues that this interpretation “ignores the rule's plain language.” IEPA Mot. at 39. Second, IEPA argues that IPGC collapses the two elements of the rule and renders one element meaningless. *Id.*

IEPA questions IPGC's position that “there is no ‘scientific basis’ for considering Section 845.650(e) to require two elements rather than just one.” IEPA Mot. at 40, *citing* Hahn Rpt. at 11. IEPA acknowledges that the two elements could conceivably be redundant if an ASD demonstrated to a 100% certainty that an impoundment did not cause or contribute to contamination. However, IEPA asserts that such a demonstration is “virtually impossible” to

make. IEPA Mot. at 40. IEPA adds that the burden of proving both elements ensures that the rule protects public health and the environment. *Id.*, *citing* 415 ILCS 5/22.59(a) (2024).

IEPA also questions IPGC’s arguments that financial burdens of supporting an ASD make the rule unreasonably burdensome. IEPA Mot. at 40-41, *citing* Pet. Exh E (Vodopivec affidavit); R. at 2213-14. IEPA suggests that, even if the Board accepted this argument, it does not mean that the rule ignores reality. IEPA Mot. at 41, *citing* Pet at 15 (¶48); R. at 1985. IEPA cites the Board to argue that an ASD is “a limited exception for which some owners or operators may qualify.” IEPA Mot. at 41, *citing* Standard for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 81 (Feb. 4, 2021).

Summary

IEPA argues that IPGC cannot meet its burden of proof because it did not specify a specific alternative source of the chloride contamination at APW15 and did not demonstrate that the PAP did not contribute to that contamination. IEPA Mot. at 41. IEPA concludes that it correctly identified gaps in the ASD and correctly declined to concur in it. IEPA requests that the Board enter an order granting it summary judgment. *Id.* at 42.

IPGC Response

IPGC asserts that IEPA filed what is “a summary judgment motion in name only.” IPGC Resp. at 1. IPGC further asserts that the motion “presents new facts and opinion,” improperly expands the scope of its non-concurrence, and “misrepresents or misconstrues scientific principles and evidence.” *Id.* IPGC argues that the Board must deny IEPA’s motion because it “is based on disputed material facts that the Board must weigh at hearing.” *Id.*; *see id.* at 44.

In the following subsections, the Board summarizes IPGC’s response to IEPA’s motion for summary judgment.

Requirement to Identify Alternative Source

IPGC notes IEPA’s position that the Act requires that the Board establish rules describing “the process and standards for identifying a specific alternative source of groundwater pollution when the owner or operator of the CCR surface impoundment believes that groundwater contamination on the site is not from the CCR surface impoundment.” IPGC Resp. at 8, *citing* 415 ILCS 5/22.59(g)(11) (2024). IPGC argues that the Board rule adopted under that authority does not use the term “specific” and provides that an owner or operator “submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination.” IPGC Resp. at 8-9, *citing* 35 Ill. Adm. Code 845.650(e).

IPGC refers to the testimony of a participant in the proceedings that adopted 35 Ill. Adm. Code 845. That participant proposed to modify ASD requirements “to require an affirmative demonstration of the location of the alternative source and the extent of the source’s impact to

water quality.” IPGC Resp. at 9, *citing* Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R 20-19, slip op. at 16-18 (Aug. 27, 2020) (testimony of Mark Hutson). From that rulemaking docket, IPGC cites IEPA’s post-hearing brief, which opposed this proposal to have “the ASD specifically identify any alternate source and its impact on groundwater.” IPGC Resp. at 9, *citing* Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R 20-19, slip op. at 12 (Oct. 20, 2020) (Public Comment 120). IPGC states that the Board did not revise the ASD provision with the proposed amendment. IPGC Resp. at 9.

IPGC argues that, if the Board’s rule is interpreted to require that an ASD identify an alternative source, “it provides no specification regarding the degree of specificity or what evidence must be included in support of that demonstration.” IPGC Resp. at 9. It further argues that the Board provided no standards for providing the location of that alternative source, for identifying that source with specificity, or for any kind of sampling or analysis to support the demonstration. *Id.* at 10., *citing* 35 Ill. Adm. Code 845.650(e). IPGC asserts that a court “may not add provisions to a statute nor read any conditions not expressed in the language.” IPGC Resp. at 9, *citing* Walker v. Dart, 2015 IL App (1st) 140087, ¶51. IPGC adds that 35 Ill. Adm. Code 845 governs CCR surface impoundments and argues that processes and standards for alternative sources are addressed under the Board’s authority in unspecified other programs. IPGC Resp. at 10. IPGC asserts that the Board’s ASD provision provides “discretion to the qualified professional compiling the alternative source demonstration to exercise judgment in determining what facts and evidence to consider when reaching a determination.” *Id.*

Whether IEPA’s Motion Expands Scope of its Non-Concurrence

Section IV.A of IEPA’s motion for summary judgment argues that IPGC’s ASD is inadequate on its face. IEPA Mot. at 10-25. IPGC asserts that this section “is largely an attempt by IEPA to rewrite its Denial.” IPGC Resp. at 11. IPGC argues that IEPA raises additional bases for its non-concurrence by questioning for the first time specific evidence in the ASD. *Id.* at 10. IPGC argues that, because IEPA’s non-concurrence letter frames the scope of the appeal, raising additional bases for the non-concurrence “is unfair to IPGC and contrary to Board precedent.” *Id.* at 10, 11, *citing* Pulitzer Cmty. Newspapers v. IEPA, PCB 90-142, slip op. at 6 (Dec. 20, 1990). IPGC asserts that, if these “new reasons for nonconcurrency are properly before the Board,” each raises “a question of fact inappropriately raised at this stage of the case.” IPGC Resp. at 15.

IPGC states that IEPA did not concur in its ASD based on three data gaps. IPGC Resp. at 12, *citing* R. at 1965. IPGC argues that, other than suggesting that the ASD was incomplete without those data, IEPA’s non-concurrence “does not discuss any of the facts or evidence presented in the ASD.” IPGC Resp. at 13. IPGC further argues that, other than referring to 35 Ill. Adm. Code 845.640 in Data Gap 3, IEPA cites no statutory or regulatory provision violated by the ASD. *Id.*

IPGC argues that Section IV.A of IEPA’s motion for summary judgment for the first time asserts that non-concurrence is based on disagreements with evidence presented in the ASD. IPGC Resp. at 13. IPGC further argues that IEPA presents no evidence that it considered the

analysis in Section IV.A of its motion when it issued its non-concurrence. *Id.* IPGC asserts that “it is clear IEPA is conducting an after-the-fact analysis of the information in IPGC’s ASD in an attempt to bolster and expand the reasons for its denial.” *Id.*

IPGC argues that IEPA’s motion disputes for the first time its reliance on two studies and a document cited in its ASD. IPGC Repls. at 31, *citing* IEPA Mot. at 12-17. IPGC argues that, although IEPA did not include those materials in its record, it addresses them in its motion. IPGC Resp. at 13. IPGC further argues that two IEPA employees who reviewed the ASD “admitted at deposition that they had never reviewed these documents in connection with IPGC’s ASD.” *Id.*, *citing* Hahn Rpt., Document 3 (Hunt deposition), Document 4 (Mullenax deposition); *see* IPGC Resp., Exh. C (excerpts). IPGC further argues that “IEPA now asserts that these documents do not support the conclusions drawn from them in the ASD.” IPGC Resp. at 14.

IPGC also argues that IEPA’s motion for the first time disputes its conclusions in the ASD. IPGC Resp. at 14, *citing* IEPA Mot. at 18-24. Additionally, IPGC argues that IEPA’s motion for the first time asserts that it should have considered leach testing data. IPGC Resp. at 14. Although IPGC states that IEPA witnesses raised some of these issues in depositions, IPGC suggests that this does not make these issues valid bases for non-concurrence. *Id.* n.9. Although IPGC acknowledges that “the scope of the evidence in the ASD may be relevant” with regard to whether the data gaps are appropriate grounds for non-concurrence, IPGC argues that that “is not the same as identifying additional reasons for not concurring with the ASD, as IEPA does here.” *Id.*, n.10. IPGC concludes that, if IEPA disagreed with any aspect of its ASD, “it should have included those among the reasons for nonconcurrence.” *Id.* It adds that the reasons in Section IV.A of IEPA’s motion cannot be the bases for its non-concurrence. IPGC Resp. at 15.

Data Gaps as Issues of Fact

IPGC asserts that IEPA’s arguments that the ASD is inadequate on its face and that it correctly declined to concur based on the identified data gaps “are issues of fact that are inappropriate for summary judgment.” IPGC Resp. at 11; *see id.* at 15. IPGC suggests that IEPA’s motion for the first time attempts to challenge evidence in the ASD. *See id.* at 11. IPGC argues that IEPA does so “largely through arguments based on a flawed scientific understanding of the facts” and “by expounding unsupported opinions and assertions.” *Id.* IPGC argues that IEPA’s positions at most “amount to differing expert opinions regarding the facts and evidence in IPGC’s ASD and what those facts and evidence demonstrate.” *Id.* IPGC concludes that these are fact questions for the Board to decide after a hearing and inappropriate to decide as a matter for summary judgment. *Id.* at 11, 15.

Differences of Professional Judgments and Opinions Are Issues of Material Fact.

IPGC asserts that, when deciding a motion for summary judgment, “the pleadings, depositions, admissions, and affidavits on file must be construed against the movant and in favor of the opponent of the motion.” IPGC Resp. at 15-16, *citing* Brill v. Latoria, PCB 00-219, slip op. at 2 (Nov. 2, 2000). IPGC further asserts that “[c]onflicting expert opinions demonstrate that factual issues exist.” IPGC Resp. at 16, *citing* Rock v. Pickelman, 214 Ill. App. 3d 368, 377 (1991); Nicholas v. City of Alton, 107 Ill. App. 3d 404, 408 (1982); Sierra Club, et al v. Midwest

Generation, PCB 13-15, slip op. at 5 (Jan. 19, 2017). IPGC argues that “IEPA’s entire argument that the ASD is deficient is based on opinions that differ from those of IPGC’s Qualified Professional Engineer and Geologist (“QPEs”) and expert”. IPGC Resp. at 15. IPGC asserts that “it is well established that the trier of fact considers the weight to be given to conflicting expert opinions.” *Id.* at 16 (citations omitted). IPGC concludes that IEPA’s motion is inappropriate for decision as a matter of summary judgment. *Id.* at 15. IPGC adds that the “competing expert opinion or conclusions are not ripe for resolution during summary judgment and must be weighed by the Board at hearing.” *Id.* at 16.

IPGC argues that, instead of prescribing specific information that must be submitted with an ASD, the Board’s rules require that the owner or operator “submit a demonstration to the Agency that a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination.” IPGC Resp. at 16, *citing* 35 Ill. Adm. Code 845.650(e). The owner or operator must provide the “factual or evidentiary basis for any conclusions” and “a certification of accuracy by a qualified professional engineer.” *Id.* IPGC argues that the Board’s rules “contemplate that a qualified professional engineer will make judgments regarding what evidence to collect and consider for an alternative source demonstration, what methodology to apply in conducting an alternative source demonstration, and how that evidence and methodology supports (or does not support) an alternative source demonstration.” IPGC Resp. at 16-17. IPGC concludes that reading additional requirements into an ASD “would be contrary to the rules of statutory and regulatory interpretation.” *Id.* at 16, *citing* Walker v. Dart, 2015 IL App (1st) 140087, ¶51.

IPGC notes that its expert, Dr. Melinda Hahn, characterizes ASDs as requiring a form of environmental forensic analysis. IPGC Resp. at 17, *citing* Hahn Rpt. at 11. This analysis considers information that “can be site-specific, regional, or from the literature.” IPGC Resp. at 17, *citing* Hahn Rpt. at 11-12. Dr. Hahn asserts that qualified professionals “use their judgment and rely on commonly accepted lines of evidence to identify or rule out sources.” IPGC Resp. at 17, *citing* Hahn Rpt. at 12. IPGC argues that this is why 35 Ill. Adm. Code 845.650(e) “does not lay out more specific criteria.” IPGC Resp. at 17.

IPGC concludes that the issues raised in Section IV.A of IEPA’s motion for summary judgment regarding the evidence in the ASD and whether it supports the conclusions in it “are matters of differing expert opinions.” IPGC Resp. at 18. IPGC adds that these issues are not appropriate for decision as matters of summary judgment. *Id.*

Sufficiency of ASD an Issue of Fact. Although IPGC argues that IEPA raised issues that are matters of differing expert opinions and that these issues make summary judgement inappropriate, IPGC responded to IEPA’s positions on specific issues.

Identification of Alternative Source. IPGC disputes IEPA’s position that it is entitled to summary judgment because the ASD does not identify an alternative source. IPGC Resp. at 18, *citing* IEPA Mot. at 11-12. IPGC counters that the ASD does so by identifying “naturally occurring chloride from underlying bedrock as the source of the chloride exceedance in APQ15.” IPGC Resp. at 18, *citing* R. at 1613, 1617. IPGC argues that the qualified professional engineers who prepared the ASD stated that “it has been demonstrated that the GWPS exceedance of

chloride at APW15 is not due to the PAP but is from a source other than the CCR unit” and that the “chloride concentrations in bedrock groundwater are a likely source of chloride observed in APW15.” IPGC Resp. at 19, *citing* R. at 1617. IPGC adds that, before IEPA’s decision deadline on the ASD, it responded to IEPA questions with the same explanation of its lines of evidence. IPGC Resp. at 19, *citing* R. at 1940. IPGC asserts that IEPA’s position is based entirely on the weight of IPGC’s evidence and whether that evidence is sufficient to make the demonstrations in the Board’s rule. IPGC Resp. at 18-19; *see id.* at 15, n.11, 20.

IEPA Position on Evidence of Alternative Source. IPGC argues that IEPA dismisses evidence in the ASD as “speculative” to explain away disputed facts. IPGC Resp. at 20. IPGC asserts that it used “site-specific information and regional-specific scientific literature (that is indicative of site-specific conditions), evaluated by QPEs” to conclude that bedrock was the likely alternative source of the chloride exceedance. *Id.*, *citing* R. at 1617-19. IPGC adds that, before IEPA’s decision deadline, the QPE responded to questions and requests with the same conclusion. IPGC Resp. at 19, *citing* R. at 1940. IPGC further argues that IEPA has overlooked evidence that the ASD cites and discusses. IPGC Resp. at 19, *citing* R. at 1613, 1617-19; *see* IPGC Resp. at 19, n.17 (citations omitted).

IPGC argues that IEPA has not persuasively characterized this evidence as “speculative.” IPGC Resp. at 20. IPGC further argues that the weight that should be given to this evidence including expert testimony is a question for the Board at hearing and is not appropriate for summary judgment. *Id.*, *citing* Nicholas v. City of Alton, 107 Ill. App. 3d 404, 408 (1982).

IEPA’s Arguments on Chloride in Bedrock. IPGC notes that Section IV.A.1.b of IEPA’s motion for summary judgment addresses evidence of chloride concentrations in bedrock near APW15. IPGC Resp. at 20; *see* IEPA Mot. at 12-14.

IPGC argues that IEPA’s motion “cites to no affidavit, oath or certification in support of the interpretation and conclusions raised in Section IV.A.1.b.” IPGC Resp. at 20, n.18, *citing* IEPA Mot. at 12-13. IPGC asserts that this section of the motion “can be assumed to be nothing more than an attorney’s interpretation and analysis of IPGC’s ASD evidence,” while the ASD was certified by a QPE and supported by an expert. IPGC Resp. at 20, n.18.

IPGC next disputes IEPA’s assessment of evidence in the ASD that Jasper County bedrock has elevated levels of chloride. IPGC Resp. at 20-21, *citing* R. at 1617-18. IPGC argues that IEPA incorrectly interprets a figure in that evidence and reaches incorrect conclusions. IPGC Resp. at 21, *citing* Hahn Rpt., Document 13 at 41 (Figure 7. Cross section D-D’ extending east-west across southern Illinois and southern Indiana). IPGC challenges IEPA’s assertions that the figure is not site-specific and does not indicate chloride concentrations near APW15. IPGC Resp. at 21., *citing* IEPA Mot. at 12-14. IPGC argues that the article accompanying the figure indicates bedrock chloride across southern Illinois based on sampling at various intervals. IPGC Resp. at 21, *citing* Hahn Rpt. at 16; R. at 1940. IPGC adds that the figure uses measurement of known points to estimate chloride levels at unsampled locations. IPGC Resp. at 22, *citing* Hahn Rpt. at 16. It asserts that the article and figure “can be used to support the determination that bedrock is the alternative source.” IPGC Resp. at 22. IPGC further asserts that IEPA does not dispute the lack of variability in chloride or explain “why

similar chloride concentrations would *not* be expected in the bedrock near APW 15.” *Id.* (emphasis in original).

IPGC next disputes IEPA’s assessment that this information would be consistent with Jasper County measurements being less than the 270 mg/L at APW15. IPGC Resp. at 22, *citing* IEPA Mot. at 13. In Figure 7, IPGC states that red dots indicate a chloride concentration of 100-5000 mg/L. IPGC Resp. at 22, *citing* R. at 1617. While IPGC acknowledges that the 1000 mg/L isoconcentration line in the figure suggests that the red dots in Jasper County may represent concentrations “somewhat less than 1000 mg/L,” it argues that their position indicates values near 1000 mg/L. IPGC Resp. at 22-23, *citing* Hahn Rpt. at 16. IPGC adds that IEPA “ignores the observation that the 1000 mg/L isoconcentration line itself is located near the top of the uppermost bedrock throughout Jasper County.” IPGC Resp. at 23, *citing* Hahn Rpt. at 16.

Next, IPGC argues that IEPA cites “no evidence that would contradict the findings regarding bedrock impacts to APW15 contained in the ASD.” IPGC Resp. at 23. Additionally, IPGC contends that IEPA cites no evidence contradicting the position of IPGC’s QPE’s and expert’s position that “this was the best available information to identify the alternative source of chloride in APW15 during the 60-day period available to IPGC to conduct the ASD.” *Id.*, *citing* R. at 1940; Hahn Rpt. at 16, 18, 21. IPGC concludes that IEPA now raises matters of professional judgement that must be decided by the Board after a hearing. IPGC Resp. at 23.

IEPA’s Arguments on Structural Features of Bedrock. IPGC disputes IEPA’s position on “the presence of conduits for groundwater to leave the bedrock and enter the upper aquifer (where APW15 is located).” IPGC Resp. at 23, *citing* IEPA Mot. at 14-15.

IPGC first discounts IEPA’s suggestion that there is “a need to know the exact distance of the Clay City Anticline from the PAP.” IPGC Resp. at 23. IPGC indicates that IEPA has not provided “a scientific basis for why that information is relevant or would or should change the conclusions of the ASD.” *Id.* IPGC asserts that its ASD shows “the existence of the saline spring mapped 10 miles from the PAP adjacent to the Clay City Anticline.” *Id.*, *citing* R. at 1617; Hahn Rpt. at 17. IPGC argues that the ASD shows the presence of this spring with scientifically supported sources. IPGC Resp. at 23, *citing* R. at 1613, 1617, 1940; Hahn Rpt. at 17. IPGC asserts that QPEs have shown that “this geologic feature supports the presence of a potential pathway for chloride to migrate from the underlying bedrock to APW15.” IPGC Resp. at 24, *citing* R. at 1613, 1940; Hahn Rpt. at 17.

IPGC also discounts IEPA’s position that “the data regarding the saline spring cannot be probative of site-specific migratory pathways.” IPGC Resp. at 24. IPGC asserts that IEPA has not supported its position and suggests that that determination is premature at this point in the case. *Id.* IPGC argues that “bedrock of the type near APQ15 is known to contain fissures and cracks that could result in the movement of groundwater from the bedrock to APW15.” *Id.*, *citing* R. at 1613, 1617, 1940; Hahn Rpt. at 17. IPGC asserts that this is a question that should be decided by the Board after a hearing. IPGC Resp. at 24.

IEPA's Arguments on Pathways in Bedrock. IPGC disputes IEPA's position on evidence in the ASD "of a pathway for chloride from the bedrock to reach APW15." IPGC Resp. at 25, *citing* IEPA Mot. at 16-17.

First, IPGC argues that it is not relevant for IEPA to compare APW02 and APW15. It asserts that APW15 is in close proximity to bedrock, is screened at a lower elevation than other wells monitoring the upper aquifer, and is the only well affected by a chloride exceedance. IPGC Resp. at 25, *citing* R. at 1611, 1617.

IPGC also disputes IEPA's suggestion that chloride from bedrock may not reach APW15 because of a lower confining unit between them. IPGC Resp. at 25. IPGC asserts that this overlooks evidence of "geologic features supporting the potential transport of chloride upward from the bedrock" and also overlooks differences between the thickness and permeability of the upper and lower confining units. *Id.*, *citing* R. at 723, 1613-13.

Finally, IPGC also disputes IEPA's suggestion that there are "at least 25 feet of till between the APW15 screen and bedrock." IPGC Resp. at 25, *citing* IEPA Mot. at 17. IPGC argues that closely reviewing the drawing it submitted with its ASD shows that the correct distance is less than 25 feet. IPGC Resp. at 25-26, *citing* R. at 776. IPGC adds that boring logs for APW15 indicate that "there is at least 5.7 feet of clay (the LCU) below the silty sand unit where the well is screened." IPGC Resp. at 25, *citing* R. at 820-25. IPGC argues that "the thickness of the LCU below APW15 is obviously much less than the 60-foot Upper Confining Unit that precludes a pathway from the PAP." IPGC Resp. at 26, *citing* R. at 1615.

IPGC concludes that "these are issues of differing expert opinion for the Board to consider after a hearing, not at the summary judgment stage." IPGC Resp. at 26.

Lines of Evidence. IPGC argues that IEPA's positions on lines of evidence in its ASD are based on "unsupported opinion and incomplete scientific knowledge." IPGC Repls. at 26. IPGC indicates that IEPA raises questions of fact that are not appropriate for summary judgment. *Id.*

IEPA's Arguments on Separation from Upper Aquifer at APW 15. IPGC asserts that IEPA for the first time in its motion questions the sufficiency of evidence on the lack of a pathway between the PAP and APW15. IPGC Resp. at 26.

IPGC asserts that, although IEPA's nonconurrence does not question its groundwater monitoring network or cite it as a basis for nonconurrence, IEPA "now questions why APW15 is located in an area with an incomplete pathway from the PAP." IPGC Resp. at 26. IPGC asserts that it proposed its groundwater monitoring network in October 2021 as part of its operating permit application. *Id.*, *citing* R. at 1242-63. IPGC argues that IEPA can consider the location of APW15 when it reviews that application but that it "has no relevance to this proceeding." IPGC Resp. at 27. IPGC asserts that the CCR rules require a groundwater monitoring system to address "[a]ll *potential* contaminant pathways." *Id.* (emphasis in original), *citing* 35 Ill. Adm. Code 845.630(a). It adds that this includes wells in various locations and at

various depths to capture groundwater that may pass through the CCR surface impoundment. IPGC Resp. at 27, *citing* 35 Ill. Adm. Code 845.630(a)(2), 845.630(b); R. at 779.

IPGC describes as “unsupported” and “theoretical” IEPA’s position that “there may be ‘joints or sand lenses’ in the Upper Confining Layer through which contaminants could travel from the PAP to APW15.” IPGC Resp. at 27. IPGC first indicates that this is a factual issue inappropriate for summary judgement. *Id.* IPGC also argues that IEPA overlooks evidence including “boring log data for APW15, data regarding the low permeability of the glacial till in the Upper Confining Layer, and evidence of an approximately 60 feet separation between the upper aquifer (where APW15 was sampled) and the base of the ash in the PAP.” *Id.*, *citing* R. at 1615, 1626-34. IPGC asserts that evidence shows that “there is no pathway between the PAP and APW15.” IPGC Resp. at 27. IPGC adds that IEPA’s conflicting opinion on this issue shows that it is not appropriate for summary judgement. *Id.*

IEPA’s Arguments on Background Concentrations. IPGC asserts that IEPA for the first time in its motion takes the position that nonconcurrence was appropriate because “chloride leaking from the PAP may not necessarily be accompanied by elevated boron and sulfate.” IPGC Resp. at 27-28, *citing* IEPA Mot. at 19-20. IPGC argues that this position is inconsistent with “widely accepted scientific evidence” on boron, sulfate, and chloride from CCR units. IPGC Resp. at 28, *citing id.*, Exh. A at 3-4 (Hahn Declaration); Hahn Rpt. at 6; Hahn Rpt., Document 35 (80 Fed. Reg. 21302 (Apr. 17, 2015)); Hahn Rpt. at 14 (*citing* 80 Fed. Reg. 21342 (Apr. 17, 2015), 83 Fed. Reg. 11588 (Mar. 15, 2018)).

IPGC argues that “widely accepted scientific evidence” shows that boron, sulfate, and chloride have similar mobilities and travel in groundwater at similar rates. IPGC Resp. at 28, *citing* Hahn Rpt. at 14-15. IPGC concludes that this evidence refutes IEPA’s position that “boron and sulfate have higher mobilities than chloride” and that chloride could “separate from boron and sulfate.” IPGC Resp. at 28, *citing* IEPA Mot. at 20.

IPGC also asserts that IEPA for the first time in its motion argues that nonconcurrence was appropriate because “it does not agree with the ASD’s findings indicating that groundwater chemistry at APW15 is inconsistent with an impact from the PAP.” IPGC Resp. at 28-29. IPGC states that IEPA opined that “the porewater samples are not representative of porewater contamination that could be leaving the PAP.” *Id.* at 29. IPGC cites Dr. Hahn’s report comparing monitoring results at APW15 with CCR porewater data: “APW15 is marked by only background levels of boron and sulfate, but significantly elevated chloride. On the other hand, the CCR porewater data have elevated concentrations of boron and sulfate, but concentrations of chloride consistent with background.” *Id.*, *citing* Hahn Rpt. at 14-15. IPGC argues that IEPA’s position reflects a different opinion on the evidence, making this question inappropriate for summary judgment. IPGC Resp. at 29.

IPGC first disputes IEPA’s position that porewater samples came from “one corner of the PAP.” IPGC states that “the porewater monitoring wells are spread out across the PAP (spanning more than 3,200 feet) in locations where it is technically feasible for such wells to be installed.” IPGC Resp. at 29, *citing id.* Exh A at 304 (Hahn Declaration), Exh. B (Hennings Declaration); R. at 774. IPGC also challenges IEPA’s suggestion that, because porewater wells

are not installed on the southern end of the PAP, they do not represent potential CCR impacts there. IPGC Resp. at 29, *citing* IEPA Mot. at 20. IPGC stresses that APW02 on the southwest side of the PAP showed exceedances consistent with the porewater samples. *Id.* at 29-30, *citing id.* Exh. A at 4; Hahn Rpt. Document 14 (monitoring data and detected exceedances).

IPGC also disputes IEPA's interpretation of Dr. Hahn's position on collecting porewater at the base of a surface impoundment. IPGC Resp. at 30, *citing* IEPA Mot. at 22. IPGC asserts that she had not argued that porewater must be collected at the lowest possible elevation to be representative of leachate that may be leaving the surface impoundment. IPGC asserted that Dr. Hahn instead argued that porewater data are representative because samples were collected at the base of the surface impoundment where leachate concentrations should be highest and did so in multiple locations during multiple sampling events. IPGC Resp. at 30, *citing id.* Exh. B; R. at 1616, 1635-39; Hahn Rpt. at 14. IPGC argues that the dispute over this issue raises issues of fact inappropriate for summary judgment. IPGC Resp. at 30.

IEPA's Arguments on Chloride Concentrations at APW15. IPGC states that it compared chloride in APW15 and in PAP porewater samples "to conclude that chloride concentrations in APW15 are not related to the PAP." IPGC at 30, *citing* R. at 1616. IPGC asserts that IEPA for the first time in its motion questions whether the evidence allows it to compare these values "because the ASD does not analyze possible chemical differences that might affect solubility and does not contain documentation regarding sampling techniques, chain of custody, or extraction techniques for porewater results." IPGC Resp. at 31, *citing* IEPA Mot. at 21.

IPGC first argues that IEPA does not identify "chemical differences" other than possible variation in pH over time. IPGC Resp. at 31. IPGC asserts that scientific evidence shows that this analysis is "unnecessary because chloride is a conservative solute and is therefore unlikely to be impacted by chemical variations such as pH." *Id.*, *citing* R. at 24-31. IPGC notes Dr. Hahn's explanation that conservative solutes such as chloride "are *not subject* to decay, adsorption, or other chemical processes" and "will travel in groundwater at approximately the same speed as the groundwater itself." IPGC Resp. at 31 (emphasis in original), *citing* Hahn Rpt. at 6. IPGC also argues that this analysis is neither relevant nor necessary because other wells such as APW02 "show monitoring results consistent with the porewater signature from the PAP." IPGC Resp. at 31, *citing id.* Exhibit A; Hahn Rpt. Document 14.

Second, IPGC argues that it is "disingenuous" for IEPA to argue that documentation of sampling, chain of custody, or extraction "was not part of the record before the Agency." IPGC Resp. at 31. IPGC states that "IEPA points to no requirements suggesting IPGC must have done so." *Id.* It argues that, although it did not submit what would have been voluminous laboratory documentation, it provided documentation in groundwater monitoring reports. *Id.*, *citing* Hahn Rpt. Document 14. IPGC adds that it referred to these reports in the ASD. IPGC Resp. at 31-32, *citing* R. at 1618.

IPGC concludes that, because IEPA has questioned whether the data IPGC submitted is sufficient, this issue is not appropriate for summary judgment. IPGC Resp. at 31.

Relevance of Porewater Data. IPGC notes that IEPA “questions the relevance of porewater data in characterizing the potential impact of a CCR surface impoundment to groundwater.” IPGC Resp. at 32, *citing* IEPA Mot. at 22-23. IPGC notes IEPA’s suggestion that, because 35 Ill. Adm. Code 845 does not use the term “porewater,” an ASD cannot use it to characterize the potential impact of the PAP on groundwater. IPGC Resp. at 32.

IPGC argues that IEPA does not cite any provision of 35 Ill. Adm. Code 845 requiring a specific methodology in an ASD to characterize the potential impact of a surface impoundment. IPGC Resp. at 32. IPGC also cites USEPA’s explanation that porewater data “best reflect leachate as it is released into underlying soils” and have been “determined to be the most representative data available for impoundments.” *Id.* at 32-33, *citing* Hahn Rpt. at 19; Hahn Rpt. Document 18 at 3-18, Document 23 at 4-5, 5-17.

Additionally, IPGC questions IEPA’s apparent position that USEPA’s statement on the use of porewater data to characterize the impact of CCR surface impoundments is not relevant because the federal rules are risk-based and 35 Ill. Adm. Code 845 in relevant sections applies strict numerical standards. IPGC Resp. at 32-33, n.22. IPGC argues that this makes no sense because the issue is characterizing the impact of a CCR surface impoundment, and USEPA supports the use of porewater sampling because “it most accurately represents leachate conditions.” *Id.* IPGC asserts that “[i]t does not matter the ultimate purpose for which that information may be used.” *Id.*

IPGC concludes that IEPA raises a question of differing opinions on this issue, which should be resolved after a hearing and not through summary judgment. IPGC Resp. at 32, 33.

IEPA’s Position on Leach Testing and Porewater Sampling. IPGC noted IEPA’s position that the ASD should have evaluated CCR in the PAP by using a leach testing methodology in SW-846 or using a USEPA porewater guidance document for sediment. IPGC Resp. at 33, *citing* IEPA Mot. at 23-24.

IPGC first asserts that “IEPA confuses the idea of porewater sampling and laboratory leach testing.” IPGC Resp. at 33-34, *citing* Hahn Rpt. at 2. IPGC next states that it conducted porewater sampling and argues that IEPA’s suggestion that IPGC should have conducted a Method 1314, 1315, or 1316 leach test is irrelevant. IPGC Resp. at 34. In support, IPGC cites Dr. Hahn’s explanation that these three methodologies “would not be useful to the ASD.” *Id.*, *citing* Hahn Rpt. at 22-23.

IPGC also challenges IEPA’s position that IPGC should have performed porewater sampling according to USEPA guidance on collecting samples in sediment. IPGC Resp. at 35. IPGC notes IEPA’s suggestion that this guidance is an SW-846 methodology but asserts that it “has not been incorporated into SW-846 through the public comment process” and is not included in USEPA’s validated methods. *Id.* at 33, n.23.

IEPA concludes that this issue presents differing expert opinions and is not appropriate for summary judgment. IPGC Resp. at 34, 35.

Whether Information in Data Gaps Is Required. IPGC asserts that Section IV.B of IEPA’s motion addresses the data gaps it identified as bases for its nonconurrence. IPGC Resp. at 36; *see* IEPA Mot. at 25-35. IPGC argues that IEPA does not show that information in these data gaps was required by law or that they are appropriate bases for nonconurrence. IPGC Resp. at 36. IPGC further argues that it “has presented significant evidence disputing the relevance, appropriateness, and need for the ‘Data Gap’ information.” *Id.* IPGC characterizes IEPA’s positions in Section IV.B as disputes of material fact. *Id.* IPGC asserts that IEPA’s reliance on data gaps for its nonconurrence presents questions of fact for the Board to decide after a hearing and not on summary judgment. IPGC Resp. at 15, 18, 36, *citing* IEPA Mot. at 25-35 (Section IV.B).

IPGC notes that IEPA did not accept IPGC’s position that information in the data gaps would not change the conclusions in the ASD. IPGC Resp. at 42, n.30, *citing* IEPA Mot. at 35. IPGC argues that IEPA “fails to understand the forensic analysis process, which involves the development of evidence to the point where the scientist has a reasonable degree of confidence in their findings.” IPGC Resp. at 43, n.30, *citing* Hahn Rpt. at 11-13. IPGC asserts that performing additional analysis “would result in the never-ending process of collecting data, though such data collection is unnecessary based on confidence in existing evidence.” IPGC Resp. at 43, n.30.

Data Gap 1. IEPA stated that it did not concur with IPGC’s ASD because it determined that the “[s]ource characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with [SW-846].” R. at 1965; *see* IPGC Resp. at 36. IPGC argues that IEPA misunderstands and mischaracterizes the evidence and scientific principles presented. IPGC Resp. at 36.

IPGC first disputes IEPA’s characterization of total solids sampling as a groundwater method governed by SW-846 by *citing* 35 Ill. Adm. Code 845.640(j). IPGC Resp. at 36. IPGC asserts that this provision applies to groundwater samples. *Id.* It asserts that “[s]olids sampling is not a *groundwater* method, nor does it involve analyzing a *groundwater sample*.” IPGC Resp. at 36-37 (emphasis in original), *citing* Hahn Rpt. at 2. IPGC argues that 35 Ill. Adm. Code 845.640(j) provides no support to IEPA’s suggestion that “Part 845 contains a requirement to conduct solids sampling in accordance with SW-846 methodologies for an ASD.” IPGC Resp. at 37.

IPGC further argues that IEPA provides no requirement that IPGC must conduct total solids sampling for an ASD or must perform total solids sampling using SW-846. IPGC Resp. at 37. IPGC disputes IEPA’s opinion that “total solids sampling for chloride is necessary to determine whether the PAP is contributing to groundwater contamination.” *Id.* IPGC cites Dr. Hahn’s position that “total solids analysis provides information regarding constituents that are currently within the solids in a CCR SI. It does not provide information regarding the concentration of constituents in porewater that are potentially leaving a CCR SI and entering groundwater.” *Id.*, *citing* Hahn Rpt. at 18. IPGC argues that IEPA has not persuasively refuted Dr. Hahn’s position or explained “why solids sampling is required to characterize what is leaching from a CCR surface impoundment.” IPGC Resp. at 38. IPGC concludes that this issue is a matter of professional judgment that is not appropriate for summary judgement. *Id.*

IPGC “does not dispute that SW-846 must be used for groundwater sampling under Subpart F of Part 845 or that it can serve as useful guidance in other contexts.” IPGC Resp. at 38, n.27. However, it asserts that “it is an undisputed fact that ‘there is no EPA SW-846 method that includes chloride as an analyte in a solid sample so the request for ‘total solids sampling’ using an SW-846 method for chloride or chlorine is not possible as written.’” IPGC Resp. at 38, *citing* Hahn Rpt. at 18. IPGC concludes that it is not possible to obtain the information that IEPA describes in data gap 1. IPGC Resp. at 38.

In addition, IPGC argues that IEPA’s discussion of the first data gap responds to evidence related to laboratory leach testing and not to total solids sampling. IPGC Resp. at 38, *citing* IEPA Mot. at 27-28. IPGC argues that discussing leach testing in this context is irrelevant. IPGC Resp. at 39. IPGC asserts that “[t]he important question for purpose of an ASD is whether constituents in groundwater are potentially leaving a CCR surface impoundment and entering into groundwater,” and it asserts that the non-concurrence and data gap 1 do not address that issue. *Id.*

IPGC concludes that “[a]ny suggestion that IEPA, as a matter of law, should be allowed deference to issue a Denial based on its desire for information that is not legally required, impossible to provide, and irrelevant cannot stand.” IPGC Resp. at 39.

Data Gap 2. IEPA stated that it did not concur with IPGC’s ASD because it had determined that “[h]ydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and presented with hydrogeologic characterization of the bedrock unit.” R. at 1965; *see* IPGC Resp. at 39, *citing* IEPA Mot. at 28.

IPGC contends that IEPA has not argued or identified any requirement that this information must be included or considered in an ASD. IPGC Resp. at 39. According to IPGC, IEPA instead argues that “the data was required to be collected by the PAP’s operating permit application and that it must, therefore, also be included and considered with its ASD.” *Id.* While IPGC acknowledges that information in an application for an operating permit may be useful in an ASD, it asserts that the ASD rules do not require considering specific information. *Id.* at 39-40, *citing* 35 Ill. Adm. Code 845.650(e). IPGC argues that the issue of whether this information should be considered in an ASD “is a question of professional judgment” that the Board should decide after a hearing. IPGC Resp. at 39, 40.

IPGC adds that its operating permit application includes a hydrogeologic site characterization with elements listed in 35 Ill. Adm. Code 845.620(b). IPGC Resp. at 39, n.29, *citing* R. at 696-1240. IPGC indicates that IEPA’s motion misconstrues the hydrogeologic site characterization requirements by suggesting that 35 Ill. Adm. Code 845.620(b)(16) requires hydraulic conductivity data. IPGC Resp. at 39, n.29. IPGC responds that the rule “requires this data only for geologic layers identified as migration pathways and geologic layers that limit migration. *Id.* IPGC asserts that its operating permit application includes this information for applicable geologic layers. *Id.*, *citing* R. at 706-07, 721-23, 747.

IPGC notes that IEPA also cited 35 Ill. Adm. Code 845.620(b)(18), which requires that a hydrogeologic site characterization must include “[a]ny other information requested by the Agency that is relevant to the hydrogeologic site characterization.” IPGC Resp. at 40, n.29. IPGC argues that this requirement does not support IEPA’s position that its characterization must include “sampling and analysis of the bedrock beneath APW15 for chloride.” *Id.* IPGC asserts that IEPA first requested this information in connection with the ASD. *Id.*

IPGC also argues that IEPA cited 35 Ill. Adm. Code 845.620(b)(13) and (b)(15) “without explaining why or how these sections would require the specific information they are now seeking in the context of an ASD.” IPGC Resp. at 40, n.29. IPGC adds that its operating permit application includes a hydrogeological site characterization with this information. *Id.*, citing R. at 706, 714-18.

IPGC concludes that any disagreement IEPA may have with the hydrogeologic site characterization submitted with its application for an operating permit “should be addressed in the context of that application process.” IPGC Resp. at 39, n. 29.

IPGC argues that, even if it is required to collect hydraulic conductivity data and characterize bedrock, that requirement would not determine whether its ASD is facially deficient. IPGC Resp. at 40. It asserts that the relevant question at summary judgment “is whether the information must have been included and considered” as part of its ASD. *Id.* Because this is disputed with IEPA, IPGC argues that the question is not appropriate for summary judgement. *Id.*

IPGC further argues that “the hydraulic conductivity of the bedrock would not change the conclusions of the ASD.” IPGC Resp. at 41. It cites Dr. Hahn, who stated that “there is no hydraulic conductivity value that could contradict the conclusion reached through the evidence considered in the ASD.” *Id.* Exh. A at 3. She added that, through the mode of diffusion, solutes “move in the direction of decreasing concentration by random molecular action according to Fick’s Law.” *Id.* Because chloride concentrations in southern Illinois bedrock aquifers increase with depth, “chloride would move upward in the bedrock aquifers even if the groundwater was stationary.” *Id.*, citing Pet. Exh. B (ISGS report of concentrations). IPGC adds that direct sampling of bedrock also would not change the conclusions of the ASD. IPGC Resp. at 41. Dr. Hahn concluded that this would be “unnecessary because there are regional and local data available in the literature,” which the ASD includes. Hahn Rpt. at 21

In addition, IPGC argues that it provided evidence that it could not reasonably have collected these data by the 60-day deadline to compile its ASD. IPGC Resp. at 41, citing R. at 2213-14.

Data Gap 3. IEPA stated that it did not concur with IPGC’s ASD because it determined that “[c]haracterization to include sample and analysis in accordance with 35 Ill. Adm. Code 845.640 of the alternative source must be provided with the ASD.” R. at 1965. Although IPGC found this language “unclear,” IEPA’s motion indicated that IPGC’s samples of an alternative source must have provided information listed in 35 Ill. Adm. Code 845.640(a). IPGC Resp. at 41, citing IEPA Mot. at 32-33.

IPGC disputes IEPA's position, arguing that this requirement refers to sampling and analysis as part of the groundwater monitoring program submitted as part of an application for an initial operating permit. IPGC Resp. at 42, citing 35 Ill. Adm. Code 845.610(b)(1)(C). IPGC argues that an ASD is not part of a groundwater monitoring program, so 35 Ill. Adm. Code 845.640(a) "does not apply to sampling of an alternative source." IPGC Resp. at 42.

IPGC asserts that the information in this data gap may at most be "necessary as a matter of professional judgment in support of an ASD." IPGC Resp. at 42. It concludes that the Board should decide this issue, making it inappropriate for summary judgment. *Id.*

IEPA's Arguments on IPGC Comment

IPGC notes IEPA's argument that the Board should not consider the comment it submitted during the comment period for the ASD. IPGC Resp. at 42, citing IEPA Mot. at 33-35. IPGC first asserts that this argument is "misplaced" in a motion for summary judgment as opposed to an evidentiary motion. IPGC Resp. at 42. IPGC further asserts that IEPA included the comment in the record it filed, making it part of the evidence in this proceeding. *Id.*, citing 35 Ill. Adm. Code 105.212, 105.214. IPGC argues that its comment responded to IEPA's requests and questions. IPGC Resp. at 43, citing R. at 1762-62, 1770, 1787. IPGC further argues that IEPA should have considered the comment when deciding whether to concur in its ASD. It adds that, if IEPA can pose questions and make requests to IPGC, declining to consider the response "would result in gross unfairness." IPGC Resp. at 43.

IEPA's Arguments on Relevance of Gavin ASD

Although IPGC notes IEPA's discussion of the alternative closure deadline requested for the Gavin Plant in Ohio, it stresses that USEPA's denial in that matter has been appealed and should not be relied upon as precedent or for guidance. IPGC Resp. at 43-44, *citing Gavin Power, LLC v. USEPA*, No. 24-41 (S.D. Ohio). IPGC notes the acknowledgement in USEPA's motion to dismiss that its findings "did not determine rights or obligations or carry any legal consequences (with respect to findings made regarding the alternative source demonstrations or other 40 C.F.R. Part 257 requirements)." IPGC Resp. at 44, *citing Gavin Power v. USEPA*, No. 24-41, slip op. at 12-13 (S.D. Ohio) (Oct. 16, 2024). IPGC argues that USEPA had "determined that Gavin failed to make a demonstration for an alternative closure deadline, not that as a matter of law it was out of compliance with the alternative source demonstration or other 40 C.F.R. Part 257 requirements." IPGC Resp. at 44, *citing Gavin Power v. USEPA*, No. 24-41, slip op. at 13 (S.D. Ohio) (Oct. 16, 2024).

IEPA Reply

IEPA argues that the undisputed facts show that IPGC's ASD failed to meet the requirements of the ASD rule. IEPA concludes that, because there is no genuine issue of material fact that IPGC failed to do so, its right to summary judgment in its favor is clear. IEPA requests that the Board grant its motion and deny IPGC's cross-motion. IEPA Reply at 23.

Question Before Board

IEPA asserts that “[t]he sole question before the Board is whether, as a matter of law, [IEPA] was justified in issuing the nonconurrence when presented with the information in Petitioner’s ASD.” IEPA Reply at 22.

IEPA argues that “[t]he interpretation of a statute . . . is a matter of law and thus presents a matter that is appropriate for summary judgment.” IEPA further argues that the question of whether it is appropriate to grant summary judgment also is a matter of law. IEPA Reply at 1, *citing* Hooker v. Ret. Bd. of the Firemen’s Annuity & Benefit Fund of Chi., 2013 IL 114811, ¶15.

IEPA asserts that IPGC does not create a genuine issue of material fact by recasting the interpretation of the ASD rule as a fact question or by arguing whether disputes over this interpretation are issues of law. IEPA Reply at 2. IEPA argues that there is no dispute about the material facts in the record before it at the time of its decision, which is the basis for the Board’s review and decision. *Id.* IEPA concludes that “there is no factual dispute that, as a matter of law,” IPGC’s ASD failed to meet the requirements of the Board’s rule. *Id.*; *see id.* at 22-23.

IPGC’s Burden on Summary Judgment. IEPA discounts IPGC’s suggestion that IEPA confuses the relevant burdens in this appeal. IEPA Reply at 2, *citing* IPGC Resp. at 3. IEPA also argues that IPGC attempts to shift its own burden onto IEPA. IEPA Reply at 2, *citing* IPGC Resp. at 7, n.3. IEPA states its position on the burdens at issue.

First, IEPA asserts that, by seeking as ASD, IPGC bore the burden of demonstrating that it had met the requirements of the ASD rule. IEPA Reply at 3, *citing* 35 Ill. Adm. Code 845.650(e). IEPA elaborates that this requires IPGC “to provide enough evidence to rebut the natural presumption that of a monitoring well that was designed and sited to detect contamination from a CCR surface impoundment detects contamination, the contamination probably came from the impoundment.” IEPA Reply at 3, *citing* IEPA Mot. at 10, n.1, 17, 18. IEPA asserts that IPGC’s response “does not appear to contest this point.” IEPA Reply at 2, n.1.

Second, IEPA asserts that IPGC in this appeal bears the burden of showing that IEPA erred and that it was entitled to a concurrence with its ASD. IEPA Reply at 2, *citing* 35 Ill. Adm. Code 105.112(a).

Third, IEPA asserts that, by moving for summary judgement, it took on “the burden of showing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.” IEPA acknowledges that it must show that “its right to judgment is ‘clear and free from doubt.’” IEPA Reply at 3, *citing* Adames v. Sheahan, 233 Ill.2d 276, 295, 296 (2009).

IEPA argues that these burdens are applied to the record before it at the time of its decision. IEPA Reply at 3, *citing* 35 Ill. Adm. Code 105.214(a). IEPA summarizes that its motion requires it to show based on its record that there is no genuine issue of material fact that IPGC failed to carry its burden of showing that the ASD met the requirements of the ASD rule. IEPA Reply at 3.

IEPA notes IPGC’s argument that its reference to the summary judgment standard was “too shallow” because it failed to note that “evaluations of witness credibility or evidence weight are out of place at summary judgment.” IEPA Reply at 3, *citing* IPGC Resp. at 2. While it acknowledges that the principle is valid, IEPA asserts that it is not relevant in a review based on the record of its decision including its ASD. IEPA Reply at 3. IEPA adds that IPGC’s cited authorities reflect this because they “all relate to trial court proceedings rather than Board matters.” *Id.*, *citing* IPGC Resp. at 3.

IEPA notes IPGC’s position that its motion “is not based on undisputed material facts” and “inappropriately calls on the Board, at this summary judgment stage, to weigh the evidence.” IEPA Reply at 3, *citing* IPGC Resp. at 3. IEPA asserts that IPGC’s response “does not dispute the *material* facts in this case – the content of the Agency record – and thus makes no argument against summary judgment.” IEPA Reply at 3-4 (emphasis in original).

IEPA also disputes IPGC’s position that “summary judgment is improper because the short timeline for issuing an ASD decision means that the appeal is when the parties can put on their full evidence.” IEPA Reply at 4, *citing* IPGC Resp. at 5, *citing* ESG Watts v. IPCB, 286 Ill. App. 3d 325, 331 (3rd Dist. 1997). IEPA questions whether IPGC confuses “the *de novo* standard of review with a trial *de novo* in which new evidence can be presented.” IEPA Reply at 4. Procedural rules in effect at the time of ESG Watts and until 2001 “provided for a ‘*de novo* hearing’ at which evidence outside the Agency Record could be presented on disputed issues of fact.” *Id.*, *citing* City of Quincy v. IEPA, PCB 08-86, slip op. at 39 (June 17, 2010). IEPA argues that current Board rules “require the Board *not* to consider any evidence outside the Agency Record.” IEPA Reply at 4, *citing* 35 Ill. Adm. Code 105.214(a). IEPA asserts that, “[b]ecause the relevant facts are all in the Agency Record and there is no dispute about the record’s accuracy, this case is ideally suited for summary judgment.” IEPA Reply at 4.

IEPA disputes IPGC’s position that the legal opinions in its motion for summary judgment “are invalid because [they are] unsupported by affidavits or expert testimony.” IEPA Reply at 4, *citing* IPGC Resp. at 18, n.15. 20, n.18. IEPA counters that “summary judgment is appropriate *because* [IEPA’s] arguments rest on the undisputed content of the Agency Record, rather than [on] expert opinions outside the record.” IEPA Reply at 4 (emphasis in original).

IEPA discounts cases cited by IPGC “in which summary judgment was denied or overturned due to conflicting expert testimony.” IEPA Reply at 4, *citing* IPGC Resp. at 16. IEPA argues that the cited cases “all relate to disputes of material *facts*, and are thus inapposite here where the relevant facts, namely the content of the Agency Record, are undisputed.” IEPA Reply at 4, *citing* Rock v. Pickleman, 214 Ill. App. 3d 368, 377 (1991); Pet. Resp. at 16. IEPA asserts that “expert testimony is not competent on issues of law.” IEPA Reply at 5, *citing* Pietrzak v. Rush-Presbyterian-St. Luke’s Med. Ctr., 284 Ill. App. 3d 244, 252 (1996); Korte & Luitjohan Contractors, Inc. v. Erie Ins. Exch., 2022 IL App (5th) 210254, ¶25.

Finally, IEPA disputes IPGC’s contention that “any difference of opinion” on the ASD’s “facts, evidence and conclusions” is an “issue[] of material fact.” IEPA Reply at 5, *citing* IPGC Resp. at 15. IEPA argues that IPGC changes the legal question of whether the ASD and

nonconcurrency met the requirements of the ASD rule into “a factual question on which only qualified experts may opine.” IEPA Reply at 5. IEPA argues that, if the Board accepted this contention, it would effectively eliminate summary judgment from ASD appeals and other appeals of IEPA determinations. *Id.* IEPA projects that, if both parties support their positions with expert opinion, then “there will always be a genuine issue of material fact.” *Id.*

Regulatory Interpretation. IEPA asserts that “[t]he interpretation of a regulation is a question of law.” IEPA Reply at 5, *citing* Haage v. Zavala, 2012 IL 125918, ¶41. Arguing that IPGC has not consistently addressed the issue of regulatory interpretation, IEPA argues that its response relies on expert opinion. IEPA Reply at 5-6. IEPA argues that, instead of any legal authority, IPGC asserts that 35 Ill. Adm. Code 845.650(e) “does not lay out more specific criteria” because an ASD “requires independent professional judgment to determine what data and analytical techniques should be used in the assessment.” *Id.* at 6, *citing* IPGC Resp. at 17, *citing* Hahn Rpt. IEPA characterizes IPGC’s position to be that “the ASD rule means whatever Petitioner’s expert says it means.” IEPA Reply at 6.

IEPA argues that this position is inconsistent with both regulatory interpretation and the purpose of the ASD rule. It asserts that the rule intends to protect “the public health and environment of Illinois from the known hazards of CCR surface impoundments.” IEPA Reply at 6, *citing* 415 ILCS 5/22.59 (2024); IEPA Mot. at 38-43. IEPA argues that IPGC’s position “would make the impoundment owner and its consultants the arbiters of ASD adequacy.” IEPA Reply at 6. IEPA concludes that the text and legislative background of the rule contradict this position that the interpretation and application of the rules is reserved to experts. *Id.* at 6-7.

Certification by Professional Engineer. IEPA challenges IPGC’s position that a professional engineer’s certification on the ASD “is enough to defeat summary judgment.” IEPA Reply at 7, *citing* IPGC Resp. at 15-16. IEPA argues that this certification “is simply a minimum requirement” for an ASD. IEPA Reply at 7, *citing* 35 Ill. Adm. Code 845.650(e). IEPA further argues that IPGC’s position overlooks the requirement that IPGC’s ASD “must *demonstrate* both ASD elements.” *Id.* IEPA asserts that the professional engineer’s certification that “the information in this report is accurate” does not change the legal question of whether the ASD is adequate into a question of fact. IEPA Reply at 7, *citing* R. at 1608.

IEPA notes that nonconcurrency in this case means that its experts disagree with IPGC’s experts. IEPA Reply at 7. IEPA argues that, if this disagreement is sufficient to establish a genuine issue of material fact, then “summary judgment would *never* be proper in an appeal of a nonconcurrency.” *Id.* (emphasis in original). IEPA suggests that IPGC changed its position on the appropriateness of summary judgement soon after filing its own motion. *Id.*

Whether IPGC’s ASD Met the Requirements of the Rule

IEPA cites the Board’s rule requiring an ASD to demonstrate both that “a source other than the CCR surface impoundment caused the contamination and the CCR surface impoundment did not contribute to the contamination.” IEPA Reply at 7, *citing* 35 Ill. Adm. Code 845.650(e). IEPA argues that IPGC’s submission “did not make either of these required

demonstrations.” IEPA Reply at 7-8. IEPA asserts that neither the ASD itself “nor any reasonable inference that could be drawn from it” could carry IPGC’s burden of proof. *Id.* at 8.

Whether IPGC Met First Element by Identifying Alternative Source. IEPA disputes IPGC’s position that its ASD satisfied the first required element because it “identifies naturally occurring chloride from underlying bedrock” as the source of contamination. IEPA Reply at 8, *citing* IPGC Resp. at 18. IEPA argues that the ASD concludes based on three reasons that “chloride concentrations in bedrock groundwater are a likely source of chloride observed in APW15.” IEPA Reply at 8, *citing* R. at 1617. IEPA asserts that naming “a likely source” does not identify the alternative source and demonstrate that it caused the exceedance. IEPA Reply at 8. IEPA disputes IPGC’s position that a likely source means that it was more probable than not. *Id.*, n.4, *citing* IPGC Resp. at 20. IEPA asserts that “likely” does not necessarily describe a probability greater than 50 percent and commonly means “possible.” IEPA Reply at 8, n.4 (citation omitted). IEPA argues that “[n]aming a possible alternative source is not enough to carry Petitioner’s burden on this element.” *Id.* at 9. IEPA further argues that IPGC’s problem is not that it used the wrong term to conclude that it had satisfied the first element but that it had not met that requirement. *Id.* at 8, n.4.

IEPA disputes IPGC’s position that IEPA “points to no evidence contradicting statements by IPGC’s QPEs and expert indicating that this was the best available information to identify the alternative source of chloride.” IEPA Reply at 9, *citing* IPGC Resp. at 23. IEPA responds that the ASD rule does not intend to allow an owner or operator to presume that an alternative source must exist and then to demonstrate its existence with best available evidence. IEPA Reply at 9. IEPA asserts that the ASD has only ever been intended as a limited exception for which an owner or operator might qualify. *Id.*, *citing* Standards for the Disposal of Coal Combustion Residuals in Surface Impoundment, R20-19, slip op. at 81 (Feb. 4, 2021). IEPA argues that, if the best available information doesn’t demonstrate the existence of an alternative source by a preponderance of the evidence, that simply means that the owner or operator isn’t entitled to a concurrence. IEPA Reply at 9.

IEPA argues that the three reasons IPGC cites to identify an alternative source “are speculative.” IEPA Reply at 9, *citing* IEPA Mot. at 17. IEPA disputes IPGC’s position that “whether the evidence it presented is ‘speculative’ is a matter of ‘clearly disputed facts.’” IEPA Reply at 9, *citing* IPGC Resp. at 20. IEPA asserts that this is not an argument that IPGC provided the required demonstration for, but only an argument that its expert’s opinions have created issue of material fact. *Id.* IEPA argues that no amount of expert testimony can make the ASD more than “a bare series of three speculative points unsupported by any substantial analysis.” IEPA Reply at 9, *citing* R. at 1617.

Chloride Concentrations in Bedrock Groundwater. The ASD first stated that “chloride concentrations in bedrock groundwater are a likely source of chloride observed in APW15” because “[c]hloride is present in Pennsylvanian shale in Jasper County at concentrations ranging from 100 to 5,000 mg/L.” R. at 1617; *see* IEPA Reply at 10. IEPA argues that this assertion “is not site-specific, and amounts to speculation that levels of chloride that *might* be higher than the concentration in APW15 *might* exist in natural groundwater near APW15.” IEPA Reply at 10 (emphasis in original), *citing* R. at 1617.

IEPA argues that IPGC first claimed that chloride levels range from 100 to 5,000 mg/L (IEPA Reply at 10, *citing* R. at 1617) and then claimed that they are more than 1,000 mg/L (IEPA Reply at 10, *citing* Hahn Rpt. at 16). IEPA argues that IPGC's response concedes that the two measured concentrations in Jasper County may be less than 1,000 mg/L but insists that "they must still be higher than the concentration APW15." IEPA Reply at 10, *citing* IPGC Resp. at 22. IEPA also notes that IPGC's response now argues that "the concentrations do not vary significantly at all." IEPA Reply at 10, *citing* IPGC Resp. at 21. IEPA asserts that IPGC's position still rests on speculation, was not before IEPA at the time of its nonconcurrence, and is therefore not relevant to this appeal. IEPA Reply at 10.

IEPA concludes that IPGC's first reason "does not make it any more likely than not that this chloride-enriched bedrock groundwater somewhere in Jasper County (where *according to the ASD submittal* such chloride concentrations vary from 100 to 5,000 mg/L) caused the contamination." IEPA Reply at 10-11 (emphasis in original). IEPA asserts that IPGC's reason is speculative and that IEPA was correct to disregard it. *Id.*, *citing* IEPA Mot. at 14.

Existence of Salt Spring. The ASD next stated that "chloride concentrations in bedrock groundwater are a likely source of chloride observed in APW15" because "[u]pward vertical hydraulic gradients and fractures near geologic features provide conduits for these chloride-rich waters to migrate. The Clay City Anticline is present east of the PAP and a saline spring has been mapped adjacent to this anticline approximately 10 miles south of the PAP in Clay County." R. at 1617; *see* IEPA Reply at 11, *citing* IPGC Resp. at 23. IEPA asserts that IPGC "has provided no reason, then or now, to believe that this salt spring is likely to have any bearing on groundwater flow ten miles away at the PAP." IEPA Reply at 11. IEPA argues that, even drawing every inference in IPGC's favor, "this evidence shows at most that such upwelling is *possible* in the region." *Id.* at 11 (emphasis in original). IEPA notes that "[a] circle with a 10-mile radius covers approximately 31 square miles." *Id.* IEPA argues that even a single upwelling with an area of that size "does not suggest that a second example is especially likely to have occurred right under Petitioner's monitoring well." *Id.* IEPA asserts that IPGC's second reason is also speculative and that IEPA was correct to disregard it. *Id.*, *citing* IEPA Mot. at 14-15.

Existence of Chloride Migration Pathway. The ASD next stated that "[w]ell APW15 is located in close proximity to bedrock and screened at a lower elevation than other wells monitoring the UA which could explain why it is the only affected well. . . . The high hydraulic conductivity of the UA relative to the low hydraulic conductivity of underlying bedrock . . . at this location provides a potential pathway for interaction with upward-migrating chloride-containing bedrock groundwater. R. at 1617; *see* IEPA Reply at 12.

IEPA notes IPGC's position that "APW15 was correctly sited because there was a 'potential contaminant pathway' from the PAP through the alleged 60 feet of till in the Upper Confining Unit." IEPA Reply at 12, n.5, *citing* IPGC Resp. at 27. Although IEPA acknowledges that "both pathways are possible," it argues that IPGC does not present evidence "that an upward pathway from bedrock is more likely than a downward pathway from the PAP, let alone more likely than not to be the sole pathway." IEPA Reply at 12, n.5.

IEPA also notes IPGC's position that IEPA mistakenly suggested that a drawing submitted with IPGC's application for an operating permit showed "at least 25 feet of till between the APW15 screen and bedrock." IEPA Reply at 12, *citing* IPGC Resp. at 25, R. at 1787. After reviewing that position, IEPA asserts that "there is slightly less than 25 feet between the APW15 screen and *the bottom of the drawing*, which does not portray *any* bedrock under APW15 at all." IEPA Reply at 12, *citing* R. at 776. IEPA surmises that there could be as much as 50 feet of till between the APW15 screen and bedrock. *See* IEPA Reply at 12. IEPA questions how this creates a genuine issue of material fact. Arguing that IPGC presented this potential pathway in speculative terms, IEPA asserts that it "was therefore justified as a matter of law in rejecting it." IEPA Reply at 12.

IEPA also notes IPGC's objection to IEPA's "puzzlement over why a single-well chloride exceedance would be 'anomalous.'" IEPA Reply at 12, n.6, *citing* IPGC Resp. at 25. IEPA asserts that IPGC first made this characterization. IEPA Reply at 12, n.6, *citing* IEPA Mot. at 16, Pet. at 13 (¶42). Based on IPGC's more recent objection, IEPA argues that "apparently the parties now agree that there is nothing anomalous about a single-well exceedance that would necessarily call for an alternative source." IEPA Reply at 12.

IEPA suggests that a "potential pathway" that "could explain" the exceedance does not meet the requirements of the ASD rule. *See* IEPA Reply at 12, *citing* R. at 1617. For this reason, IEPA concludes that it was correct to disregard it. IEPA Reply at 12.

Whether IPGC Met Second Element by Demonstrating that PAP Did Not Contribute to Contamination. The second element of an ASD under the Board's rules is demonstrating that "the CCR surface impoundment did not contribute to the contamination." 35 Ill. Adm. Code 845.650(e); *see* IEPA Reply at 13. Although IPGC submitted three lines of evidence in support of this element, IEPA argues that none was "sufficient to establish that the PAP did not contribute to the exceedance in APW15." IEPA Reply at 13, *citing* IEPA Mot. at 20-26.

As the first line of evidence, IPGC stated that "[t]he PAP is separated from the UA at APW15 by a thick layer of low permeability glacial till (UCU)." R. at 1615; *see* IEPA Reply at 13. IPGC dismissed as "unsupported" or "theoretical" the possibility that contaminants could move from the PAP to APW15 through joints or sand lenses. IEPA Reply at 13, *citing* IPGC Resp. at 27. IEPA responds by stressing the role of joints and sand lenses in the Vandalia Till in the failure of the unlined Earthline landfill. IEPA Reply at 13, *citing* IEPA Mot. at 19, n.4. IEPA also suggest that IPGC has taken inconsistent positions. It argues that IPGC "justifies its siting of APW15 based on a potential contaminant pathway from the PAP while still defending its statement in the ASD submittal that no such pathway existed." IEPA Reply at 13, *citing* IPGC Resp. at 14, R. at 1615.

As the second and third lines of evidence, IPGC stated that "concentrations of primary CCR indicators in APW15 do not exceed background limits and are not increasing" and that "concentrations of chloride at APW15 are greater than source concentrations." IEPA notes that both lines rely on porewater evidence. R. at 1615-16; *see* IEPA Reply at 13. Apart from its

general position on porewater sampling and IPGC's data, IEPA argues that the data were unrepresentative because they "came solely from wells that are all at the 'northern end' of the PAP." IEPA notes that APW15 "is located at the southern edge of the PAP approximately 5,000 feet from the nearest porewater well." IEPA Reply at 13-14, *citing* IPGC Resp. Exh. A at 4, R. at 1621. IEPA argues that IPGC's expert reported that "there is likely to be a considerable difference in waste composition between the shallower and deeper parts of the PAP – which in this case are precisely the northern and southern parts of the PAP, where the porewater wells and APW15 are respectively located." IEPA Reply at 14, *citing* IEPA Mot. at 21; Hahn Rpt. at 8. Although IPGC asserts that it is not technically feasible to place porewater wells any nearer to APW15, IEPA argues that "this does not make the existing wells any more representative." IEPA Reply at 14, *citing* IPGC Resp. at 29.

IEPA argues that IPGC's assumptions about boron, sulfate, and chloride concentrations in the PAP are based on porewater taken from the far edge of the PAP and not from the lowest part of the impoundment as recommended by IPGC's expert. IEPA Reply at 14, *citing* IEPA Mot. at 21, Hahn Rpt. at 8. Noting that expert's report is outside of its record, IEPA asserts that IPGC provided no "evidence to indicate that these samples are representative of the entire PAP." IEPA Reply at 14, *citing* IEPA Mot. at 21-22. Based on these arguments, IEPA asserts that IPGC's second and third lines of evidence are "insufficient to show that the PAP did not contribute to the contamination in APW15." IEPA Reply at 14.

IEPA concludes that IPGC's lines of evidence are inadequate to show that the PAP did not contribute to the exceedance in APW15. IEPA Reply at 14. IEPA argues that IPGC failed as a matter of law to meet the requirements of the ASD rule. *Id.* IEPA asserts that, although IPGC attempts to raise an issue of fact, no hearing is necessary, and summary judgement in IEPA's favor is appropriate. *Id.*

IPGC's Arguments Concerning Fairness and Process.

Fairness. IEPA discounts IPGC's position that it would be "fundamentally unfair" to uphold the nonconurrence based on the three data gaps because "they impose new requirements of which it was not on notice." IEPA Reply at 15, *citing* IPGC Resp. a 7, 11. IEPA asserts that the data gaps do not impose new requirements but instead explain how IPGC "could have met the existing requirements of the ASD rule." IEPA Reply at 15. IEPA further asserts that insisting on following the rule is not at all unfair and fulfills the purpose of the Act and rules "to restore, protect, and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." *Id.*, *citing* Midwest Generation, LLC v. IPCB, 2024 IL App (4th) 210304, ¶ 182, Granite City Div. of Nat'l Steel Co. v. IPCB, 155 Ill. 2d 149, 182 (1993).

Noting IPGC's position that gathering the information in the data gaps would be impossible within the 60-day period, IEPA argues that this is a consequence of its own actions. IEPA Reply at 17, *citing* IPGC Resp. at 10, n.6. IEPA suggests that failing to collect data already required for IPGC's operating permit application cannot mean that it would now unfairly take too long to collect. *See* IEPA Reply at 17. IEPA disputes IPGC's position that any issues with its application are not relevant in this proceeding, arguing that the requirement to collect

these data “has considerable relevance for its claim that gathering the data within 60 days would be impossible.” *Id.*, n.7., *citing* IPGC Resp. at 27, 39, n.29. IEPA argues that it correctly held IPGC to its burden to show that it qualified for an ASD. *Id.*

Due Process. IEPA also discounts the position that, “[b]ecause IPGC’s substantive rights are at stake, it is entitled to due process.” IEPA Reply at 15, *citing* IPGC Resp. at 6. IEPA argues that IPGC has not explained what substantive rights are at stake, why the right to due process applies, or whether its claim is procedural or substantive. IEPA Reply at 15. IEPA asserts that the ASD rules do not give IPGC a “legitimate claim of entitlement” or property interest in a concurrence it did not receive. *Id.* at 15-16, *citing* C.Capp’s LLC v. Jaffe, 2014 IL App (1st) 132696, ¶¶25-26. IEPA argues that IPGC “has no Constitutionally protected property interest at stake in this proceeding” and “therefore has only the procedural rights that the Board rules grant it.” IEPA Reply at 16.

Notice. IEPA also disputes IPGC’s position that “the Board’s review should be limited to the data gaps identified in [IEPA’s] nonconcurrence letter.” IEPA Reply at 16, *citing* IPGC Resp. at 7. IEPA argues that the cases IPGC cites on this point are distinguishable because “there is only one regulation at issue in this case.” IEPA Reply at 16, *citing* Pulitzer Cmty. Newspapers v. IEPA, PCB 90-142, slip op. at 5-6 (Dec. 20, 1990); Centralia Env’tl. Svcs. v. IEPA, PCB 89-170, slip op. at 7 (May 10, 1990). IEPA argues that those cases involved a statute or rule that “required the applicant to prove that it had not violated or would not violate” any authority and also required specific content for IEPA’s denial. IEPA Reply at 16. IEPA states that, “where the potential grounds for denial was nearly unbounded *and* the bases for denial had to be spelled out, fairness indeed required the Board to limit its review to *the statutes and regulations* set forth in the denial.” *Id.* at 16-17 (emphasis in original). IEPA asserted that IPGC in this case must show compliance only with the ASD rule, “which is only two sentences long.” *Id.* at 17. It further asserts that “the ASD rules [do] not require the nonconcurrence to have any content at all other than a statement of nonconcurrence.” *Id.*

IPGC’s Remaining Arguments. IEPA argues that IPGC’s remaining arguments do not address the shortcomings in its ASD. IEPA Reply at 17. IEPA asserts that IPGC instead attempts to “misrepresent the data gaps, introduce evidence outside the Agency Record, and distort the policy background of the ASD rule.” *Id.* IEPA further asserts that, because these arguments do not raise a genuine issue of material fact, it is entitled to summary judgment in its favor. *Id.*

Whether Data Gaps Impose New Requirements. IEPA characterizes the data gaps as “a courtesy” to IPGC that identified where the ASD fell short of meeting the requirements of the ASD rule and clarified the grounds for nonconcurrence without imposing any new requirements. IEPA Reply at 18-19, *citing* R. at 1965.

IEPA argues that, even if IPGC had provided all of the information identified in the data gaps, it “would not be entitled to a concurrence.” IEPA Reply at 18. IPGC would still have the burden of providing adequate data supporting its ASD so that IEPA could concur with it. *Id.* IEPA discounts IPGC’s position that that data gaps “are based on disputes of material fact” that preclude summary judgment. *Id.*, *citing* IPGC Resp. at 36. IEPA first asserts that IPGC’s

position relies chiefly on evidence outside of the Agency Record. IEPA Reply at 18, *citing* IPGC Resp. at 36-42. IEPA adds that IPGC’s position does not meet its burden of demonstrating that the chloride exceedance at APW15 was caused by a source other than the PAP and that the PAP did not contribute to the exceedance. IEPA Reply at 18. IEPA asserts that IPGC’s arguments on the data gaps are misguided and not relevant to the question of law before the Board. *Id.*

Whether IPGC Relies on Evidence Outside IEPA Record. IEPA argues that IPGC’s response relies on Dr. Hahn’s evidence that was not before IEPA at the time of its decision and is therefore not material to the issues in this appeal. IEPA Reply at 19. While IPGC argues that IEPA has not responded to or refuted Dr. Hahn, IEPA argues that it made no sense for it to do so because it was not relevant to whether the ASD was sufficient, and because the Board’s review is based solely on the record before IEPA at the time of its decision. *Id.*, *citing* 35 Ill. Adm. Code 105.412; IPGC Resp. at 48; IEPA Resp. at 23.

IEPA acknowledges that experts’ disputes over material fact can preclude summary judgment. IEPA Reply at 19, *citing* Nicholas v. City of Alton, 107 Ill. App. 3d 404, 408 (5th Dist. 1982); Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 5 (Jan. 19, 2017). IEPA asserts that, even if this appeal proceeds to hearing, it must be based exclusively on the record, and that Dr. Hahn’s report and affidavits are not part of it. IEPA Reply at 19, *citing* 35 Ill. Adm. Code 105.214(a).

IEPA argues that IPGC appears to interpret the requirement that an “ASD must include a report that contains the factual or evidentiary basis for any conclusions and a certification of accuracy by a qualified professional engineer” in manner inconsistent with the ASD rule. IEPA Reply at 20, *citing* 35 Ill. Adm. Code 845.650(e). IEPA asserts that a party opposing summary judgment must “present a factual basis which would arguably entitle [it] to a judgment” and that the basis must come from the record before IEPA at the time of its decision. IEPA Reply at 19, *citing* Gauthier v. Westfall, 266 Ill. App. 3d 213, 219 (2nd Dist. 1994); 35 Ill. Adm. Code 105.214(a). IEPA asserts that Dr. Hahn’s report cannot create a genuine issue of material fact, which leaves only an issue of law ripe for Board decision. IEPA Reply at 20.

IEPA argues that IPGC also improperly cites deposition testimony. IEPA Reply at 20, *citing* IPGC Resp. at 13-14. IEPA asserts that IPGC did not seek to depose an IEPA representative under Illinois Supreme Court Rule 206(a)(1) or to depose the IEPA decision maker in this case. IEPA Reply at 20. IEPA adds that IPGC deposed two IEPA employees long after the nonconcurrency. IEPA argues that their testimony was not part of the record before it when it issued its nonconcurrency and that it is therefore not relevant to the Board’s review. *Id.*

Whether Board Should Consider Gavin. IEPA disputes IPGC’s position that the Board should not consider USPEPA’s denial of an ASD for the Gavin Power Station in Ohio. IEPA Reply at 21, *citing* IPGC Resp. at 42-43, IEPA Mot. at 10, n.1, 37-38. IEPA acknowledges that, although the direct appeal of the denial to the D.C. Circuit was dismissed, “the case remains under appeal in district court.” IEPA Reply at 21, n.8, *citing* Electric Energy, Inc. v. EPA, 106 F.4th 31 (D.C. Cir. 2024); Gavin Power, LLC v. USEPA, Case No. 24-41 (S.D. Ohio). IEPA further acknowledges that it does not argue that this case applying federal rules is binding

precedent on Illinois. IEPA Reply at 21. However, because the Act requires that Illinois rules be no less protective than federal rules, “to the extent there is a close question, USEPA’s denial of a similar ASD on similar facts should be taken into account.” *Id.*, *citing* IEPA Mot. at 37-39; *see* 415 ILCS 5/22.59(g)(1) (2024). IEPA further argues that IPGC cites USEPA’s motion to dismiss, which appears to turn on whether the denial order imposes a new legal obligation on Gavin. IEPA Reply at 21, *citing* IPGC Resp. Exh. D. IEPA asserts that there is no question that its nonconcurrence in this case does not do so because it declined to exempt IPGC from corrective action requirements. IEPA Reply at 21-22, *citing* 35 Ill. Adm. Code 845.650.

DISPUTES OF MATERIAL FACT PRECLUDE SUMMARY JUDGMENT

The parties agree that IPGC’s Newton Power Plant includes an unlined CCR surface impoundment known as the PAP. They further agree that in the second quarter of 2023 groundwater monitoring from the PAP showed exceedances in chloride, lithium, sulfate, and total dissolved solids. IPGC proceeded with corrective action measures for lithium, sulfate, and total dissolved solids, and filed this ASD for the chloride exceedance. The parties are in dispute over many other issues raised in the ASD.

As discussed in more depth above, IEPA’s denial stems from three alleged data gaps: 1) “[s]ource characterization of the CCR at the Primary Ash Pond must include total solids sampling in accordance with [SW-846]”, 2) “[h]ydraulic conductivities from laboratory or in-situ testing must be collected, analyzed, and presented with hydrogeologic characterization of the bedrock unit”, and 3) “[c]haracterization to include sample and analysis in accordance with 35 Ill. Adm. Code 845.640 of the alternative source must be provided with the ASD.” The parties are in dispute over issues raised for each of the alleged data gaps in the ASD denial, some of which are discussed below. IPGC argues that IEPA’s nonconcurrence with the ASD, which is based on the identified data gaps, presents issues of fact that are inappropriate for summary judgment. IPGC Resp. at 11, 15. These data gaps include whether total solids sampling must be conducted in accordance with SW-845.

Additionally, IEPA argues the evidence presented in the ASD does not demonstrate a specific alternative source caused the exceedance and merely speculates about the source. This dispute centers around the potential for local bedrock to cause the exceedance of chloride. Disagreements include whether the evidence is site specific enough or if it properly demonstrated upward mobility and hydraulic conductivity of chloride from the bedrock. Additionally, there are other disagreements regarding local geologic features and their impact on the exceedance. IPGC argues that these disputes amount to differing expert opinions and therefore are an issue of material fact and not appropriate for summary judgment.

The Board finds that these disputes constitute genuine issues of material fact, precluding summary judgment. When ruling on a motion for summary judgment, the Board must only find whether a question of fact exists and should not resolve genuine factual issues. When deciding a motion for summary judgment, the Board cannot weigh competing evidence to resolve a dispute over material facts. That exercise is appropriate only after a hearing.

CONCLUSION

Construing the evidence in favor of each party opposing each motion for summary judgment, the Board finds there are issues of material fact, including those described above. Therefore, the Board denies the cross motions for summary judgment. The Board directs that the hearing officer and the parties proceed expeditiously to hearing on the appeal.

ORDER

The Board denies IPGC's and IEPA's cross-motions for summary judgment. The Board directs the hearing officer and the parties to proceed expeditiously to hearing on the appeal.

IT IS SO ORDERED.

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

A handwritten signature in cursive script that reads "Don A. Brown". The signature is written in black ink and is positioned above a horizontal line.

Don A. Brown, Clerk
Illinois Pollution Control Board