BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	AS 2021-001
PETITION OF MIDWEST	)	
GENERATION, LLC FOR AN	)	
ADJUSTED STANDARD FROM	)	(Adjusted Standard)
845.740(a) AND FINDING OF	)	
INAPPLICABILITY OF PART 845	)	
(JOLIET 29 STATION)	)	

NOTICE OF FILING

To: See attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Petitioner Midwest Generation, LLC's Response to Illinois EPA's Post Hearing Brief, a copy of which is herewith served upon you.

Dated: October 7, 2022

MIDWEST GENERATION, LLC

By: /s/Kristen L. Gale

Kristen L. Gale
Susan M. Franzetti
NIJMAN FRANZETTI LLP
10 South LaSalle Street Suite 3600
Chicago, IL 60603
(312) 251-5590
kg@nijmanfranzetti.com
sf@nijmanfranzetti.com

SERVICE LIST

Don Brown, Clerk of the Board
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, IL 60605
don.brown@illinois.gov

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, IL 60605
Brad.Halloran@illinois.gov

Christine Zeivel
Stefanie Diers
Sara Terranova
Division of Legal Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
P.O. Box 19276
Springfield, IL 62794-9276
Christine.Zeivel@illinois.gov
Stefanie.Diers@illinois.gov
Sara.Terranova@illinois.gov

Greg Stucka
Assistant Counsel
Illinois Environmental Protection Agency
1021 North Grand Avenue East
Springfield, Illinois 62794
(217) 524-1376
Gregory.Stucka@Illinois.gov

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, and Petitioner Midwest Generation, LLC's Response to Illinois EPA's Post-Hearing Brief was electronically filed on October 7, 2022 with the following:

Don Brown, Clerk of the Board
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, IL 60605
don.brown@illinois.gov

and that copies were sent via e-mail on October 7, 2022 to the parties on the service list.

Dated: October 7, 2022 /s/Kristen L. Gale

Kristen L Gale
Susan M. Franzetti
Nijman Franzetti LLP
10 S. LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5590
kg@nijmanfranzetti.com
sf@nijmanfranzetti.com

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
Midwest Generation, LLC's Petition for	)	
an Adjusted Standard and Finding of	)	AS 2021-001
Inapplicability from 35 Ill. Adm.	)	
Code 845 (Joliet 29 Station)	)	
	)	

MIDWEST GENERATION LLC'S RESPONSE TO
ILLINOIS EPA'S POST HEARING BRIEF

The Illinois Environmental Protection Agency ("Agency") provides no rebuttal to MWG's volumes of evidence, including its three expert opinions, demonstrating that the adjusted standard to reuse the Pond 2 HDPE liner should be granted. Instead, the Agency repeats the baseless claims it made in its Recommendation that were directly addressed by MWG's experts at the hearing, without any cross-examination by the Agency. MWG's fact and expert witnesses established that:

(1) CCR was not used to construct Pond 2 nor used when the pond was relined;

(2) the Poz-o-Pac is in good condition, a cementitious product, and the CCR used to make the Poz-o-Pac is a coal combustion by-product ("CCB"). 415 ILCS 5/3.135;

(3) the HDPE liner is in good condition; and

(4) there is no groundwater contamination nor a "release" from Pond 2.

Because there is no release and there is no groundwater contamination from Pond 2, MWG's proposed adjusted standard is as protective as the applicable federal rule, 40 C.F.R. §257.102(c) and the Agency's reliance upon to the *proposed* "Part B" revisions to 40 C.F.R. §257.102(c) is improper.

MWG has met its burden for the adjusted standard under Section 28.1(c) of the Act through its fact witnesses, expert witnesses, and evidence. The Agency's response to MWG's evidence is mere "concerns" without any basis, and without evidentiary support for the invasive and damaging

testing they suggest. Because MWG has met its burden, the Board should grant MWG's Petition to allow it to reuse the liner in Pond 2.[1]

I. The Agency's Speculations Are Defeated by MWG's Evidence.

The Agency's Post-Hearing Brief is replete with speculation and misleading statements that were directly rebutted by MWG's fact and expert witnesses. As the Board has done before, the Board should give the Agency's baseless speculations little weight. In *ExxonMobil Oil Corp. v. Illinois EPA*, the Board gave little weight to the Agency's concerns over a requested variance. PCB11-86; 12-46 (cons.) (Dec. 1, 2011), 2011 Ill. ENV LEXIS 512. There, the Board found that ExxonMobil addressed the Agency's concerns in the pre-hearing filing, at the hearing, and in the post-hearing brief. *Id* at *69. Additionally, the Board found that the Agency did not avail itself of opportunities to further describe its concerns nor "describe how ExxonMobil's evidence or arguments was lacking." *Id*. The Board found that the absence of a meaningful response from the Agency reduced the persuasive value of the Agency's concerns, and granted the variance. *Id*. Similarly, in *Timber Creek Homes, Inc. v. Village of Round Lake Part, et al.*, the Board rejected the petitioner's "evidence" of collusion between the Village Board and waste transfer company, because the information was merely speculative. *Timber Creek Homes, Inc. v. Village of Round Lake Part, et al.*, PCB 14-99 (Aug. 21, 2014), 2014 Ill. ENV LEXIS 319, *183.

Each of the Agency's speculations and supposed concerns about the Poz-o-pac, the black silty gravel, and HDPE liner are addressed by MWG's fact and expert witnesses. As thoroughly described in MWG's Post-Hearing Brief, and further detailed in this Response, MWG's experts testified that the Poz-o-pac was in good condition, defeating the Agency's speculative claim that the Poz-o-pac has degraded or will degrade. Similarly, MWG's fact and expert witnesses testified

[1] Because there is no dispute that Ponds 1 and 3 are not CCR surface impoundments, this Response contains no additional information and MWG requests that the Board grant the adjusted standard for both ponds.

that the material in the Pond 2 berms is natural fill material, *not* CCR. They also showed there are other possible sources of suitable fill for the embankments, defeating the Agency's false claim that the "black silty gravel" is CCR. Finally, MWG's expert specifically testified that the HDPE liner was in good condition, and there was no concern of damage or deterioration. The Agency did not cross examine any of the witnesses on their expert testimony at the Hearing. Because the Agency ignores MWG's evidence that addressed its concerns and did not avail itself of opportunities to further describe how MWG's expert's conclusions were lacking, the Board should give the Agency's concerns little weight.

II. The Poz-o- Pac is Not Damaged and There is No Potential for Leaching

The Agency's entire theory about the Poz-o-pac is premised upon speculation – "*if*" the Poz-o-pac degrades and a "potential" for leaching. (Agency Brief, p. 4-7).[2] With no evidence of past or future degradation, the Agency's brief is wholly unsupported speculation of risk, ignoring the direct testimony of MWG's three expert witnesses and their reports. The Agency falsely claims that MWG's Poz-o-pac expert, Dr. Radlinski, did not address Poz-o-pac's "tendency to degrade." (Agency Brief, p. 4.) As an initial matter, there is no basis to suggest, and no evidence in the record, that "Poz-o-pac" has a "tendency to degrade." The Agency's assumption is incorrect, and all evidence is to the contrary. Dr. Radlinski specifically testified that he saw no evidence that the Poz-o-pac was degraded. (6/28/2022 Tr., p. 87:9-12 ("Number two, it sounds like the inherent assumption in this hypothetical question is that there could be cracks in the poz-o-pac. **I haven't seen any evidence of that.**")). The Agency also ignores Mr. Dehlin's expert testimony that directly addresses the Agency's concerns about the potential for the Poz-o-pac to be degraded. As MWG described in its post-hearing brief, Mr. Dehlin conducted an exhaustive review of the Pond 2

[2] The Agency's Post-Hearing Brief is difficult to cite because the pages are not sequentially numbered, in violation of 35 Ill. Adm. Code 101.302.

documentation and concluded that the Poz-o-pac was in good condition. (MWG Brief, pp. 10-11). Finally, the Agency ignores that the Poz-o-pac was rarely exposed to heavy machinery. (6/28/2022 Tr., p. 23:19-24:4). Dr. Radlinski stated that the performance of the Poz-o-pac depended on what the material is exposed to, and here, the Poz-o-pac was rarely exposed to heavy machinery resulting in little likelihood of degradation. (*Id.* p. 93:10-94:14).

MWG also specifically addressed the Agency's concern regarding supposed leachability of the Poz-o-pac. The totality of the evidence presented by MWG, including the testimony of three experts, demonstrates that the Pond 2 Poz-o-pac is in good condition, there is little to no risk of leachability, and there is no adverse risk to groundwater. In response to a question about whether the Poz-o-pac is "nonleachable," Dr. Radlinski testified that the chemical formed in the chemical reaction, calcium silicate hydrate, "is a water **in**soluble material." (6/28/2022 Tr., p. 84:5-14)(emphasis added). Dr. Radlinski further stated that in his expert opinion, while he saw no evidence that the Poz-o-pac was cracked, even if it were, it is "highly unlikely" that it is possible for it to leach material into the groundwater. (*Id*. p. 86:18-87:1). The Poz-o-pac is now covered by a multicomponent waterproofing system – the HDPE liner – and for water to reach the Poz-o-pac, it would first have to flow through the waterproofing system, which is unlikely. (*Id.* p. 87:1-8). Ultimately, based upon the totality of the factors Dr. Radlinski concluded there was not a concern of leaching into the groundwater. (*Id.*, p. 88:6-10). Dr. Radlinski's testimony is supported by the fact that there has been no impact to groundwater. Mr. Maxwell, MWG's expert on groundwater, evaluated the quarterly groundwater monitoring data that MWG performed for the last twelve years and found no sign of leaching to groundwater – even though the Poz-o-pac has been in place for 44 years. Based upon the absence of groundwater contamination and the four decades the Poz-

o-pac has been in the ground, he concluded it is not a potential source of contamination. (6/28/2022 Tr. p. 137:1-138:8).

The Agency attempts to impeach Dr. Radlinski's testimony about leaching from poz-o-pac by attaching an entirely new study they failed to show to Dr. Radlinski at the hearing.[3] But, the study is a red herring and has nothing to do with the potential leaching from ***solid*** concrete or Poz-o-pac. The study is consistent with and supports Dr. Radlinski's opinions, who stated that any potential heavy metal compounds are bound in the cementitious matrix. The study concerns the leachability of ***crushed*** recycled aggregate concrete collected from demolition sites that could be used as aggregate in a future cementitious mix. The study specifically distinguishes the loose aggregate it was studying from the final concrete, stating the hardening process of concrete binds the heavy metals, resulting in low pollution. (Agency Brief, App. A, p. 14).

Despite the uncontroverted evidence presented about the structure of Poz-o-pac, the Agency continues to claim that testing is required because of the alleged unknowns. These alleged unknowns are pure speculation and the Agency has no legitimate response to MWG's expert testimony about the nature of Poz-o-pac and why testing is unwarranted. (MWG Brief, pp. 21-22). First, the Agency falsely refers to Poz-o-pac as "CCR material" in a misleading effort to suggest that Poz-o-pac is a concern. (Agency Brief, p. 8). Dr. Radlinski, the only expert on cementitious products to testify, made it clear that Poz-o-pac is a cementitious product and not CCR. (6/28/2022 Tr., pp. 89:9-11). As described above, undisputed expert testimony established that it is "highly unlikely" that such cementitious products could leach material into the groundwater. Also, the Agency seems to claim without any basis that CCR used to make the Poz-o-pac is "structural fill,

[3] MWG objects to the Agency introducing the study after the record has closed, and the Board should disregard it in its entirety. If the Agency truly was seeking to demonstrate how the study were applicable to Dr. Radlinski's opinion, then it should have shown him the study at the hearing and asked for his response.

foundation backfill, antiskid material, soil stabilization, pavement, or mine subsidence" under Section 3.135(a)(8) of the Act. (Agency Brief, p. 7). In fact, the CCR in the Poz-o-pac is the "raw material or mineral filler in the manufacture of the…cementious products,"[4] described in Section 3.135(a)(2) of the definition of coal combustion by-product ("CCB"). (415 ILCS 5/3.135(a)(2)). Because it is raw material, the CCR is automatically CCB and neither analysis of the CCR nor even the resulting Poz-o-pac is required under the Act. (415 ILCS 5/3.135(a)(2), (a-5)). Second, MWG's expert Mr. Dehlin, specifically testified that that there is no need to sample the Poz-o-pac and the Agency had no response and no contrary evidence. (6/28/22 Tr., p. 227:16-21). In fact, all three of MWG's expert witnesses presented undisputed testimony that there is no potential for the Poz-o-pac to be a source of contamination. (6/28/22 Tr., p. 86:18-87:1, 88:6-10, 118:14-20, 121:2-6; 194:8-16, 195:3-11, 196:6-12, 197:7-11, MWG Ex. 22, p. 8-9). Third, the Agency completely ignores the fact that sampling the Poz-o-pac would unnecessarily damage the very HDPE liner MWG seeks to use. (6/28/2022 Tr. p. 227:17-228:4).

Finally, the Agency suggests the Poz-o-pac should be tested because of some yet-to-come, unknown, potential that the Pond 2 Poz-o-pac might somehow leach metals in the groundwater - sometime in the future. The Agency's position is mystifying because the same material has been used throughout Illinois for decades with little apparent concern by the Agency. The Agency's own exhibit, the Federal Highway Administration ("FHWA") User Guidelines, states that over 100 projects in Illinois used Poz-o-pac for state and county roads, and that one-third to one-half of the 30 million tons of the material used in the United States was placed in the metropolitan Chicago area. (IEPA Ex. C). Yet, the Agency expresses no concern for the potential for any of that material

[4] As previously stated, this appears to be a spelling error in the statute, because "cementious" is not a word in the dictionary. "Cementitious" is defined as "having the properties of cement." Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/cementitious (last checked on July 15, 2022)

to degrade or leach metals into the groundwater. The Board should give no weight to the Agency's inconsistent "concerns" over one area of Poz-o-pac, when it has no concern for the 15 million tons of similar material throughout Illinois.

III. The "Black Silty Gravel" is Not CCR

There is no evidence to suggest that CCR was used to either build or reline Pond 2. The reports and documents that detail the construction and relining show no CCR was used. Yet, despite the absence of any evidence of CCR, in support of their speculation of its presence, the Agency points to one phrase – "black silty gravel" stated one time in the Pond 2 History of Construction. "Black silty gravel" does not mean CCR. The Pond 2 History of Construction does not state the pond is built with CCR, and the boring logs and investigations it relies upon do not state that CCR is present. (IEPA Ex. G, Att. 1 and also at IEPA Ex. D, Att. 3)

All of the Agency's concerns about the material used to build Pond 2 and during the relining were addressed by Mr. Dehlin and Mr. Maxwell. Mr. Dehlin conducted an exhaustive investigation of the Pond 2 construction drawings, documentation, boring logs, photos, and construction notes and concluded that CCR was not used in any part of the construction or reconstruction of the pond. (MWG's Post-Hearing Brief, pp. 5-8, 12-14). Mr. Maxwell specifically stated in his report that "[m]erely because the silty gravel was described as black by the person logging the soil core does not automatically mean it is CCR," because no one used a standardized color system, like the Munsell system. (MWG Ex. 22, p. 4). At the hearing, the Agency did not cross-examine either expert on their conclusions nor attempt any rebuttal. There is absolutely nothing to support the Agency's speculation that black silty gravel is CCR and MWG clearly met its burden to establish that it **is not**.

Next, the Agency falsely claims that MWG provided no explanation for materials other than fly ash that could have been used as structural fill. (Agency Brief, p. 8). Mr. Dehlin's testimony, which the Agency ignores, specifically described the natural earthen materials used to build Pond 2. (6/28/22 Tr., p. 173:9-13) ("Pond 2's embankments and subgrade consist of natural earthen materials obtained from on-site and/or off-site borrow sources.") He further explained that according to the original 1977 Pond 2 drawings the "muck" in Pond 2 was replaced with compacted suitable fill, which includes earthen materials such as clay, sands, and gravel. (6/28/22 Tr., p. 176:20-177:19, 6/29/22 Tr., p. 70:6-20, IEPA Ex. G, p. 3-4). Mr. Dehlin also testified that the original soil had to have been clay, because the slopes of the pond were steep. (MWG Ex. 28, p. 3, 6/28/22 Tr., p. 220:20-221:12). The "natural angle of repose for sandier materials like [CCR] is in the range of 30 degrees" meaning ash does not have the geotechnical qualities to support the pond's steep slope. (MWG Ex. 28, p. 3, 6/28/22 Tr., p. 221:7-12). The photographs of the Pond 2 slopes show clays, sands, and gravel, consistent with the soils observed at similar elevations in the three borings taken from Pond 2's embankments. (MWG Ex. 28, p. 2 (citing Att. 2, p. 25-28, Att. 3, p. 3- 4)). Mr. Maxwell also testified that he was personally aware of potential borrow sources of dark fill soils available in the area of the Joliet 29 Station that are not CCR because he observed those soils at a site about a mile and a half away. (6/28/22 Tr., p. 132:7-23, MWG Ex. 22, p. 4).

There is no requirement under the Act or the Board rules to sample soil or fill material that is *not* CCR. The leachability test the Agency is requesting is *only* required to demonstrate that CCR used as sub-base, structural fill, or mine subsidence qualifies as CCB. (415 ILCS 5/3.135(a)(a-5) *citing* 3.135(a)(3)(A) and (a)(7) through (9)). The Agency has provided no rational basis to require MWG to conduct sampling of the clay, sand and gravel to prove it qualifies as CCB when none of

the materials are CCR in the first place. Additionally, any sampling of the material would require unnecessarily damaging the liner, which MWG seeks to maintain. (6/28/22 Tr., p. 161:3-162:12)

IV. Cobalt Concentrations in the Groundwater are Below the Part 845 Standard

The Agency's claim that that the cobalt concentrations in MW-4 are above the Part 845 groundwater protection standards is wrong.[5] (Agency Brief, p. 7). As MWG explained in its Post-Hearing Brief: "Cobalt has not been detected above the Illinois CCR Rule Standard of 0.006 mg/l since the Illinois CCR Rule became effective on April 21, 2021." (MWG's Post-Hearing Brief, p. 15, *citing* IEPA Ex. O, Table 1, 35 Ill. Adm. Code 846.600(a)(1)). The highest cobalt concentration in MW-4 since Part 845 became effective in the record is 0.0037 mg/l. (IEPA Ex O, Table 1). The Agency's reliance upon concentrations detected before the effective date is invalid. There are cobalt concentrations detected before the Part 845 effective date, which are MWG's initial groundwater analysis to establish groundwater protection standards under section 257.94(b) of the federal rule. (40 C.F.R. 257.94(b), IEPA Ex. O, Table 1). But, because those concentrations are from before the Part 845 effective date, they cannot be considered in evaluating compliance with Part 845. Even if the pre-2021 concentrations could be considered, those cobalt concentrations could not be used to compare to any groundwater protection standard because the concentrations were used to establish the background concentrations in the wells. It is improper to compare the background groundwater concentrations against themselves. Because the cobalt concentrations and the other constituent concentrations in the monitoring wells around Pond 2 are below the Part

[5] On November 1, 2021, MWG submitted its operating permit application for Joliet 29 Pond 2 that included proposed groundwater protection standards, pursuant to 35 Ill. Adm. Code 845.230(d)(2)(I) and 845.610(b)(1). Because Illinois EPA has not issued an operating permit for Pond 2, there are no applicable groundwater protection standards at Pond 2. 35 Ill. Adm. Code 845.610(b)(3). MWG's discussion and reference to concentrations of constituents above any groundwater protection standards is not an admission that there is an applicable groundwater protection standard.

845 groundwater standards, there is no evidence of a release from Pond 2 and there are no "data gaps" that need to be resolved.

The Agency also wrongly speculates that the cobalt detected is from Pond 2 by comparing the concentrations between MW-10, the upgradient well, and MW-4, a downgradient well. The Board should give the Agency's eleventh hour speculation little weight. Mr. Maxwell's expert groundwater opinion that the cobalt is from natural releases from the soil was readily available to the Agency long before the hearing, and the Agency did not avail themselves of the opportunity to challenge Mr. Maxwell at the hearing. Moreover, Mr. Maxwell's opinion refutes the Agency's speculation. Mr. Maxwell testified that the low concentrations of cobalt in groundwater are a small fraction of the cobalt concentrations in the soil, detected in Will County between 6.9 and 10.9 mg/kg. (MWG Ex. 22, p. 10-11). Merely because cobalt is not detected in MW-10 does not mean it does not exist in MW-10. The detection limit for cobalt is 0.001 mg/l. The maximum cobalt concentration in MW-4 is 0.0037 mg/l – a mere 0.0027 mg/l increase. The distance between MW-10 and MW-4 is about 300 feet, and according to Mr. Maxwell, the groundwater takes approximately 270 days to travel from MW-10 to MW-4. (MWG Ex. 22, p. 6 and attachment B).[6] Accordingly, it is more likely that the chlorides from the road salt releases cobalt into the soil upgradient of MW-10 but below the detection limit. As the chloride-laden groundwater passes through the soil and groundwater, more naturally occurring cobalt is mobilized, such that the concentration increases to over the detection limit by the time it reaches MW-4.

None of the leading CCR indicator constituents have ever been reported at concentrations exceeding the standards in 35 Ill. Adm. Code 845.600(a)(1) in the wells surrounding Pond 2 since

[6] This is a conservative flow rate. Mr. Maxwell's calculation was for the time it would take for chloride, a "conservative solute" which does not reach react with the soil or groundwater or undergo decay (and therefore travel faster in the groundwater). C.W. Fetter, Applied Hydrogeology 461 (1994). Cobalt is a "reactive solute" that reacts with the soil and groundwater, slowing down its transport. *Id.*, MWG Ex. 22, Attach. D, p. 331.

MWG began quarterly groundwater sampling in 2010. (6/28/22 Tr. p.118:6-20; Ex. 22, p. 7). MWG's twelve years of groundwater sampling not only demonstrates that there is not a release from Pond 2, under the Part 845 Closure by Removal rule, MWG must continue to sample the groundwater for at least three years after completion of closure to confirm the absence of release. (35 Ill. Adm. Code 845.740(b)). Thus, once the Board grants this adjusted standard, MWG will continue to sample the groundwater for at least three years after closure by removal is completed further confirming the absence of groundwater contamination.

V. The HDPE Liner is In Good Condition

Despite Mr. Dehlin's direct testimony, the Agency doubles down on its unsupported theory that there might be "potential" for damage to the HDPE liner that requires additional sampling. (Agency Brief, p. 10). There is no doubt that MWG met its burden on this point and Agency speculations do not serve to question that proof. Mr. Dehlin specifically testified that the electric leak location survey contemplated by the Agency is *not* necessary because MWG conducted that test on the liner when it was installed. (6/29/2022 Tr., p. 58:1-6, 66:4-9). The Agency's "concerns" about the potential for liner damage during its use are unfounded because the equipment was never in touch with the liner. The Agency ignores that there is a 6-inch layer of gravel (warning layer), a 12-inch layer of sand (cushion layer), and a geotextile layer specifically installed to protect the HDPE liner. (MWG Ex. 1, ¶ 23,). The Agency also ignores the fact that large equipment was used in Pond 2 to remove CCR from Pond 2 *at most* one time between 2008 and 2018, and a second time for the final removal of CCR in 2019. (MWG Ex. 1, ¶¶7, 25, 6/28/2022 Tr., p. 20:6-16, 23:19-24:4). Because MWG carefully removed the CCR and because of the presence of the protective layers, Mr. Dehlin concluded that there is little likelihood that the HPDE has sustained any punctures. (6/29/22 Tr., p. 11:16-23, 14:20-24, MWG Ex. 28, p. 6). Similarly, Mr. Dehlin

concluded that Pond 2 had not suffered degradation due to exposure to the elements. (6/29/22 Tr. p. 12:18-14:16, MWG Ex. 28, p. 6-7, and Att. 9 & 10). Mr. Dehlin testified that visual inspections and wipe testing proposed by MWG would adequately verify the competence of the HDPE liner and no other testing was necessary. (6/29/22 Tr., p. 16:17-22:9, 30:15-24, 58:1-6, 66:4-17). Again, the Agency has provided nothing to question this evidence.

VI. The Proposed Adjusted Standard is Consistent with the Effective Federal Rule

The Agency's assertion that MWG's petition is not consistent with the federal closure by removal requirements conflicts with the Agency's own statements. The proposed adjusted standard is nearly identical to the language the Agency originally proposed for Section 845.740(a), which Illinois EPA stated was consistent with the federal rule. Accordingly, the Agency has already agreed that MWG's proposed adjusted standard is consistent with federal law, as required under the Act to grant an adjusted standard.

When the Agency submitted its Statement of Reasons in the Illinois CCR Rulemaking, the Agency stated that the proposed rule was consistent with the federal CCR rule. *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, PCB20-19, Illinois EPA Statement of Reasons, (March 30, 2020), pp. 8, 10. The Agency's statement that the proposed rule was consistent with the federal rule continues to be true because the federal rule has not changed. As shown below, there is little difference between the effective federal rule, the Illinois EPA proposed rule, and MWG's proposed adjusted standard.

40 C.F.R. 257.102(c)	Illinois EPA March 2020 Proposed 35 Ill. Adm. Code 845.740(a)	Proposed Adjusted Standard
An owner or operator may elect to close a CCR unit by removing and decontaminating all areas affected by releases from the CCR unit. CCR removal and decontamination of the CCR unit are complete when constituent concentrations throughout the CCR unit and any areas affected by releases from the CCR unit have been removed and groundwater monitoring concentrations do not exceed the groundwater protection standard established pursuant to § 257.95(h) for constituents listed in appendix IV to this part.	An owner or operator may elect to close a CCR surface impoundment by removing and decontaminating all areas affected by releases from the CCR surface impoundment. CCR removal and decontamination of the CCR surface impoundment are complete when the CCR in the surface impoundment and any areas affected by releases from the CCR surface impoundment have been removed.	MWG may close by removing and decontaminating all areas affected by releases from Pond 2 at the Joliet 29 Station. CCR removal and decontamination of Pond 2 is complete when the CCR in Pond 2 and any areas affected by releases from the CCR surface impoundment have been removed. MWG must conduct visual inspection and analytical testing to demonstrate that the geomembrane liner in Pond 2 is not contaminated with CCR constituents. MWG must submit the results to Illinois EPA.

When the Agency modified the closure by removal requirement in Section 845.740(a) during the rulemaking, it stated that it was rewriting Section 845.740(a) to be consisting with the *proposed* USEPA modifications to Section 257.102(c) (the "Part B" proposal, dated March 3, 2020). *In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845*, PCB20-19, Illinois EPA Final Post-Hearing Comments, (October 30, 2020), p. 85-87. But the Agency did not withdraw its statement that its originally proposed language was consistent with the effective and applicable Section 275.102(c). *Id.* The USEPA has not adopted the proposed Part B modifications for the closure by removal requirements, and there is no indication it will. If anything, USEPA's inaction on the proposed rule for over two and half years indicates that the USEPA has concerns with it, and the Board should not rely upon it to determine consistency with a federal rule that is not applicable and may

never be. Similarly, the Board should also disregard the Agency's reliance on USEPA's preamble language, which is also not law. *Nat'l Wildlife Fed'n v. EPA*. 42, 286 F.3d 554, 569-570 (D.C. Cir. 2002).

Pursuant to Section 257.102(c), MWG has established that "there is no area affected by a release" from Pond 2, and that groundwater monitoring concentrations do not exceed the Section 257.95(h) groundwater protection standards. The Agency's claim that MWG must prove that constituent concentrations throughout the CCR unit meet the groundwater protection standards by sampling the Poz-o-pac and the "blacky silty gravel" is false. (Agency Brief, p. 13). Neither Part 845 nor the Section 257.102(c) has that requirement. Instead, both rules require groundwater monitoring to identify whether there is a release from the CCR surface impoundment, which MWG has done. MWG has established that the Agency is wrong that cobalt is above the Part 845 groundwater protection standards. (*See supra* § IV). Because the groundwater monitoring shows the Appendix IV constituents are not above the Section 257.95(h) groundwater protection standards, there is no evidence of a release from Pond 2.[7]

VII. MWG Provided Adequate Justification for the Adjusted Standard

MWG has met its burden to demonstrate that the adjusted standard to reuse the competent HDPE liner is justified and has shown there are no potential negative environmental impacts by the reuse of the liner. Neither the "black silty gravel" nor the Poz-o-pac is CCR, negating any requirement to chemically analyze the material to show it qualifies as CCB. Additionally, the twelve years of groundwater sampling shows "the groundwater has not exhibited concentrations

[7] Pursuant to the Federal Rule, MWG conducted an Alternative Source Demonstration for Pond 2, which demonstrated that the detected concentrations in the groundwater, including chlorides, were due to an alternative source and not Pond 2. *See* MWG's Federal Alternate Source Demonstration, Oct. 11, 2021, publicly available at: http://3659839d00eefa48ab17-3929cea8f28e01ec3cb6bbf40cac69f0.r20.cf1.rackcdn.com/JOT_AP2_GMI22.pdf. The Agency also agrees that the elevated chloride levels are attributable to road salt applied to nearby U.S. Highway 6. (6/28/2022 Tr., p. 106:3-11, Agency Rec., p. 21, 24; IEPA Ex. A, ¶ 34 (citing IEPA Ex. M))

that would be indicative of a CCR impact....” (6/28/22 Tr., p. 136:22-24). The absence of groundwater contamination after all this time and years of monitoring demonstrates that the Poz-o-Pac and the soil in the embankments are not a potential source of contamination. (6/28/2022 Tr. p. 138:1-7, 160:17-161:2).

The Agency’s claim that MWG should have also included a discussion of the costs of placing a composite liner over the existing liner and encapsulating soil and Poz-o-pac as part of the justification for the adjusted standard is misplaced. (Agency Brief, p. 11). Joliet 29 burns gas, and does not generate CCR. (MWG Ex. 1, ¶7). Accordingly, MWG seeks to close Pond 2. For closure by removal under Part 845, without regulatory relief, the only option is to remove the impoundment liner, impoundment structures, and ancillary equipment. (35 Ill. Adm. Code 845.745.740(a)). There is no option to place a new composite liner over the existing liner as the Agency suggests. That option is *only* available if MWG retrofitted the pond to use as a CCR surface impoundment, which it has no reason to do. (35 Ill. Adm. Code 845.770). Because there is only one closure option, MWG provided the estimated costs for complete removal of the liner, structures, and ancillary equipment.

Similarly, the Agency’s attempt to distinguish between i) reuse of the liner to retrofit the liner as a CCR surface impoundment, and ii) reuse of a liner to use as a stormwater basin, is flawed because it presumes that contaminated surface impoundment equipment and contaminated subsoils must exist. (Agency Brief, p. 16). The opposite is true. The only evidence in the record is that the HDPE liner could not have become contaminated with CCR constituents because these types of liners are highly resistant to chemicals. (6/29/22 Tr., p. 21:17-29:8, Exs. 36 & 37). Also, MWG established through its fact witnesses, experts, groundwater monitoring, and extensive investigation that there are no contaminated subsoils from Pond 2. Moreover, unlike a retrofitted

CCR surface impoundment, Pond 2 will only store low-volume wastewater, comprised primarily of stormwater, eliminating any risk from CCR and its leachate. (6/29/2022 Tr., p. 18:10-19).

VIII. CONCLUSION

MWG has met its burden under the Act for the adjusted standard. MWG has demonstrated that reusing the Pond 2 liner will not result in adverse environmental or health effects, is as protective as the effected federal rule (Part 257), and is justified. Similar to the Board's decision in *ExxonMobil Oil Corp. v. Illinois EPA*, the Board should disregard the Agency's unfounded "concerns" as unpersuasive, grant MWG's petition and allow MWG to close Pond 2 by removal of the CCR and decontamination of the liner so that it may be used as a low-volume wastewater pond. MWG also reasserts its requests that the Board find that Pond 1 and Pond 3 are not CCR surface impoundments and therefore, are not regulated by the Part 845 regulations.

Respectfully Submitted,

Midwest Generation, LLC

By: /s/ Kristen L. Gale
One of its Attorneys

Kristen L. Gale
Susan M. Franzetti
Nijman Franzetti LLP
10 S. LaSalle St, Suite 3600
Chicago, Illinois 60603
(312) 262-5524
kg@nijmanfranzetti.com
sf@nijmanfranzetti.com