BEFORE THE
ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board Southern Illinois Power Cooperative's Response to the Illinois Environmental Protection Agency's Post-Hearing Brief and a Certificate of Service, copies of which are herewith served upon you.

Respectfully Submitted,

SOUTHERN ILLINOIS POWER COOPERATIVE

/s/ *Sarah L. Lode*

Dated: December 1, 2025

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CERTIFICATE OF SERVICE

I, the undersigned, certify that on this 1st day of December:

I have electronically served a true and correct copy of the attached SOUTHERN ILLINOIS POWER COOPERATIVE'S RESPONSE TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S POST-HEARING BRIEF by electronically filing with the Clerk of the Illinois Pollution Control Board and by e-mail upon the following persons:

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SOUTHERN ILLINOIS POWER COOPERATIVE'S RESPONSE TO THE ILLINOIS ENVIRONMENTAL PROTECTION AGENCY'S POST-HEARING BRIEF

Submitted on behalf of
Southern Illinois Power Cooperative

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INTRODUCTION

Southern Illinois Power Cooperative ("SIPC") respectfully submits, pursuant to the Hearing Officer's June 16, August 28, and October 2, 2025, Orders, this Response to the Illinois Environmental Protection Agency's ("IEPA's" or the "Agency's") Post-Hearing Brief in support of its petition for a finding of inapplicability of or, in the alternative, an adjusted standard from 35 Ill. Admin. Code Part 845 ("Part 845"). IEPA's Post-Hearing Brief fails to provide any argument or evidence undercutting SIPC's request for a finding of inapplicability or, in the alternative, an adjusted standard and, instead, rests on incorrect legal positions and misconstrued facts. As an initial matter, IEPA applies Part 845's definition of a coal combustion residual ("CCR") surface impoundment inappropriately throughout its entire Post-Hearing Brief. Further, IEPA consistently misapplies all factors related to SIPC's alternative request for an adjusted standard. And finally, IEPA's analysis of the units at issue includes many misstatements and misconstructions of facts.

UNIT CLARIFICATION

To provide the Illinois Pollution Control Board (the "Board") with clarity, this Response begins by reiterating what units at SIPC's Marion Generating Station (the "Station") are at issue in this proceeding and their nomenclature in both SIPC's post-hearing briefing and IEPA's Post-Hearing Brief.

There are two sets of units at issue in this proceeding. First, the units SIPC refers to together as the "De Minimis Units." The De Minimis Units are made up of the South Fly Ash Pond, Pond 3/3a, Pond 6, Pond 4, and Former Pond B-3. *See* AS 2021-006, *In the Matter of: Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability*, Second Amended Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 and a Finding of Inapplicability ("Second Amended Petition") at 9–15 (Dec. 20, 2024); *see also* Site Map Prepared

by Andrews Engineering for SIPC (May 2021), SIPC Ex. 3. Second, the units SIPC refers to together as the "Former Landfill Area." The Former Landfill Area is made up of the Initial Fly Ash Holding Area, the Replacement Fly Ash Holding Area, and the Fly Ash Holding Area Extension (together the "Former Fly Ash Holding Units"), as well as the Former CCR Landfill that sits on top of the Former Fly Ash Holding Units. *See* Second Amended Petition at 15–19; *see also* Site Map, SIPC Ex. 3. SIPC has throughout this proceeding referred to the units as described above and on the Site Map provided as SIPC Exhibit 3.

IEPA, on the other hand, describes the 3 and 3a areas of Pond 3/3a separately, treating them as separate units. They are not. The whole of Pond 3/3a was initially known as Pond 3. AS 2021-006, *In the Matter of: Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability*, Southern Illinois Power Cooperative's Post-Hearing Opening Brief in Support of its Petition for a Finding of Inapplicability, or, in the Alternative, an Adjusted Standard from 35 Ill. Admin. Code Part 845 ("SIPC's Brief") at 15 (Oct. 10, 2025). In 1982, an internal berm was constructed within this contiguous area, creating the 3a area within the footprint of the original Pond. Declaration of Todd Gallenbach, SIPC Ex. 2; *see also* Transcript of June 10, 2025 Hearing at 57:11−17. The whole, contiguous area of Pond 3/3a has always functioned together for operational purposes. SIPC's Brief at 15–17.

Further, IEPA appears to conflate the Former Fly Ash Holding Units, the Former CCR Landfill, and Pond 6, without clearly identifying the bounds of those units as the Agency refers to them. *See* AS 2021-006, *In the Matter of: Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability*, Illinois Environmental Protection Agency's Post-Hearing Brief ("IEPA's Brief") ¶

13 (Oct. 10, 2025) (indicating the units at issue are "Pond 3, Pond 3A, Pond 4, Pond B-3, Pond 6, South Fly Ash Pond, Initial Fly Ash Pond ('IFAP'), Replacement Fly Ash Pond ('RFAP'), and Fly Ash Extension ('FAE')" but not discussing the Former CCR Landfill); *see also id.* at 13 ¶ 39[1] (acknowledging that there is a CCR landfill that is separate from Pond 6 and for which Pond 6 serves as a stormwater collection pond); *compare id. with id.* ¶ 76 (making contradictory statements, without support, that SIPC piled "dry CCR in Pond 6[, which] overflowed its limits and extended into the" Former Fly Ash Holding Units while later stating that SIPC "filled [the Initial Fly Ash Holding Area] and [Replacement Fly Ash Holding Area] beyond capacity, with dry CCR spreading into the [Fly Ash Holding Area Extension] and Pond 6"). IEPA has never clearly defined what area it considers to be Pond 6, on the one hand acknowledging that it is the stormwater collection pond for the Former CCR Landfill, *id.* at 13 ¶ 39, and on the other suggesting dry CCR from this stormwater collection pond located on the north side of the Former CCR Landfill leaped over the landfill and reached the area of the Former Fly Ash Holding Units underneath the south side of the Former CCR Landfill or vice versa. *See id.*; *see also id.* ¶ 76.

For clarity, SIPC continues in this Response to refer to the nine units at issue as they are described and named in its Second Amended Petition and its Post-Hearing Opening Brief. *See* Second Amended Petition at 9; SIPC's Brief at 1.

ARGUMENT

I. IEPA's Opposition to SIPC's Finding of Inapplicability Request Rests on an Arbitrary and Erroneous Reading of Part 845's CCR Surface Impoundment Definition.

SIPC's initial and primary request to the Board is to find that Part 845 is inapplicable to the nine units at issue. As SIPC demonstrated in its Second Amended Petition, at hearing, and in

[1] SIPC notes that IEPA's Post-Hearing Brief repeats paragraph numbers 38 and 39. For clarity, SIPC has provided page numbers when referencing or citing those paragraphs.

its Post-Hearing Opening Brief, these units do not meet Part 845's CCR surface impoundment definition for a variety of reasons. *See* SIPC's Brief, Section III. IEPA's argument that Part 845 is applicable to the nine units at issue is based on a flawed and circular application of the CCR surface impoundment's plain language definition. IEPA's Brief ¶¶ 13–16, 62–65.

A. IEPA Incorrectly Applies the Definition of CCR Surface Impoundment to Determine De Minimis Status.

IEPA's arguments regarding whether a unit containing *de minimis* amounts of CCR is a CCR surface impoundment are circular and allow for boundaryless, arbitrary application. IEPA's arguments specifically fail to properly consider two of the essential elements of the CCR surface impoundment definition: (1) whether the surface impoundment "is designed to hold an accumulation of CCR and liquids" and (2) whether "the surface impoundment treats, stores, or disposes of CCR." 35 Ill. Admin. Code § 845.120. SIPC agrees that the *de minimis* analysis[2] centers on whether the units at issue meet Part 845's CCR surface impoundment definition. IEPA's Brief ¶ 14; SIPC's Brief at 39. But IEPA's reliance on its own conclusory "configuration," "design," and "function/material" analysis turns its application into a results-driven test that allows for subjective and contradictory results. *See* IEPA's Brief ¶¶ 17–61 (applying its conclusory "configuration," "design," and "function/material" test to the units at issue).

Under IEPA's approach, the mere presence of any CCR—no matter how trivial—could convert any unit into a CCR surface impoundment without principled limits. Hypothetical

[2] IEPA, the United States Environmental Protection Agency ("USEPA"), and the Board have all affirmed that units containing *de minimis* amounts of CCR do not fall within Part 845's (or its federal counterpart, 40 C.F.R. Part 257's) definition of a CCR surface impoundment. *See* Transcript of June 12, 2025 Hearing at 512:19−21 ("Part 845 does not regulate impoundments that contain a de minimis amount of CCR"); Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities, 80 Fed. Reg. 21,302 (April 17, 2015), Revised SIPC Ex. 17 at 21,357 (USEPA explaining "that units containing only truly 'de minimis' levels of CCR are unlikely to present the significant risks this rule is intended to address."); R2020-019, *In the Matter of Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, Illinois Pollution Control Board's Second Notice Opinion and Order ("Second Notice Op.") at 14−15, 17 (Feb. 4, 2021) (declining to define the term *de minimis* but acknowledging that a *de minimis* exception exists).

application explains why IEPA's current interpretation of the CCR surface impoundment definition is absurd and could turn a unit the Agency explicitly agreed is *de minimis* into a CCR surface impoundment. At hearing, using the South Fly Ash Pond as a hypothetical example, SIPC asked IEPA's single witness whether a man-made excavation—originally designed to serve as a replacement to SIPC's Pond A-1 but never used for that purpose and instead serving as a secondary pond to SIPC's Emery Pond (a regulated 40 C.F.R. Part 257, Subpart D ("Part 257") and Part 845 CCR surface impoundment)—would be a Part 845 CCR surface impoundment if it received only a handful of CCR from Emery Pond. *See* June 12 Tr. at 526:13–527:7. The witness answered no because it would contain "a de minimis amount." *Id.* at 528:2–3. When asked if the answer would change if the unit contained a single cubic yard of CCR, the witness again answered no. *Id.* at 528:4–11.

Those answers are at odds with IEPA's Post-Hearing Brief position. In both hypothetical iterations, IEPA's proposed conclusory approach would allow the hypothetical South Fly Ash Pond to meet its "configuration" analysis because it is a man-made excavation. Further, the approach would allow the unit to meet IEPA's "design" analysis because the impoundment is "designed to allow for" the accumulation of CCR by virtue of receiving some transfer—no matter the amount—from Emery Pond. Similarly, under IEPA's "function/contents" analysis, the unit "functioned to hold" CCR because some CCR did flow from Emery Pond, despite the trivial amount. This exemplifies that IEPA's approach here is untenable. An approach that renders amount irrelevant is further in contradiction with the Agency's own testimony. June 12 Tr. at 528:24–529:2 ("Q. So you do agree that [determining whether a unit meets Part 845's definition of CCR surface impoundment] would involve some level of reviewing information and making a judgment. A.

Yes."). This underscores the malleability of IEPA's approach and the risk of unpredictable application.

IEPA attempts to rebut this concern by citing a prior proceeding in which it recommended Part 845 be found inapplicable to a unit containing *de minimis* CCR. IEPA's Brief ¶ 64 (citing AS 2021-004, *In the Matter of: Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard from 35 Ill. Admin. Code Part 845, or In the Alternative, a Finding of Inapplicability,* Recommendation of the Illinois Environmental Protection Agency (Sept. 22, 2021)) (arguing the "record does not support Petitioner's . . . claim that, under the Agency's approach, no pond could ever be considered de minimis" because it found a unit to be *de minimis* in another Board proceeding). But the rebuttal does not hold water. In AS 2021-004, despite evidence that the unit could contain up to 500 cubic yards of total sediment, IEPA did not apply its "configuration," "design," and "function/material" framework. *See* AS 2021-004, *In the Matter of: Petition of Illinois Power Resources Generating, LLC for an Adjusted Standard from 35 Ill. Admin. Code Part 845, or In the Alternative, a Finding of Inapplicability,* Petition for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability at 1 (May 11, 2021) (stating the unit contains at most 500 cubic yards of sediment); *see also generally* AS 2021-004, Recommendation (containing no discussion of the "configuration, design, and "function/material" approach IEPA proposes here). Had the Agency relied on its conclusory analysis proposed in this proceeding, which renders amount meaningless, the Agency's AS 2021-004 Recommendation likely would have read differently.

While the Agency's approach provides no boundaries for distinguishing between a unit with *de minimis* versus non-*de minimis* amounts of CCR, SIPC's analysis does. SIPC uses USEPA's direction on how to properly interpret the CCR surface impoundment definition's

requirements that a CCR surface impoundment hold an *accumulation* of CCR and liquids and *treat, store, or dispose of* CCR. *See* 35 Ill. Admin. Code § 845.120. In describing how to determine whether a surface impoundment holds an accumulation of CCR or treats, stores, or disposes of CCR, USEPA explained that

> [*de minimis* units] will not contain the *significant quantities* that *give rise to the risks modeled in [US]EPA's assessmen*t. By contrast, units that are designed to hold an accumulation of CCR and in which treatment, storage, or disposal occurs will contain *substantial amounts* of CCR and consequently are a *potentially significant source of contaminants*.

80 Fed. Reg. 21,302, Revised SIPC Ex. 17 at 21,357 (emphasis added). Therefore, while a *de minimis* unit will, necessarily, contain some CCR, the relevant question is whether it contains significant quantities or a substantial amount of CCR such that it would give rise to the risks modeled in USEPA's 2014 Risk Assessment or serve as a potentially significant source of contaminants.[3] This inquiry provides the principled boundary IEPA's approach lacks and aligns with the Board's recognition of a *de minimis* exception and IEPA's hearing admission that Part 845 does not regulate *de minimis* units. *See supra* at 4 n.2.

As detailed in SIPC's Post-Hearing Opening Brief, no De Minimis Unit contains significant or substantial amounts of CCR resulting in the risks modeled in USEPA's 2014 Risk Assessment or serving as a potentially significant source of contaminants. *See* SIPC's Brief, Sections III.A.1, 3, 5, 7, 9. Therefore, on a unit-by-unit basis, SIPC has proven that the De Minimis Units are not "designed to hold an accumulation of CCR" and do not "treat[], store[], or dispose[] of CCR." *See* 35 Ill. Admin. Code § 845.120. The fact that these units fall within USEPA's non-exhaustive list

[3] While no definition of *de minimis* exists, when IEPA proposed a definition in the Part 845 rulemaking, the Agency itself tied the finding to whether the amount of CCR in an impoundment posed a reasonable probability of adverse effects on human health or the environment. AS 2020-019, Second Notice Op. at 14. Thus, while ignored by IEPA in this proceeding, it has acknowledged the relevant question is whether there is enough CCR to pose a risk to human health or the environment.

of examples expected to contain *de minimis* amounts of CCR is further evidence (but far from the sole evidence) of their *de minimis* nature. USEPA, Frequent Questions about Definitions and Implementing the Final Rule Regulating the Disposal of Coal Combustion Residuals, SIPC Ex. 34 at 9. *But see* IEPA's Brief ¶ 65.

B. A Landfill Is Not A CCR Surface Impoundment, Despite IEPA's Misconstruction of the Units at Issue to Support its Conclusion.

IEPA applies its flawed "configuration," "design," and "function/material" test to the Former Fly Ash Holding Units. IEPA's Brief ¶¶ 47–61. Since the 1990s, the Former Fly Ash Holding Units have been dry and used as structural fill beneath the then-active Former CCR Landfill, which, in turn, had been operated and regulated as an on-site, permit-exempt landfill pursuant to 35 Ill. Admin. Code Part 815. *See, e.g.,* IEPA Violation Notice L-2020-00035 (Mar. 20, 2020), SIPC Ex. 16; June 10 Tr. at 150:23−151:8, 152:2−4, 153:16−23 (describing all the Former Fly Ash Holding Units as being dewatered by the early 1990s); *see also* SIPC's Brief at 115–18. Instead of IEPA's simplified definitional test, SIPC has proven that these units have not functioned as surface impoundments for decades and do not fall within Part 845's definition of a CCR surface impoundment. *See* SIPC's Brief at 115–18.

In an attempt to circumvent reality, IEPA conflates a structure on top of a corner of the Former CCR Landfill as proof-positive that the Former Fly Ash Holding Units continue to hold water. *See* IEPA's Brief ¶ 50 ("[SIPC] has provided a declaration stating that beginning around 2000, a cavity on top of the [Initial Fly Ash Holding Unit] was used as a holding pond for coal yard runoff and occasionally scrubber solids."). That is not so. The Former Fly Ash Holding Units were closed, dewatered, and covered by the Former CCR Landfill as of the 1990s. *See* June 10 Tr. at 150:23−151:8, 152:2−4, 153:16−23 (explaining each of these areas were no longer operating and were dewatered as of the 1990s). The units are not and have not for decades been "designed

to hold an accumulation of . . . liquids." *See* 35 Ill. Admin. Code § 845.120. SIPC admits shallow structures on top of the Former CCR Landfill, including one on top of a corner of the Former CCR Landfill that utilizes the Initial Fly Ash Holding Area as structural fill, were used to temporarily store water. *See* SIPC's Brief at 120–22. However, these shallow structures did not extend deep enough to interact with the Former Fly Ash Holding Units. *See id.* at 120–121; Transcript of June 11, 2025 Hearing at 245:9−17, 247:14−23, 248:15−22 (SIPC witness Jason McClaurin testifying regarding the depth and use of the shallow structures); *see also* Haley & Aldrich, *Evaluation Report: Southern Illinois Power Company Marion Station* (April 2025), SIPC Ex. 40 at 14–15 (discussing the depth and elevation change between the top of the Initial Fly Ash Holding Area and the top of the Former CCR Landfill).

Further, SIPC employee Jason McLaurin confirmed through sworn testimony that these structures held water for very limited periods of time, June 11 Tr. at 245:1−246:1, 246:23−247:13 (noting these areas held water only occasionally); *see also id.* at 249:13–14, and SIPC expert David Hagen confirmed saturation of the Former CCR Landfill or units below it was not possible based on the temporary nature and size of the structures at issue. *Id.* at 327:10–328:4. IEPA ignores all this evidence. Instead of CCR surface impoundments, the Former Fly Ash Holding Units and the Former CCR Landfill on top of them are CCR management units, properly addressed under the Illinois landfill program and any federal rules applicable to such units. *See* SIPC's Brief at 117–18; *see also* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments, 89 Fed. Reg. 38,950 (May 8, 2024), Revised SIPC Ex. 33 at 39,039 (providing an example of a former unit used as structural fill under a landfill being regulated as CCR management unit).

II. IEPA's Arguments Regarding SIPC's Alternative Request for an Adjusted Standard Are Irrelevant and Unsupported.

The factors applicable to the Board's consideration of an adjusted standard in this proceeding are as follows:

1. factors relating to [the ponds at issue] are substantially and significantly different from the factors relied upon by the Board in adopting the general regulation applicable to that petitioner;
2. the existence of those factors justifies an adjusted standard;
3. the requested standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability; and
4. the adjusted standard is consistent with any applicable federal law.

415 Ill. Comp. Stat 5/28.1(c). The Agency does not meaningfully address these factors (including SIPC's evidence and arguments related to each). Instead, IEPA incorrectly asserts that because it believes the units at issue are CCR surface impoundments to which Part 845 applies, the units fail to satisfy the first and second adjusted standard factors. IEPA's Brief ¶ 78. Such an argument belies the purpose of an adjusted standard, which requires considering the adjusted standard factors when it is found that a regulation (such as Part 845) would otherwise apply.

IEPA further improperly applies the third adjusted standard factor, overstating and mischaracterizing environmental and human health risks. IEPA focuses almost exclusively on the groundwater monitoring network at the Station to argue that significant environmental harm will result from the adjusted standard. IEPA's Brief ¶¶ 80–82. This approach ignores the actual scope of the requested adjusted standards and further ignores the other lines of evidence SIPC presented in this proceeding that show *no* human health or environmental risk is associated with the limited adjusted standards proposed. Finally, IEPA now asserts, in a flawed interpretation, that the proposed adjusted standard is inconsistent with federal law. SIPC takes each of these issues in turn below.

A. IEPA Conflates and Incorrectly Applies the First Two Factors Applicable to SIPC's Alternative Request for an Adjusted Standard.

The Agency gets the first factor wrong. It assumes that if a unit is a Part 845 CCR surface impoundment, it automatically fails the first factor. IEPA's Brief ¶ 78 ("Petitioner has failed to provide adequate proof that any one of the nine ponds at issue in this matter is not a CCR surface impoundment, thus it has failed to provide adequate proof that factors relating to this matter are at all different from the factors relied upon by the Board in adopting Part 845."). This contradicts the first factor's plain language that Part 845 must be *applicable* for a unit to be eligible for an adjusted standard. 415 Ill. Comp. Stat 5/28.1(c)(1) (". . . the factors relied upon by the Board in adopting *the general regulation applicable to that petitioner* . . . .") (emphasis added).

This flawed argument conflates SIPC's separate requests for a finding of inapplicability and an adjusted standard. SIPC's requests are in the alternative: (1) a finding of inapplicability, which—by its nature—requires a unit be unregulated by Part 845, or (2) if Part 845 is determined to be applicable, an adjusted standard, which—by its nature—requires a unit be regulated and have unique factors that justify an adjustment. Therefore, meeting Part 845's CCR surface impoundment definition, as IEPA argues all the units at issue do, does not preclude a unit from having substantially and significantly different factors that, in turn, justify an adjusted standard.[4]

SIPC has proven that the units at issue meet both the first and second factors for issuance of an adjusted standard. *See* SIPC's Brief, Section III.A.2.a, 2.b, 4.a, 4.b, 6.a, 6.b, 8.a, 8.b, 10.a, 10.b; *id.*, Section III.B.3.a, 3.b.

[4] Indeed, if applicability of a rule meant that the first two adjusted standard factors could not be met, the adjusted standard provisions would be rendered meaningless. The entire purpose of an adjusted standard is to allow an adjustment when a rule would otherwise apply in its entirety.

B. IEPA Mischaracterizes the Totality of SIPC's Adjusted Standard to Incorrectly Allege Potential Environmental Harm.

IEPA's analysis of the third factor completely ignores that SIPC's proposed adjusted standards would apply all Part 845 requirements related to protecting human health and the environment. *See* Second Amended Petition, Appendix A; *see also id.*, Sections IV.B.4, C.4, D.4., E.4. SIPC's proposed adjusted standard applies all groundwater monitoring, corrective action, closure, and post-closure care requirements, with some modification for timing of permit filing and issuance, continued operation of Pond 4 unless found to be contributing to groundwater contamination, and the potential evaluation of the Former Landfill Area's CCR for beneficial use. *Id.* IEPA's analysis of environmental harm does not account for the actual scope of the requested adjusted standards and, therefore, glazes over nuance that must be considered to determine if these units qualify for an adjusted standard.

IEPA further mischaracterizes the proposed adjusted standard by incorrectly asserting in its Post-Hearing Brief that SIPC supports its adjusted standards by stating it will "evaluate whether CCR in the relevant ponds is eligible for Beneficial Use" for all units at issue. IEPA's Brief ¶ 83; *see also id.* ¶ 84. However, SIPC proposes an adjusted standard to determine the viability of beneficial use for *only* the Former Landfill Area or to, in the alternative, close that area consistent with Part 845 performance standards. Second Amended Petition, Appendix A, Section IV. SIPC's proposal for evaluation of beneficial use of the Former Landfill Area's CCR includes IEPA oversight and signoff and follows guidelines for beneficial use that are consistent with beneficial use provisions in Part 845 and Part 257 for other CCR units. *See id.*; *see also* 40 C.F.R. § 257.102

(allows for beneficial reuse prior to closure); 35 Ill. Admin. Code § 845.120 (defining beneficial reuse); *id.* § 845.730 (allows for beneficial reuse prior to closure).[5]

C. IEPA Ignores Specific Evidence Demonstrating Lack of Human Health and Environmental Harm while Making Unsupported Claims that Environmental Harm Will Occur.

IEPA engages in a misplaced focus on the Station's current groundwater monitoring system. Without more, IEPA cursorily states that because the groundwater monitoring system is "inadequate," SIPC cannot prove the proposed adjusted standard will not result in environmental or health effects substantially and significantly more adverse than the effects considered by Part 845. *See* IEPA's Brief ¶¶ 80–82. But IEPA fails to acknowledge that, of course, SIPC's current groundwater monitoring system is not compliant with Part 845 or Part 257 because at the time SIPC submitted its initial Petition, neither applied to the units in this proceeding. Even so, the available groundwater data must be considered with the additional lines of evidence presented by SIPC.

IEPA's focus on only the sufficiency of the Station's groundwater monitoring network ignores these significant additional lines of evidence clearly demonstrating that the proposed adjusted standard[6] will not result in human health or environmental harm substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability. *See* SIPC's Brief at 57–58 (South Fly Ash Pond); *id.* at 71–73 (Pond 3/3a); *id.* at 85–86 (Pond 6); *id.* at 100–102 (Pond 4); *id.* at 113–115 (Former Pond B-3); *id.* at 131–132 (Former Landfill Area). This evidence includes (1) shake test results showing that the De Minimis Units do

[5] IEPA includes an irrelevant citation to shake test results from the De Minimis Units to suggest beneficial use may not be viable. IEPA's Brief ¶ 83. Again, the proposed adjusted standard does not seek to use material from the De Minimis Units for beneficial use. *See generally* Second Amended Petition, Appendix A.

[6] Indeed, evidence presented by SIPC demonstrates that even under a finding of inapplicability there will be no adverse impacts to human health or the environment. *See* SIPC's Brief, Sections III.A.1., A.3., A.5., A.7., A.9., B.1., B.2.

not have concentrations of CCR constituents at levels that would contribute to groundwater contamination, Pond Investigation Report for Certain Ponds at SIPC's Marion Station, SIPC Ex. 29 at 17−20; (2) SIPC expert David Hagen's pond investigation report showing that—after reviewing multiple lines of evidence—all the De Minimis Units contain a nominal amount of sediment and CCR compared to typical CCR surface impoundments and are not adversely impacting (or expected to adversely impact) groundwater, *see generally* Pond Investigation Rep., SIPC Ex. 29; (3) SIPC toxicology and risk assessment expert Ari Lewis's Human Health and Ecological Risk Assessment ("HHERA"), concluding that even after all conservative assumptions were considered, the De Minimis Units, and more broadly the Station as a whole, do not pose a risk to human health or the environment, Gradient, *Human Health Risk Assessment, Marion Power Station* (Dec. 20, 2024), SIPC Ex. 37 at 35–36, and (4) SIPC expert Andrew Bittner's Pond 4 Closure Impact Assessment, concluding that continued operation of Pond 4 will not result in any greater risk to human health or the environment compared to the Pond's closure. Andrew Bittner, M.Eng., P.E. Closure Impact Assessment, Pond 4 (Dec. 20, 2024), SIPC Ex. 38 at 18. SIPC presented multiple, separate lines of unrebutted evidence showing that the proposed adjusted standard "will not result in environmental or health effects substantially and significantly more adverse than the effects considered by the Board in adopting the rule of general applicability." 415 Ill. Comp. Stat 5/28.1(c)(3); *see also* SIPC's Brief, Sections I.G., III.A.2.c., III.A.4.c., III.A.6.c., III.A.8.c., III.A.10.c., III.B.3.c.

In fact, if IEPA was concerned about the sufficiency of the Station's groundwater monitoring network and reliance on the data collected from it, its objection to an interim adjusted standard is unjustified. The Board, prior to hearing, invited the parties' thoughts regarding a potential interim adjusted standard to allow SIPC to obtain additional groundwater data and assess

the impact, or lack thereof, of the units at issue. AS 2021-006, Hearing Officer Order; AS 21-6 Potential Hearing Questions at 7 (Jun. 6, 2025). IEPA objected to any interim adjusted standard, IEPA Ex. 56 at 6–7, citing inaccurate information about the Station's geology and groundwater flow. SIPC's Brief at 135–36. Such an objection is unwarranted not only because it relies on improper geology but also because an interim adjusted standard would directly address IEPA's alleged concerns regarding a perceived lack of groundwater data. Once again, IEPA is taking inconsistent positions.

Further, IEPA does not identify any specific environmental harm that may occur here. Instead, IEPA simply alleges that such harm may occur based on overgeneralization and mischaracterization of SIPC's presented evidence. *See* IEPA's Brief ¶ 79 ("The requested adjusted standard here would result in environmental harm."); *see also id.* ¶ 82. SIPC presented ample, uncontroverted evidence to the contrary. *See*, *e.g.*, SIPC's Brief, Section I.G.; *see also* HHERA, SIPC Ex. 37 at 35–36; Closure Impact Assessment, SIPC Ex. 38 at 18. IEPA cursorily states that this evidence is insufficient due to the perceived groundwater monitoring system's inadequacy, but IEPA did not rebut SIPC's evidence in any meaningful way. IEPA's legal argument in its Post-Hearing Brief, without any evidence showing or even suggesting environmental harm, does not and cannot discredit the evidence SIPC has presented.

And finally, as stated, despite lack of evidence indicating human health or environmental risk, SIPC's proposed adjusted standard still includes all groundwater monitoring, corrective action, closure, and post-closure care requirements. *See supra* Section II.B.

D. IEPA's Federal Inconsistency Argument Fails.

IEPA's new argument that SIPC's requested adjusted standard is inconsistent with federal law is both incorrect and untethered from the governing legal framework and facts.

First, IEPA's argument fails because there can be no inconsistency with federal law when a unit is excluded from a federally approved CCR permit program. In that circumstance, the adjusted standard does not displace federal law; it operates alongside it. The USEPA letter the Agency relies on in its Post-Hearing Brief confirms this. USEPA explained that Illinois chose not to seek approval of adjusted standards in its CCR permit program application to streamline the application and avoid the additional time needed to review those "provisions and the associated variance history." *See* AS 2021-006, *In the Matter of: Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability*, Correspondence from Carolyn Hoskinson, Director (USEPA) directed to James Jennings, Director, (IEPA) ("P.C. #24") at 6 (Sept. 11, 2025). Thus, any unit with a Part 845 adjusted standard is excluded from USEPA's review and potential federal approval of Illinois's CCR permit program. *Id.* Relatedly, any pending adjusted standards, such as those at issue here, are necessarily not ripe for submission to USEPA as no adjusted standard has been issued to review.

Because these adjusted standards will not be part of Illinois's federally approved program, in the event it is approved, they cannot be less stringent than or inconsistent with federal law because they are not supplanting or changing applicable federal law. Rather, any unit with a Part 845 adjusted standard must comply with both any applicable federal requirements under Part 257 and the terms of its Illinois adjusted standard.[7] As this Board has recognized, "Part 257 is self-implementing;" and whether a given unit is subject to the federal rule is a matter for SIPC (and USEPA) to decide. *See* AS 2021-005, *In the Matter of: Petition of Electric Energy, Inc. for a*

[7] By way of example, Emery Pond at the Station is a CCR surface impoundment that closed under Part 257 and is regulated by the Part 845 permitting program. Assuming Illinois's CCR permit program is federally approved, as submitted, any Emery Pond permit issued under Part 845, and any requirements within that permit, will operate in lieu of Part 257 and its requirements. In contrast, any permit issued under Part 845 for a unit granted an adjusted standard will not operate in lieu of—and instead will operate in parallel with—any federal requirement that may otherwise apply.

Finding of Inapplicability or, in the Alternative, an Adjusted Standard from 35 Ill. Admin. Code Part 845, Order of the Board at 44 (Jun. 26, 2025). This will remain the case for any unit granted an adjusted standard. Thus, IEPA's decision to exclude adjusted standards from its federal submittal only cements that any Board decision granting those adjusted standards will not conflict with federal law.

Second, IEPA incorrectly asserts that the adjusted standard relief that could be granted in this proceeding "cannot be recognized by USEPA" and, therefore, "cannot be considered consistent with federal law." IEPA's Brief ¶ 91. This assertion similarly misstates the law and facts. USEPA has not said it cannot recognize Part 845 adjusted standards, including the adjusted standards requested here. To the contrary, USEPA retains the authority to determine whether alternative State requirements are "at least as protective as" Part 257 when and if the State submits them. *See* P.C. #24 at 6. Because IEPA has not submitted any adjusted standards—granted or proposed—USEPA has taken no position on their protectiveness compared to Part 257.[8] The absence of a USEPA position results from IEPA's choice to expedite approval of Part 845, not from any legal bar to USEPA's recognition.

Finally, IEPA incorrectly suggests no unit found to be a CCR surface impoundment under Part 845 could satisfy the federal consistency requirement for an adjusted standard. IEPA's Brief ¶¶ 87 (arguing that all units "at issue in this matter are CCR surface impoundments" and therefore "[g]ranting an adjusted standard exempting these ponds from regulation under Part 845 would be inconsistent"). That argument again improperly conflates SIPC's distinct requests for a finding of inapplicability and for an adjusted standard. Consistency with federal law is relevant to the latter, not the former. *See* SIPC's Brief at 41–42 (outlining the applicable standards of review for each

[8] Relatedly, USEPA has taken no position on whether it believes that one or more of the units in this proceeding are Part 257 CCR surface impoundments.

alternative request). Meaning, if the Board denies the requested finding of inapplicability and concludes that one or more of the units in this proceeding is a Part 845 CCR surface impoundment (or determines that further evaluation is required under an interim adjusted standard), such a finding does not automatically preclude an adjusted standard. Rather, it raises the question of whether the limited scope of relief requested through SIPC's adjusted standard (or a potential interim adjusted standard) is consistent with federal law. And it would be. As described above, the proposed adjusted standard necessarily cannot conflict with federal law because the adjusted standard will be excluded from the federally approved Illinois CCR permit program, and any applicable Part 257's requirements will continue to apply in parallel.

Further, determination that a unit is a Part 845 CCR surface impoundment will not preclude USEPA from determining an adjusted standard is as protective as Part 257, if such a question is ever posed. Part 845 regulates a broader set of units and, in important respects, more stringently than Part 257. *See Midwest Generation, LLC v. Ill. Pollution Control Bd.,* 240 N.E.3d 119, 131–33 (Ill. App. 4th Dist. 2024) (noting that the Board properly adopted Part 845, which regulated a broader set of units than regulated by Part 257); *see also, e.g.*, 35 Ill. Admin. Code §§ 845.200–.290 (permitting requirements not included in Part 257); *id.* § 845.750 (closure in place requirements that are more stringent than the closure in place performance standards in 40 C.F.R. § 257.102). Thus, a determination under Part 845 does not predetermine the federal classification of a unit or preclude USEPA from later concluding that any adjusted standard is at least as protective as Part 257.

III. SIPC Has Met its Burden of Proof for Both its Finding of Inapplicability Request and its Alternative Adjusted Standard Request; in Response, IEPA Mischaracterizes Evidence.

IEPA mischaracterizes the evidence before the Board in multiple ways. Many of those ways have already been discussed. *See supra* at 8–9 (conflating the temporary structures on top of the

Former CCR Landfill with liquids contained in a decades-closed unit); *id.* at 12–13 (overstating the proposed adjusted standard and its impact on the environment and human health), *id.* at 13–15 (focusing only on the adequacy of the Station's groundwater network without addressing any other lines of evidence showing that the proposed adjusted standard does not present a risk to human health or the environment); *id.* at 15–18 (misstating a conflict between federal and state law when such a conflict does not exist). But IEPA's mischaracterizations do not end there. IEPA has also done all the following in its Post-Hearing Brief: (1) overstated Polarized Light Microscopy ("PLM") results and skewed the results' "Other" category, without any rebuttal evidence; (2) cursorily discredited sworn testimony regarding routine Station maintenance; and (3) outright misstated evidence presented by SIPC.

A. The "Other" Category in SIPC's PLM Analysis Results Contains Little, if any, CCR Material.

IEPA claims that SIPC's "own data undercuts its de minimis claim" because when SIPC references its PLM results, it "excluded the 'Other' fraction of its summary of the sediment samples from each pond when estimating CCR in the units it labeled 'de minimis.'" IEPA's Brief ¶ 66. IEPA further claims that SIPC's PLM analysis classifies scrubber sludge as 100% "Other," and therefore, the entire "Other" category must be composed of CCR. *Id.* ¶ 66–67. IEPA has mischaracterized not only the evidence but also SIPC's position for two reasons.

First, SIPC presented evidence that the "Other" category is likely to contain little, if any, scrubber sludge because (1) the Station only disposed of scrubber sludge on the Former CCR Landfill and not within its pond system, and (2) it is more likely than not that the majority of the "Other" category is made up of organic material from lawn, landscape maintenance, and other runoff at the Station. *See* SIPC's Brief at 48 n.8; *see also id.* at 24–26. Further, SIPC did not rely on *only* PLM data to support its conclusions that sediment in the De Minimis Units contains non-

CCR material, instead presenting a fulsome, lines of evidence approach. This included evidence regarding the uses of the units (*e.g.*, for activities such as the collection of coal pile runoff, Station runoff, and natural organic deposition), results of carbon versus hydrogen and hydrogen versus nitrogen analysis demonstrating the presence of non-CCR sources within the sediments, shake test results demonstrating a lack of CCR-indicating contaminants, and plant personnel observations of the content and makeup of the De Minimis Units. SIPC's Brief 43–48 (South Fly Ash Pond); 59–64 (Pond 3/3a); 73–77 (Pond 6); 87–91 (Pond 4); 102–106 (Former Pond B-3). All the evidence, taken together, supports that the De Minimis Units contain little, if any, CCR and that not all sediment within the units is CCR.

Second, SIPC has provided evidence demonstrating that *even if* all the sediments in the De Minimis Units are considered CCR, the units still contain a *de minimis* amount of CCR and are, therefore, not regulated by Part 845. SIPC's Brief at 45–46 (South Fly Ash Pond), 61–62 (Pond 3/3a); 75–76 (Pond 6), 88–89 (Pond 4).[9]

B. IEPA's Dismissal of Sworn Testimony Without Rebuttal or Contradictory Evidence Does Not Support its Argument that SIPC Failed to Meet its Burden of Proof.

SIPC acknowledges that it bears the burden of proof in this proceeding. *See* 415 ILCS 5/28.1(c); 35 Ill. Admin. Code § 104.426. To meet that burden, SIPC submitted 56 exhibits and presented the sworn testimony of seven witnesses, including four experts. *See generally* June 10 Tr.; June 11 Tr.; *see also* SIPC's Brief at 6–8.

IEPA now claims, in multiple statements in its Post-Hearing Brief, that despite explicit sworn testimony to the contrary, SIPC has failed to meet its burden of proof due to lack of supplemental documentary evidence. *See, e.g.*, IEPA's Brief ¶¶ 20, 25, 30, 36, 40, 45. Such an

[9] Former Pond B-3 is not included in this list because it has been cleaned of all sediment and liquids and currently contains *no* CCR. SIPC's Brief at 23–24.

argument is unsupported by Illinois law. In determining whether SIPC has met its burden of proof, the Board is both the finder of fact and of law. The Illinois Supreme Court has held that "in Illinois a finder of fact may not simply reject unrebutted testimony." *See Sweilem v. Ill. Dept. of Revenue*, 372 Ill. App. 3d 475, 485 (1st Dist. 2007) (citing *Bucktown Partners v. Johnson*, 456 N.E.2d 703 (Ill. 1983)). The Board has held similarly: that uncontroverted evidence should be accepted as true and accurate. *See* PCB 2011-086, *Exxonmobil Oil Corp. v. IEPA*, Opinion and Order of the Board at 30 (Dec. 1, 2011) (finding cost estimates presented by way of testimony only to be "true and accurate" for purposes of the Board's opinion because "the Agency failed to probe [Petitioner's] sworn testimony on cross-examination at hearing, or to present testimony challenging its estimates . . . .").

IEPA has not rebutted SIPC's testimony in these instances with its own testimony or other evidence. Instead, IEPA argues that the testimony is meaningless unless it is backed with documentary evidence; documentary evidence that does not and is not required to exist as a course of standard industry and business practices. June 11 Tr. at 264:12–23. The Board must give weight to SIPC's presented sworn testimony even if not further corroborated by documentary evidence, and IEPA cannot argue simply, without more, that testimonial evidence on its face is insufficient to meet SIPC's burden.

C. IEPA Consistently Misstates or Skews Evidence to Support Its Arguments, Which Are Otherwise Unsupported and Flawed.

IEPA has, in many instances, explicitly misstated or otherwise skewed evidence. Below, we have outlined several of those instances.[10]

[10] Notably, many of the evidentiary errors IEPA makes in its Brief were also made in its Recommendation. SIPC has addressed those evidentiary errors in its Response to IEPA's Recommendation. AS 2021-006, *In the Matter of: Petition of Southern Illinois Power Cooperative for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability,* Petitioner's Response to IEPA's Recommendation (Apr. 10, 2025).

Pond 3/3a. IEPA indicates that "Pond 3 is a man-made excavation, as reflected in the 1969 construction permit and confirmed in testimony" and relies upon that same permit when discussing its "design" factor. IEPA's Brief ¶ 18 (citing June 10 Tr. at 170; IEPA Ex. OO). However, in questioning SIPC witness Todd Gallenbach, no such confirmation occurred based on that Exhibit. June 10 Tr. at 170:16–20 (Q: (Referencing IEPA Exhibit OO) "I'm asking about the terminology of land cut and fill to construct a levee, and I'm asking if that's a man-made excavation or diked area. A. It's hard to tell from the description."). Further, IEPA admitted page nine of its own Exhibit OO, on which it relies, is not labeled and may not even be referring to Pond 3/3a. June 10 Tr. at 172:18–173:11 (Mr. Gallenbach indicating that page nine of IEPA Exhibit OO to which IEPA referenced in questioning was "talking about building a pond to sell slag," which "looks like it's our ponds 1 and 2 . . . It's not labeled what pond it is," to which IEPA responded "[t]hat's right. I didn't make [the] exhibits and I agree. It's not [labeled]."). Despite this fact, IEPA still uses Exhibit OO as evidence related to Pond 3/3a in both its "configuration" and "design" arguments. IEPA's Brief ¶¶ 18–19. While IEPA has not proven IEPA Exhibit OO's relevance to Pond 3, SIPC has explained through evidence in this proceeding that unit names have changed over time and the permitted uses for all the De Minimis Units tend to be broader than and do not necessarily reflect actual uses. *See, e.g.*, Evaluation Report, SIPC Ex. 40 at 10 ("IEPA assumes permitted uses were actual uses, which is not always the case.").

Additionally, IEPA states, summarily, that aerial photography and the construction of berms indicate that the 3a area of Pond 3/3a is "designed to hold an accumulation of CCR and liquids." IEPA's Brief ¶ 24. Such a statement is unsupported. Aerial photographs cannot show, without more, that a unit was "designed" to hold CCR or even that it did hold CCR. *See* June 11 Tr. at 319:4–320:5 (testimony of David Hagen indicating that color on aerial photography is not a reliable way

to determine sediment contents and aerial photographs do not account for fluctuating water levels); *see also* Evaluation Report, SIPC Ex. 40 at 9, 11–12 (indicating that aerials cannot clearly establish CCR content or delta development, which can be attributed to fluctuating water levels). Further, when asked directly, SIPC witness Todd Gallenbach stated that Pond 3/3a *was not* designed to hold an accumulation of CCR. June 10 Tr. at 174:16–17. It functioned, instead, as a secondary or finishing pond, depending on the time of its use. June 10 Tr. at 174:18–175:2.

Pond 4. IEPA cites a construction permit application and discharge permit materials to incorrectly argue Pond 4 was designed to accumulate CCR. IEPA's Brief ¶ 29. On the contrary, these exhibits support SIPC's assertions that Pond 4 received sediment from a variety of non-CCR sources and was not designed to accumulate CCR. SIPC's Brief at 19–22 (discussing the sources of water Pond 4 received); *see also* IEPA Ex. QQ at 1 (referring to Pond 4 as a "Holding Pond for Coal Storage and Yard Drainage" and explaining Pond 4 was meant to receive yard drainage, coal yard drainage, boiler blow down, and water from the Station's settling ponds); IEPA Ex. YY at 18 (explaining Pond 4 receives *water* runoff from settling ponds, boiler blow down, and coal storage rain runoff).

Former Pond B-3. IEPA makes several misstatements related to Former Pond B-3. First, IEPA indicates that SIPC "did not conduct a [PLM] analysis on Pond B-3 or sample the internal berms, so Petitioner has not provided estimates of the amount of CCR contained in Pond B-3." IEPA's Brief ¶ 35. IEPA fails to mention that SIPC did not conduct a PLM analysis of Former Pond B-3's sediment or provide a sediment estimate because Former Pond B-3 *contains no sediment*. SIPC's Brief at 23–24. This unit was closed, with IEPA oversight, in 2017. *Id*. To show that all CCR sediments had been removed from the Pond, SIPC provided sampling data from the time of Former Pond B-3's closure; sworn, firsthand witness testimony; and IEPA's own acknowledgment

of Former Pond B-3's clean closure. *See* Pond Investigation Rep., SIPC Ex. 29, Att. E; June 11 Tr. at 238:20–241:13 (SIPC witness Jason McLaurin testifying to his personal knowledge of the cleaning and dewatering of Former Pond B-3); IEPA Ex. BB; *see also* Testimony of David Hagen PowerPoint Demonstrative, SIPC Ex. 52 at 14. Additionally, SIPC did sample two accessible berm locations for Former Pond B-3, both of which found no evidence of CCR. *See* Pond Investigation Rep., SIPC Ex. 29 at 12, 19; *see also id.*, Attachment C (boring logs demonstrating no CCR was identified in Former Pond B-3 berm samples and shake test results demonstrating no exceedances of CCR constituents).

IEPA also makes a tenuous comparison between sampling of Pond 3/3a's berms and the Former Pond B-3's internal berm,[11] which is completely unsupported. IEPA claims—without presenting any evidence or explanation—that "the partial shake test data from the Pond 3A berm show two samples being 90% and 91% fly ash. The sulfate and calcium levels in Pond 3A are comparable to those measured in Pond B-3, indicating similar material composition. Taken together, this supports that Pond B-3's berms are likewise constructed primarily of CCR." IEPA's Brief ¶ 35. As an initial matter, the findings of 90% and 91% fly ash in the 3a area berm resulted from a *PLM analysis*, not shake tests. *See* Pond Investigation Rep., SIPC Ex. 29 at 15. Further, IEPA's statement that the "sulfate and calcium levels" are comparable is also unsupported. The berm samples from the two units show varied sulfate levels and markedly different calcium levels. Specifically, the 3a area berm samples show 5.26 milligrams per liter ("mg/L") of calcium at two to four feet and 17.1 mg/L at eight to ten feet, while Former Pond B-3 berm samples show 0.699

[11] SIPC continues to reiterate a unit's berms and the composition of those berms, which make up the structure of a unit but not its contents, are not relevant to whether a pond is a regulated CCR surface impoundment. SIPC's Brief at 104 n.14. The relevant question for defining a CCR surface impoundment is an evaluation of materials placed within the natural topographic depression, man-made excavation, or diked area, and managed under a hydraulic head. 35 Ill. Admin. Code § 845.120.

mg/L and <0.100 mg/L of calcium in two samples taken at four to six feet. *See* Pond Investigation Rep., SIPC Ex. 29 at 12; Evaluation Report, SIPC Ex. 40 at 7 ("The shake test samples from the berm of [Former] Pond B-3 are samples B-B3a and B-B3b. Both samples show low concentrations of sulfate (no more than 15 mg/L) and calcium (less than 0.7 mg/L), indicating there is likely little to no CCR present.").

Even more relevant than just a strict comparison of cherry-picked constituents, IEPA ignores boron levels—a CCR indicator constituent. *See* June 11 Tr. at 306:15–22 (David Hagen explaining that the "[t]here's one constituent in particular that we see over and over and over, almost all ash ponds, actually, CCR ponds, and that's boron."). Both of the 3a area's berm samples show greater than .15 mg/L of boron as compared to the Former Pond B-3 berm samples that contained an undetectable level of boron, below .02 mg/L, showing more than a seven times greater boron level in the 3a area berm sample. Pond Investigation Rep., SIPC Ex. 29 at 19. IEPA's cursory comparison without further technical or expert support is simply inappropriate, unfounded, and cannot rebut SIPC's expert reports, evidence, and testimony provided on the matter. *See, e.g.*, Pond Investigation Rep., SIPC Ex. 29 at 12 (Based on shake test results, "it is concluded that the Pond sediments and berm samples from former Pond B-3 have little, if any, CCR material."); *see also* Evaluation Report, SIPC Ex. 40 at 7. Former Pond B-3's internal berm results are not consistent with it being "constructed primarily of CCR" as IEPA alleges. IEPA's Brief ¶ 35.

Finally, IEPA states that SIPC's "unsupported claim that Pond B-3 contains 'little or no CCR' lacks credibility. . . . Consistent with the treatment of the 'Other' sediment in the ponds for which Petitioner completed PLM analysis for, all sediment must be considered CCR." IEPA's Brief ¶ 37. This is simply a meaningless statement. SIPC has provided substantial evidence that Former Pond B-3 was cleaned to the clay, its exterior berm was cut, and it contains *no sediment or liquids*

and has not done so for years. *See, e.g.*, SIPC's Brief at 23–24, 104–05. Further, IEPA itself noted that SIPC did not conduct a PLM analysis of sediment or berms associated with Former Pond B-3, so its statement that "all sediment must be considered CCR" pursuant to those PLM results is irrelevant. *Compare* IEPA's Brief ¶ 35 *with* ¶ 37. Relying only on "permitted capacity," *id.* ¶ 37, to determine Former Pond B-3 contains more than a *de minimis* amount of CCR further ignores all evidence presented to this Board. *See, e.g.*, SIPC's Brief at 22–24, 102–09.

Even if IEPA is referring to any sediment previously contained in Former Pond B-3 prior to closure, the evidence similarly does not support the unit ever containing more than a *de minimis* amount of CCR. June 11 Tr. at 239:8−13 (SIPC witness Jason McLaurin's sworn testimony that most of the materials removed from Former Pond B-3 were coal fines that were recombusted as fuel); *id.* at 239:22–240:11 (Mr. McLaurin further indicating that the remainder of the material removed from Former Pond B-3 was likely organic material); *see also* Pond Investigation Rep., SIPC Ex. 29 at 12; Hagen Demonstrative, SIPC Ex. 52 at 14 (prior sampling of Former Pond B-3 demonstrating concentrations below Illinois groundwater quality standards (35 Ill. Admin. Code Part 620) with the exception of two clear anomalies).

Pond 6. IEPA misleadingly cites testimony to assert that SIPC admitted "construction activities at Pond 6 are consistent with those that would be appropriate for a CCR surface impoundment." IEPA's Brief ¶ 39. The testimony at issue plainly relates to SIPC's expert pointing out that construction activities depicted on IEPA Exhibit CC are related to grading for the *construction of a landfill* to ensure landfill runoff flows in the correct direction. June 11 Tr. at 390:13–394:5.

Further, IEPA states the following, again without defining the bounds of Pond 6 as it refers to it, *see supra* at 1–3 (discussing IEPA's classifications of the units at issue): "Aerial photographs

from 1993-2021 consistently show CCR in Pond 6 in direct contact with water. *See* Agency Ex. 3-18.[12] Piling of dry CCR in Pond 6 overflowed its limits and extended into the IFAP, the RFAP, and the FAE. *See* Agency Exs. 2-9." IEPA's Brief at 13 ¶ 39. IEPA's notion that dry CCR overflowed Pond 6 and entered the area of the Former Fly Ash Holding Units (or vice versa as it claims in a later paragraph of its Post-Hearing Brief, IEPA's Brief ¶ 76) is an impossibility. The entirety of the Former CCR Landfill sits between Pond 6 and the Former Fly Ash Holding Units, and that Former CCR Landfill was built entirely upon dry land. June 11 Tr. at 323:13–327:9 (discussing how the Former CCR Landfill was built, the direction of water flow, and the lack of saturation within the Landfill's material). It is this CCR material deposited dry on the Former CCR Landfill (not CCR from Pond 6) that eventually extended over top of the Former Fly Ash Holding Units, with those Units serving as structural fill.

In addition, IEPA indicates that its cited aerials (only *one of which* is dated prior to Pond 6's construction in 1982) in combination with a site plan stamped in 2003 (20 years after the Pond's construction) show that "construction of CCR surface impoundments took place on top of this dry CCR." IEPA's Brief at 13 ¶ 39; *see also* IEPA Ex. RR (permitting the construction of Pond 6 around the Former Landfill Area in 1982). There is simply no evidence in the record that Pond 6, as SIPC defines it and as it operates at the Station, was constructed within or on top of existing dry CCR fill, and instead, SIPC presented sworn testimony that Pond 6 does not sit within any CCR from the Former CCR Landfill. *See* June 10 Tr. at 134:3–13.

South Fly Ash Pond: IEPA misleadingly relies upon its Exhibit NN as evidence of the South Fly Ash Pond's design. IEPA's Brief ¶ 44. While the South Fly Ash Pond was originally intended

[12] As already indicated, reliance on the color or appearance of aerial photography is inappropriate when attempting to determine the makeup or existence of sediment. *See supra* at 22–23. Further, IEPA provided no technical or expert interpretation or review of these photos. Simply stating they show CCR within the bounds of Pond 6 or contact with water does not make it true. *See* June 11 Tr. at 319:4–320:5.

to be used to collect fly ash as a replacement to Pond A-1 (as reflected in IEPA Exhibit NN), it was never actually used for that purpose. *See* SIPC's Brief at 13–15 (describing the current and former uses of the South Fly Ash Pond). The relevant inquiry into whether a unit is designed to hold an accumulation of CCR is its actual use, not a potential use that was never realized.

Initial Fly Ash Holding Area. SIPC reiterates the same misconception regarding aerial photography's reliability as it relates to IEPA's statement that "[a]erial photos from 1980-2015 show the continued use of the IFAP for sluicing CCR during this period – i.e. it was designed and operated to hold an accumulation of CCR and liquids." IEPA's Brief ¶ 49. SIPC's evidence establishes that the Initial Fly Ash Holding Area ceased receipt of waste and was closed prior to the construction of the Replacement Fly Ash Holding Area. *See* SIPC's Brief at 27. IEPA misleadingly refers to SIPC witness testimony acknowledging that the unit *at one time was* designed to hold CCR and liquid, IEPA's Brief ¶ 49, while ignoring SIPC witness testimony explaining that the unit *stopped* being designed to hold liquid once it was closed. *See* June 10 Tr. at 150:13–154:5 (discussing the operation and closure of the Former Fly Ash Holding Units); June 11 Tr. at 385:7–23.

IEPA also indicates that SIPC filled the Initial Fly Ash Holding Area "beyond capacity." IEPA's Brief ¶ 76 (citing aerial photography). The only reliable evidence in the record—as SIPC continues to object to the unsupported interpretation of historic aerial photography—indicates that the Initial Fly Ash Holding Area was closed pursuant to the required permit condition and not filled beyond capacity as IEPA suggests. *See* SIPC's Brief at 27. IEPA's reference to SIPC expert Kenn Liss's statement does not rebut this evidence. *See* IEPA's Brief ¶ 76 (citing June 11 Tr. at 376:23–377:4). Instead, IEPA has again skewed testimony: Kenn Liss was discussing the aspects of the Former CCR Landfill that make it a landfill and was not, as IEPA suggests, discussing the

overfilling of the Former Fly Ash Holding Units beneath the landfill that had been dewatered, closed, and were serving as structural fill. *See* June 11 Tr. at 376:14–22 ("Q. Okay. [S]tarting in 1990, under what regulations would the landfill area have been regulated . . . ? A. [Part] 815. . . . Q. And what characteristics of the unit [the former landfill] make it subject to Part 815?").

Replacement Fly Ash Holding Area. IEPA states, citing its Exhibit SS, that "[o]peration [of the Replacement Fly Ash Holding Area] under this permit accumulated so much CCR that it led to construction of the [Fly Ash Holding Area Extension] for additional capacity." IEPA's Brief ¶ 54; *see also id.* ¶ 76. As an initial matter, the only part of this statement that IEPA's Exhibit SS supports is that the Replacement Fly Ash Holding Area was permitted. The rest of the statement is mere speculation and goes against all other evidence presented in this proceeding. In fact, there is no evidence or testimony that even suggests the Replacement Fly Ash Holding Area "accumulated so much CCR" as to require another unit, as IEPA alleges. As Mr. Gallenbach testified, while the initial purpose of constructing the Fly Ash Holding Area Extension was to serve as a backup option to receive fly ash in the event additional space was needed for disposal, he does not believe the Fly Ash Holding Area Extension was ever used for this purpose. June 10 Tr. at 152:19−153:15.

Fly Ash Holding Area Extension. Similarly, IEPA again claims that the Fly Ash Holding Area Extension was built "to accommodate the overflow of the accumulated CCR." IEPA's Brief ¶ 59; *see also id.* ¶ 76. Such a statement skews the facts and is unsupported by its citations. As Mr. Gallenbach testified, the Fly Ash Holding Area Extension was built to serve as a replacement if the Replacement Fly Ash Holding Area ever filled, but the unit was likely never used for this purpose. June 10 Tr. at 152:19−153:15. Following generation unit 4's construction, fly ash was collected dry, mixed with scrubber sludge, and no longer needed to be disposed of with water in a pond, rendering the Former Fly Ash Holding Units obsolete. *Id.*

CONCLUSION

SIPC respectfully requests that the Board grant its request for a finding of inapplicability or, in the alternative, an adjusted standard as set forth in this proceeding.

Respectfully Submitted,

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