BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Pollution Control Board the Illinois Environmental Protection Agency's POST-HEARING BRIEF, a copy of which is herewith served upon you.

Dated: October 10, 2025

Respectfully submitted,
ILLINOIS ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

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THIS FILING IS SUBMITTED ELECTRONICALLY

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ILLINOIS EPA'S POST-HEARING BRIEF

NOW COMES the ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, ("Illinois EPA" or "Agency") by and through its counsel and submits its Post-Hearing Brief in the above-captioned matter. Illinois EPA states as follows:

I. BACKGROUND

1. On May 11, 2021, Petitioner, Southern Illinois Power Cooperative ("Petitioner" or "SIPC"), filed a "Petition for an Adjusted Standard from 35 Ill. Admin. Code Part 845 or, in the Alternative, a Finding of Inapplicability" ("Petition" or "Pet.").

2. On September 2, 2021, SIPC filed an "Amended Petition for an Adjusted Standard from 35 Ill. Adm. Code Part 845, or, in the Alternative, a Finding of Inapplicability" ("Amended Petition" or "Amd. Pet.").

3. The Agency filed its Recommendation ("Recommendation" or "Rec.") on January 3, 2023.

4. On December 20, 2024, Petitioner filed its "Second Amended Petition for an Adjusted Standard from 35 Ill. Adm. Code Part 845 or in the Alternative, a Finding of Inapplicability" ("Second Amended Petition" or "Sec. Amd. Pet.").

5. The Agency filed its Amended Recommendation ("Amended Recommendation" or "Amd. Rec.") on February 3, 2025.

6. On June 10-12, 2025, the Board held a hearing in Marion, Illinois in this matter.

7. Simultaneous post-hearing briefs are due on October 10, 2025, and simultaneous response briefs are due on December 1, 2025.

II. DEFINITIONS

8. A "CCR surface impoundment" is defined as a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the surface impoundment treats, stores, or disposes of CCR. 415 ILCS 5/3.143; 35 Ill. Adm. Code 845.120; 40 CFR 257.2.

9. An "Inactive CCR surface impoundment" is defined as a CCR surface impoundment in which CCR was placed before but not after October 19, 2015 and still contains CCR on or after October 15, 2015. Such impoundments may be located at an active facility or an inactive facility. 35 Ill. Adm. Code 845.120.

III. ARGUMENT

SIPC has failed to meet its burden of proof in this Adjusted Standard Proceeding

10. Petitioner has the burden of proof in an adjusted standard case. 415 ILCS 5/28.1(c); 35 Ill. Adm. Code 104.426. In the present matter, Petitioner is therefore responsible for proving that all of the nine ponds at issue in this matter are not CCR surface impoundments under Part 845; it is not the duty of Illinois EPA to prove that that they are. Likewise, if the Board does find that any of the nine ponds are CCR surface impoundments, it is Petitioner's responsibility to prove that an adjusted standard is appropriate for those ponds. Illinois EPA does not have to

provide a single piece of evidence or testimony, without which the Board could still deny Petitioner's request for an adjusted standard. 415 ILCS 5/28.1(c); 35 Ill. Adm. Code 104.426.

11. Because 35 Ill. Adm. Code Part 845 does not provide a specific level of justification required by a petitioner to obtain an adjusted standard, Petitioner is required to present adequate proof of the following under Section 28.1(c) of the Illinois Environmental Protection Act (the "Act"):

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

12. Failure to prove any of the four elements mandates the denial of the adjusted standard. *See* AS 21-3, *Petition of Midwest Generation, LLC for a Finding of Inapplicability of 35 Ill. Adm. Code 845*, Opinion & Order at 7 (March 20, 2025).

IV. EACH POND MEETS THE DEFINITION OF A CCR SURFACE IMPOUNDMENT

13. Petitioner alleges that Part 845 should be held as inapplicable to nine ponds at its Marion Generating Station: 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").

14. The first question is whether each pond at issue is a "CCR surface impoundment," because that determination controls the applicability of Part 845.

15. For clarity, the analysis applies three criteria that track the Part 845 definition verbatim: (1) Configuration (whether the unit "is a natural topographic depression, man-made excavation, or diked area"), (2) Design (whether it is designed to hold an accumulation of CCR and liquids"), and (3) Function/Materials (whether it "treats, stores, or disposes of CCR"). 415 ILCS 5/3.143, 35 Ill. Adm. Code 845.120.

16. Applying those three criteria pond-by-pond below, the record shows that each pond at issue satisfies (1) Configuration, (2) Design, and (3) Function/Materials and therefore meets the definition of a CCR surface impoundment under Part 845.

V. POND-BY-POND ANALYSIS

Pond 3

17. Pond 3 meets the definition of a CCR surface impoundment. It is a man-made excavation designed to hold an accumulation of CCR and liquids and it continues to contain CCR.

18. Configuration. Pond 3 is a man-made excavation, as reflected in the 1969 construction permit and confirmed in testimony. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 170; Agency Ex. OO. The permit record and testimony confirm that Petitioner constructed Pond 3 by excavation, consistent with the definition of a CCR surface impoundment as "a natural topographic depression, man-made excavation, or diked areas." 415 ILCS 5/3.143; 35 Ill. Adm. Code 845.120. Therefore, Pond 3 satisfies the Configuration criterion for a CCR surface impoundment.

19. Design. The 1969 construction permit authorized Pond 3 as an ash/settling pond designed to have slag and fly sluiced directly to it and to receive runoff from the ash storage areas. *See* Agency Exhibit OO. Additionally, Petitioner's witness confirmed at hearing that a berm was built

to the west of Pond 3 to stop erosion or runoff from the sludge storage area because the pond was receiving sludge runoff. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 175. These facts demonstrate that Pond 3 was purpose-built to hold an accumulation of CCR and liquids. Therefore, Pond 3 satisfies the Design criterion for a CCR surface impoundment.

20. Function/Material. According to SIPC's own data, Pond 3 contains 83,987 cubic feet (3,110 cubic yards "CY") of CCR-containing sediment in Pond 3. *See* June 11, 2025 Hearing, Testimony of David Hagen, p. 341; SIPC Ex. 29 at Table 1, page 7. Further, testimony confirmed that a 2003 cleaning removed 20 to 50 ten-ton truckloads of sediment (approximately 200-500 tons, up to approximately 382 CY). *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 170; SIPC Ex. 49 at 17. Petitioner, however, has not provided records of this cleaning. Without such records, the Agency cannot know with any degree of certainty how much sediment was removed, what that sediment consisted of, and whether that was all the sediment in the pond. As is discussed *infra*, Petitioner also failed to meet its burden to prove that the sediment categorized as "Other" in its 2021 Pond Investigation Report was not CCR. Therefore, all of the sediment identified in that report must be treated as CCR. Accordingly, Pond 3 satisfies the Function/Material criterion for a CCR surface impoundment.

21. Having met all three definition criteria—Configuration, Design, and Function/Materials — the record shows that Pond 3 meets the definition of a CCR surface impoundment under Part 845.

Pond 3A

22. Pond 3A meets the definition of a CCR surface impoundment and also qualifies as an inactive CCR surface impoundment under 35 Ill. Adm. Code 845.120. Pond 3A is a man-made excavation designed to hold an accumulation of CCR and liquids and still contains CCR. The

Agency has no evidence CCR was placed in Pond 3A after October 15, 2015. Because Pond 3A ceased receiving CCR prior to October 19, 2015, but still contains CCR, it is an inactive CCR surface impoundment as defined in 35 Ill. Adm. Code 845.120.

23. Configuration. Pond 3A is a man-made, bermed area designed as an ash pond to settle and store CCR, as shown in historical aerial photos and confirmed in testimony. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 174; Agency Exhibits 1-4. Therefore, Pond 3A satisfies the Configuration criterion for a CCR surface impoundment.

24. Design. Pond 3A functioned as a downslope overflow area extending from the Initial Fly Ash Pond ("IFAP"). *See* Agency Ex. 1. While Pond 3A was later separated from the IFAP, as shown in an aerial photograph from 1980, the historical connection between the two units is evident. *See* Agency Ex. 2. By 1998, Pond 3A had a distinct berm between it and Pond 3, as well as a U-shaped berm around the southern perimeter. *See* Agency Ex. 4. These are man-made berms constructed primarily out of fly ash and designed to hold an accumulation of CCR and liquids. *See* Pet. Ex. 29. Therefore, Pond 3A satisfies the Design criterion for a CCR surface impoundment.

25. Function/Materials. Pond 3A stores CCR. According to Petitioner's 2021 Haley & Aldrich report, Pond 3A contains 95,666 cubic feet (3,543 CY) of CCR-containing sediment as of September 2021. SIPC Ex. 29. Testimony further established that a 2003 cleaning removed 20 to 50 ten-ton truckloads (approximately 200-500 tons, up to approximately 382 CY), but no records of this cleaning were produced. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 170; June 11, 2025 Hearing, Testimony of David Hagen, p. 341; SIPC Ex. 29 at Table 1, page 7; SIPC Ex. 49 at 17. Without those records, the Agency cannot determine how much sediment was removed, what that sediment consisted of, and whether that was all the sediment in the pond. As is discussed *infra*, Petitioner has failed to prove that sediment categorized as "Other" in its 2021

Pond Investigation Report was not CCR; therefore, all sediment identified in that report must be treated as CCR. Accordingly, Pond 3A satisfies the Function/Materials criterion for a CCR surface impoundment.

26. Having satisfied all three criteria—Configuration, Design, and Function/Materials— Pond 3A is CCR surface impoundment under Part 845.

Pond 4

27. Pond 4 meets the definition of CCR surface impoundment. It is a man-made diked area designed to hold an accumulation of CCR and liquids that still contains CCR.

28. Configuration. The permit history and testimony at hearing show that Pond 4 is a man-made, diked area. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 176-177; Agency Ex. QQ. Per the 1970 construction permit for Pond 4, Petitioner was permitted to use an earth levee (diked area) to construct the settling pond, and testimony confirmed Pond 4 was man-made structure. *Id.* Pond 4 therefore satisfies the Configuration criterion for a CCR surface impoundment.

29. Design. Pond 4's installation and operating permit shows that Pond 4 had a capacity of 18 million gallons and was described as a catch basin designed, among other things, to hold slag washing down-hill from a slag storage pile west of Ponds 1 and 2. Agency Ex. QQ; Rec. at 15.[1] National Pollutant Discharge Elimination System (NPDES) related submittals characterize Pond

[1] Boiler slag is one type of material included in the definition of CCR. *See* Illinois Environmental Protection Act § 3.142. To the extent this "slag" refers to boiler slag generated from coal combustion, that material is expressly included in the statutory and regulatory definition.

4 as an ash pond receiving CCR by design. *See* Rec. at 16; Agency Exs. YY, 5, 51-55. Therefore, Pond 4 satisfies the Design criterion of a CCR surface impoundment.

30. Function/Materials. According to Petitioner's own Haley & Aldrich report, Pond 4 contains 91,076 cubic feet (3,373 CY) of CCR-containing sediment as of September 2021.[2] June 11, 2025 Hearing, Testimony of David Hagen, p. 341; SIPC Ex. 29 at Table 1, page 7. Testimony further established that a 2003 cleaning removed approximately 50 ten-ton truckloads of material (500 tons or approximately 382 CY), and that in 2010 the pond was cleaned again when it was about one-fifth full. June 10, 2025 Hearing, Testimony of Todd Gallenbach, pp. 178, 251-252. Petitioner has not provided records for either of these cleanings. Without such records, the Agency cannot determine how much sediment was removed, its composition, and whether that was all the sediment in the pond. As discussed *infra*, Petitioner has also failed to meet its burden to prove that the sediment categorized as "Other" in its 2021 Pond Investigation Report was not CCR, and therefore the sediment identified in that report must be treated as CCR. Accordingly, Pond 4 satisfies the Function/Materials criterion for a CCR surface impoundment.

31. Having satisfied all three criteria—Configuration, Design, and Function/Materials—Pond 4 is CCR surface impoundment under Part 845.

Pond B-3

32. Pond B-3 meets the definition of a CCR surface impoundment. It is a man-made excavation designed to hold an accumulation of CCR and liquids that still contains CCR.

[2] Petitioner lowered the water level in Pond 4 shortly before the bathymetric survey was conducted, rendering much of the pond unable to be sampled. Thus, the 3,373 CY reported should be considered a conservative estimate. *See* June 11, 2025 Hearing, Testimony of David Hagen, p. 281. Petitioner declined to repeat the bathymetric survey later, when the pond was back at its full water level, to meet its burden. *See* June 11, 2025 Hearing, Testimony of David Hagen, p. 281-282.

33. Configuration. Pond B-3 is a manmade, diked impoundment. Per its 1986 construction permit, Pond B-3 was permitted as a 6.6-acre impoundment with a storage capacity of 45 acre-feet (approximately 72,585 CY) for disposal and settling of fly ash and sludge from sulfide dioxide scrubbers. Agency Ex. 48. Testimony confirmed it was a man-made structure. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 180. Therefore, Pond B-3 satisfies the Configuration criterion for a CCR surface impoundment.

34. Design. The permit history describes Pond B-3 as a settling pond, to receive fly ash and scrubber waste – both CCR – sluiced directly into the pond for settling before being discharged to Little Saline Creek. *See* Agency Ex. 48. Petitioner states that Pond B-3 was built in 1985 and served primarily as a secondary pond to Pond A-1. Amd. Pet. at 12. Petitioner also states that Pond A-1 received coal pile runoff until 2003, and Pond B-3 may have additionally received discharges of fly ash from Units 1, 2, and 3 during Pond A-1 outages. *Id.* at 12-13. Testimony further confirmed that Pond B-3 was designed to hold an accumulation of CCR and liquids. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 180. Therefore, Pond B-3 meets the Design criterion for a CCR surface impoundment.

35. Function/Materials. Pond B-3 treats, stores, or disposes of CCR. Petitioner did not conduct a polarized light microscopy (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 as it has with the other ponds that it claims are "de minimis." Petitioner instead relied on partial shake test data, which it mischaracterized as indicating little or no CCR. Pet. Ex. 29 at 12. However, 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.

36. Pond B-3 also underwent cleanings in 2003 (fewer than 50 ten-ton truckloads was removed) and 2017, but Petitioner produced no records documenting the volume or composition of the removed material. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 180-181; SIPC Ex. 49 at 15. Without records of these cleanings, the Agency cannot know with any degree of certainty how much sediment was removed, what that sediment consisted of, and whether that was all the sediment in the pond.

37. Moreover, given the pond's 72,585 CY permitted capacity and its established receipt of CCR, Petitioner's unsupported claim that Pond B-3 contains "little or no CCR" lacks credibility. *See* Agency Ex. 48. Consistent with the treatment of the "Other" sediment in the ponds for which Petitioner completed PLM analysis for, all sediment must be considered CCR. Therefore, Pond B-3 satisfies the Function/Materials criterion for a CCR surface impoundment.

38. Having satisfied all three criteria—Configuration, Design, and Function/Materials— Pond B-3 is CCR surface impoundment under Part 845.

Pond 6

39. Pond 6 meets the definition of a CCR surface impoundment. Pond 6 is a man-made, diked area designed to hold an accumulation of CCR and liquids that still contains CCR.

38. Configuration. Pond 6 is a manmade, diked area built by Petitioner. *See* Amd. Pet. 53, Agency Ex. RR. Petitioner diked Pond 6 in 1982 following the issuance of a construction permit authorizing that work. *See* Agency Ex. RR. Therefore, Pond 6 satisfies the Configuration criterion for a CCR surface impoundment.

39. Design. Pond 6 was designed to hold an accumulation of CCR and liquids. In 1982, Petitioner obtained construction and operating permits to construct a dike to contain stormwater runoff from its CCR pile. *See* Agency Ex. RR. At hearing, Petitioner confirmed that Pond 6 serves as a stormwater collection pond for the CCR landfill and also receive water from Ponds 3 and 3A, which as noted above, also contain CCR. *See* June 10, 2025 Hearing, Testimony of Wendell Watson, p. 58. Additionally, Petitioner admitted that the construction activities at Pond 6 are consistent with those that would be appropriate for a CCR surface impoundment. *See* June 11, 2025 Hearing, Testimony of Kenneth Liss, p. 392-393. Aerial photographs from 1993-2021 consistently show CCR in Pond 6 in direct contact with water. *See* Agency Ex. 3-18. 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. As a result, construction of CCR surface impoundments took place on top of this dry CCR. *See* Agency Ex. DD at 2. Therefore, Pond 6 satisfies the Design criterion for a CCR surface impoundment.

40. Function/materials. Pond 6 treats, stores, or disposes of CCR. SIPCs data report shows that Pond 6 contained 103,452 cubic feet (3,831 CY) of sediment containing CCR as of September 2021. SIPC Ex. 29 at Table 1, page 7. Petitioner additionally stated at hearing that Pond 6 contains scrubber sludge, a form of CCR. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 134-135. Testimony establishes that Pond 6 was cleaned out in 2003, with the materials removed placed in the nearby CCR landfill, but no records of this cleaning were produced. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 148; SIPC Ex. 49 at 16. Without records of this cleaning, the Agency cannot know with any degree of certainty how much sediment was removed, what that sediment consisted of, and whether that was all the sediment in the pond. As is discussed *infra*, Petitioner has failed to meet its burden to prove that the sediment categorized as "Other" in

its 2021 Pond Investigation Report was not CCR, and therefore all of the sediment identified in that report must be considered CCR. Pond 6 therefore satisfies the Function/Materials criterion for a CCR surface impoundment.

41. Having satisfied all three criteria—Configuration, Design, Function/Materials—Pond 6 meets the definition of a CCR surface impoundment under Part 845.

South Fly Ash Pond

42. The South Fly Ash Pond meets the definition of a CCR surface impoundment. It is a man-made diked area designed to hold an accumulation of CCR and liquids that still contains CCR.

43. Configuration. Petitioner confirmed at hearing that the South Fly Ash Pond is a manmade, diked area. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 186; Amd. Pet. at 12. Petitioner constructed the South Fly Ash Pond in 1989 after obtaining a permit from the Agency to construct a new ash pond. Agency Ex. NN. The South Fly Ash Pond therefore satisfies the Configuration criterion.

44. Design. The South Fly Ash Pond is designed to hold an accumulation of CCR and liquids. The permit record shows that the South Fly Ash Pond was built in 1989 to be a "Fly-ash settling pond for an electric generator," i.e., it was designed to receive and settle out fly ash. Agency Ex. NN. Petitioner's assertion that the South Fly Ash Pond never directly received CCR is irrelevant. The controlling definition turns on design – whether the pond was intended to contain an accumulation of CCR and liquids – not the mode of deposition; direct sluicing is not required. Therefore, the South Fly Ash Pond satisfies the Design criterion.

45. Function/materials. The South Fly Ash Pond treats, stores, or disposes of CCR. According to SIPC's data report, the South Fly Ash Pond contained 563,054 cubic feet (20,854 CY) of CCR-

containing sediment as of September 2021, and testimony established that a 2003 cleaning removed 10 to 20 ten-ton truckloads of sediment, with no records produced. SIPC Ex. 29 at Table 1, page 7; s*ee* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 186.[3] Without records of this cleaning, the Agency cannot know with any degree of certainty how much sediment was removed, what that sediment consisted of, and whether that was all the sediment in the pond. As is discussed *infra*, Petitioner has failed to meet its burden to prove that the sediment categorized as "Other" in its 2021 Pond Investigation Report was not CCR, and therefore all of the sediment identified in that report must be considered CCR. The South Fly Ash Pond therefore satisfies the Function/Materials criterion.

46. Having satisfied all three criteria—Configuration, Design, Function/Materials—the South Fly Ash Pond meets the definition of a CCR surface impoundment under Part 845.

Initial Fly Ash Pond

47. The Initial Fly Ash Pond ("IFAP") is a CCR surface impoundment under Part 845. The Initial Fly Ash Pond is a man-made diked area designed to hold an accumulation of CCR and liquids that still contains CCR.

48. Configuration. The IFAP is a manmade, diked area. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 190, Amd. Pet. at 12. Though the Agency has no direct permit for the IFAP, permitting documents for the RFAP refer to it as the "existing fly ash pond," demonstrating that it was at one time built and used as an ash pond. *See* Agency Exs. EE, TT. Testimony at hearing

[3] Petitioner lowered the water level in the South Fly Ash Pond shortly before the bathymetric survey was conducted, rendering much of the pond unable to be sampled. Thus, the 3,373 CY reported should be considered a conservative estimate. *See* June 11, 2025 Hearing, Testimony of David Hagen, p. 281. Petitioner declined to repeat the bathymetric survey later, when the pond was back at its full water level, to prove its burden. *See* June 11, 2025 Hearing, Testimony of David Hagen, p. 281-282.

confirmed that Petitioner built the IFAP to receive wet fly ash. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 190. Therefore, the IFAP satisfies the Configuration criterion for a CCR surface impoundment.

49. Design. The IFAP is designed to hold an accumulation of CCR and liquids. The Agency has no direct permit record for the IFAP, but RFAP permitting documents refer to it as the "existing fly ash pond." *See* Agency Exs. EE, TT. Aerial 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. *See* Agency Exs. 3-14. Petitioner further affirmatively stated at hearing that the IFAP was designed to hold CCR and liquid. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 190. Therefore, the IFAP satisfies the Design criterion.

50. Function/materials. The IFAP treats, stores, or disposes of CCR. Petitioner testified that the IFAP received wet fly ash until 1977. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 190. A 1977 permit for Petitioner to install a fly ash holding pond shows that the "existing fly ash pond" was to be abandoned and covered, and testimony at hearing established that this referred to the IFAP. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 191; Agency Ex. SS at 2. Petitioner confirmed that this abandonment and covering of the IFAP occurred. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 191. There is no record that CCR was removed prior to abandonment; the CCR remains in place. Further, Petitioner has provided a declaration stating that beginning around 2000, a cavity on top of the IFAP was used as a holding pond for coal yard runoff and occasionally scrubber solids. SIPC Ex. 41. There is likewise no record that this CCR was removed. Given that the IFAP was sent CCR at multiple points in time and never shown to be removed, the Agency must assume that the IFAP presently stores CCR. Therefore, the IFAP satisfies the Function/Materials criterion.

51. Having satisfied all three criteria—Configuration, Design, Function/Materials—the IFAP is a CCR surface impoundment under Part 845.

Replacement Fly Ash Pond

52. The Replacement Fly Ash Pond (RFAP) meets the definition of a CCR surface impoundment. The RFAP is a man-made diked area designed to hold an accumulation of CCR and liquids that still contains CCR.

53. Configuration. Petitioner has stated that the RFAP is a manmade, diked area. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 198, Amd. Pet. at 12. As shown by the 1977 construction permit for the RFAP, Petitioner constructed the RFAP for the purpose of storing CCR, and Petitioner's witness confirmed this at hearing. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 198; Agency Ex. SS. Therefore, the RFAP satisfies the Configuration criterion for a CCR surface impoundment.

54. Design. The RFAP is designed to hold an accumulation of CCR and liquids. Per its 1977 construction permit, the RFAP was permitted as a water pollution control facility to receive an average of 34,500 gallons per day from the power plant, to hold fly ash and settle out solids and to provide backup treatment. Agency Ex. SS. Operation under this permit accumulated so much CCR that it led to construction of the FAE for additional capacity. *See id.* The RFAP was built with the express purpose of holding liquids and CCR. *See id*. Therefore, the RFAP satisfies the Design criterion.

55. Function/materials. The RFAP treats, stores, or disposes of CCR. Petitioner's witness confirmed at hearing that CCR was placed in the RFAP. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 198. The record contains no evidence or indication that this CCR was ever

removed. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 198. Without any showing that the CCR was removed, the Agency must conclude that the RFAP continues to store CCR. Therefore, the RFAP satisfies the Function/Materials criterion for a CCR surpface impoundment.

56. Having satisfied all three criteria—Configuration, Design, Function/Materials—the RFAP is a CCR surface impoundment under Part 845.

Fly Ash Extension

57. The Fly Ash Extension ("FAE") meets the definition of a CCR surface impoundment. The FAE is a man-made diked area designed to hold an accumulation of CCR and liquids that still contains CCR.

58. Configuration. Petitioner confirmed at hearing that the FAE is a manmade, diked area. *See* June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 204; Amd. Pet. at 12. Per the permit history and testimony at hearing, Petitioner built the FAE in 1981 to serve as an extension settling pond to the RFAP. Agency Ex. 34; June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 204. Therefore, the FAE satisfies the Configuration criterion for a CCR surface impoundment.

59. Design. The FAE is designed to hold an accumulation of CCR and liquids. The Agency permitted the FAE in 1981 as an extension settling pond to the RFAP to accommodate the overflow of the accumulated CCR and thus was purpose-built by Petitioner to hold an accumulation of CCR and liquids. June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 204; Agency Ex. 34. The permit for the FAE estimated that between 11,000 and 15,000 cubic yards of CCR were to be sluiced to the FAE annually. *See* Agency Ex. 34 at 11. The FAE was designed to hold an accumulation of CCR and liquids and therefore satisfies the Design criterion for a CCR surface impoundment.

60. Function/material. The FAE treats, stores, or disposes of CCR. Petitioner's own filings and testimony confirm that the FAE received CCR. Petitioner asserts that the FAE was drained and free of water by the 1990s, but there are no records or testimony establishing that the CCR was removed. *See* Sec. Amd. Pet. at 16; June 10, 2025 Hearing, Testimony of Todd Gallenbach, p. 204-207. Without any indication that the CCR was removed, the Agency must conclude that the FAE continues to store CCR. Therefore, the FAE satisfies the Function/Materials criterion for a CCR surface impoundment.

61. Having satisfied all three criteria—Configuration, Design, Function/Materials—the FAE is a CCR surface impoundment under Part 845

VI. PETITIONER'S "DE MINIMIS" CLAIM FAILS

62. Petitioner argues that six of the nine ponds (Ponds 3, 3A, B-3, 4, 6, and South Fly Ash) have "de minimis" amounts of CCR and thus should not be considered CCR surface impoundments. Sec. Amd. Pet. at 27-28. In support of this argument, Petitioner asserts that these six ponds have levels of CCR that are "insignificant" or lower than those seen in a "typical" CCR surface impoundment. *See* SIPC Ex. 29 at 9-10; Sec. Amd. Pet. at 31-32. Petitioner takes this "de minimis" exception argument from the U.S. EPA guidance on the federal Part 257; there is no definition of "de minimis" under Part 845. *See id.* at 27; 80 Fed. Reg. 21357 (April 17, 2015); SIPC Ex. 34.

63. The statutory and regulatory definition of a "CCR surface impoundment" controls. Neither the Act nor Part 845 includes the qualifiers "significant," or "typical," and the Board cannot read such terms into the definition. If a unit meets the definition, it is subject to Part 845. *See* 415 ILCS 5/3. 143; 35 Ill. Adm. Code 845.120. Further, as explained above, all of the ponds the Petitioner

labels "de minimis" have undergone cleanings, and the water levels of Pond 4 and the South Fly Ash Pond were lowered prior to the bathymetric survey. *See supra* at p. 6-15. Both facts undermine Petitioner's claim that the CCR amounts were "insignificant" or "lower than typical," since the reported volumes would likely have been higher absent the cleanings and lowered water levels.

64. The record does not support Petitioner's "de minimis" characterization or its claim that, under the Agency's approach, no pond could ever be considered de minimis. In Case No. AS 21-4 before the Board, the Agency treated a unit containing approximately 50 cubic yards of CCR as de minimis. AS 21-4 Final Order, February 17, 2022; *see* June 12, 2025 Hearing, Testimony of Lynn Dunaway, p. 505-506. By contrast, each pond at issue here is orders of magnitude higher; none has fewer than approximately 3,000 cubic yards of sediment. *See* SIPC Ex. 29. Petitioner asserts most of that sediment is not CCR, but it has not proven that assertion. *See* Sec. Amd. Pet. at 32.

65. Petitioner also attempts to re-label units as "finishing ponds" to suggest that they are outside what USEPA intended to regulate, as the term "finishing ponds" appears on a list of examples of units that may fall under the "de minimis" exception to Part 257. *See* Sec. Amd. Pet. at 30; SIPC Ex. 33. That argument fails. The very guidance Petitioner relies on confirms that the definition governs, and any lists of units are examples only, not an exclusive set of covered units. 80 Fed. Reg. 21357 (April 17, 2015); SIPC Ex. 34 at 8-9. Thus, if a unit meets the definition of a CCR surface impoundment, it is subject to regulation regardless of the label or terminology Petitioner assigns.

The "Other" Category Must be Treated as CCR

66. Petitioner's own data undercuts its de minimis claim. In Petitioner's Exhibit 29, Petitioner excluded the "Other" fraction of its summary of the sediment samples from each pond when

estimating CCR in the units it labeled "de minimis." SIPC Ex. 29, Attachment D, Appendix, letters dated June 25, 2021 and July 23, 2025. That exclusion is not supported by the record.

67. Control-sample PLM analyses identify "SIPC Sludge" (flue gas desulfurization (FGD) sludge) as 100% "Other". *See* SIPC Ex. 29 at 14, Table 6; SIPC Ex. 29, Attachment D, Appendix, letters dated June 25, 2021 and July 23, 2025. The "SIPC Sludge" identified in Table 6 of Petitioner's Exhibit 29 is scrubber sludge. SIPC Ex. 29 at 13-14. As Petitioner's witness confirmed at hearing, scrubbers are the type of technology that create FGD materials, therefore scrubber sludge is made of FGD. June 10, 2025 Hearing, Testimony of Wendell Watson, p. 90. FDG is CCR under the Illinois Environmental Protection Act; CCR is defined as "fly ash, bottom ash, boiler slag, and flue gas desulfurization materials generated from burning coal for the purpose of generating electricity by electric utilities and independent power producers". 415 ILCS 5/3.142. Because Petitioner is defining its scrubber sludge as "Other" rather than CCR, despite the fact that scrubber sludge is CCR, the "Other" category includes CCR and must be considered CCR.

68. The same letters also contain the PLM control-sample analyses of Unit 123 fly ash and Unit 4 fly ash showing only 9% and 36% "Fly Ash," and 26% and 62% "Other," respectively. Pet. Ex. 29, Attachment D at 206-207. The PLM footnotes explain these low "Fly Ash" percentages: only anisotropic and opaque spheres, agglomerations of spheres, and angular ash particles were counted as "Fly Ash," while other silicate minerals were excluded and placed in "Other."[4] Pet. Ex. 29, Attachment D at 204, disclaimer notes. Petitioner's own methodology therefore reclassified CCR constituents outside the narrow morphology – including silica-rich phases recognized by

[4] EPA describes fly ash as composed chiefly of silica/silicate phases; excluding silicate minerals from what is counted as "Fly Ash" necessarily shifts CCR constituents into the "Other" category. United States Environmental Protection Agency, *Human and Ecological Risk Assessment of Coal Combustion Residuals* (Dec. 2014) at p. 2-1; Pet. Ex. 29, Att. D at 204, disclaimer notes.

USEPA as CCR components – as "Other." *See* United States Environmental Protection Agency, Human and Ecological Risk Assessment of Coal Combustion Residuals (Dec. 2014) at p. 2-1. Pet. Ex. 29, Attachment D (footnotes). Thus, the PLM method undercounts CCR, and "Other" fraction necessarily includes CCR.

69. Because Petitioner has not shown that the 'Other' fraction is non-CCR, it must be included when determining whether these units meet the definition of a CCR surface impoundment.

VII. PETITIONER'S MISCHARACTERIZATION OF CERTAIN PONDS AS A LANDILL FAILS

70. Petitioner groups the Initial Fly Ash Pond, ("IFAP"), the Replacement Fly Ash Pond ("RFAP"), and the Fly Ash Holding Area Extension ("FAE") as the "Former Fly Ash Holding Units."

71. As demonstrated *supra*, the "Former Fly Ash Holding Units" are CCR surface impoundments.

72. Petitioner contends the Former Fly Ash Holding Units are part of a landfill regulated under 35 Ill. Adm. Code 815 rather than CCR surface impoundments regulated under Part 845. Sec. Amd. Pet. at 17. Petitioner's contention is unsupported, as classification is governed by Part 845's definition, not by Petitioner's characterization.

73. The regulatory classification of a CCR surface impoundment is definition-driven. Once Part 845 took effect, any unit that meets the definition of a CCR surface impoundment is subject to Part 845. See 35 Ill. Adm. Code 845.100. The Agency acknowledges that it has a history of regulating the Former Fly Ash Holding Units under Part 815 as a landfill. *See* SIPC Ex. 16. That approach has since been corrected: upon further review the regulatory definitions, the Agency

determined that these units meet the definition of a CCR surface impoundments and are subject to Part 845, not 815.

74. Petitioner nevertheless asserts that the Former Fly Ash Holding Units ceased operating as impoundments, were "closed," and that a landfill was later constructed on top. Amd. Pet. at 14-16. The record does not substantiate closure. SIPC has provided no documentation that IFAP, RFAP, or the FAE were dewatered or closed in accordance with Part 845. To the contrary, Petitioner's Exhibit 41, 2(c), 2(d) and 2(e) show continued operation of these units as CCR surface impoundments until at least through 2015.

75. The Former Fly Ash Holding Units were historically regulated by the Agency as water-pollution control facilities (surface impoundments) before Petitioner later sought to treat them as a permit-exempt landfill under Part 815 in 1992. *See* Agency Exs. EE, SS, TT; SIPC Ex. 15; Sec. Amd. Pet. at 17. As described *supra*, these three ponds were all either directly permitted as water pollution control facilities or referenced in other permits as being water pollution control facilities prior to Petitioner's designating them a landfill. *See* Agency Exs. EE, SS, TT.

76. The operational history surrounding the Former Fly Ash Holding Units further aligns with impoundment status: Petitioner's waste-handling practices filled IFAP and RFAP beyond capacity, with dry CCR spreading into the FAE and Pond 6. *See* Agency Exs. 2-9, 56; June 11, 2025 Hearing, Testimony of Kenneth Liss, p. 376-377. Such practices are consistent with the operation of surface impoundments, not a closed landfill.

77. The Former Fly Ash Holding Units are CCR surface impoundments subject to Part 845, not a Part 815 landfill. Classification turns on the Part 845 definition. The record shows no closure in accordance with Part 845. Instead, the record reflects continued impoundment operation into at

least 2015. Petitioner has not met its burden to establish otherwise, and the Board should reject its landfill argument.

VIII. THERE ARE NO FACTORS THAT WOULD JUSTIFY AN ADJUSTED STANDARD

78. The second element necessary for an adjusted standard requires the Petitioner to demonstrate that the existence of the factors in the first element justifies an adjusted standard. 415 ILCS 5/28.1(c)(2). Because Petitioner fails on the first element required for an adjusted standard, it must likewise fail on the second element. 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. Considering that the factors described to in the first element do not exist, the second element cannot be met, so Petitioner fails on the second element for an adjusted standard.

IX. AN ADJUSTED STANDARD WOULD RESULT IN ENVIRONMENTAL HARM

79. To satisfy the third required element to obtain an adjusted standard, Petitioner must show the proposal would not result in environmental harm. 415 ILCS 5/28.1(c)(3). The requested adjusted standard here would result in environmental harm.

80. Petitioner lacks an adequate groundwater monitoring system, and the groundwater monitoring data that it relies on come from that inadequate system. The monitoring wells used for the human health and ecological evaluations are not located to intercept contaminants from the storage ponds at issue. *See* June 12, 2025 Hearing, Testimony of Lynn Dunaway, p. 507-508.

Petitioner's 2021 Haley & Aldrich report offers bivariate analyses for sulfate and calcium versus the partial shake test analyses for sulfate to prove that the impoundments at the Marion plant do not pose an environmental risk. SIPC Ex. 29 at 20-21. The conclusion appears to be that the sulfate in the shake tests does originate from the sediment. Petitioner then points to low concentrations of sulfate in groundwater monitoring data as evidence that the CCR surface impoundments are not impacting groundwater. SIPC Ex. 29 at 21. However, this report fails to provide evidence that the listed groundwater monitoring wells are constructed in locations that would intercept leachate from the impoundments. No potentiometric surface map was provided demonstrating that any of the wells are downgradient from any of the CCR surface impoundments, nor has Petitioner provided well logs that support the premise that the monitoring wells are properly constructed to intercept releases from the CCR surface impoundments at issue.

81. At hearing, Petitioner's witness Kenneth Liss acknowledged that the current groundwater monitoring system is insufficient for the purposes of the federal CCR rule, or Part 257, and that Petitioner would need more time to construct an adequate groundwater monitoring system to ensure compliance with Part 257. *See* June 11, 2025 Hearing, Testimony of Kenneth Liss, p. 395-396. As Part 257 is required to be at least as stringent as Part 257, if the groundwater monitoring system is insufficient for the purposes of Part 257, it is also insufficient for the purposes of Part 845. *See* Coal Combustion Residuals State Permit Program Guidance Document; Interim Final, p. 2-10 (82 FR 38685, August 15, 2017).

82. Without an adequate groundwater monitoring system, Petitioner's environmental-impact claims cannot be verified. Moreover, none of the ponds are lined, and, as detailed *supra*, all contain CCR. *See* June 12, 2025 Hearing, Testimony of Lynn Dunaway, p. 509-510. These conditions increase the risk of groundwater impacts, and the record contains no evidence to contrary. *See id.*

83. Petitioner contends this factor favors an adjusted standard because it intends to evaluate whether CCR in the relevant ponds is eligible for Beneficial Use. *See* Sec. Amd. Pet. At 61. But closure by Beneficial Use in and of itself is not an approved closure method under Part 845. *See* 35 Ill. Adm. Code 845.700. Even if the Board were to consider Beneficial Use in assessing environmental harm, Petitioner offers only an intention to explore that option without specific implementation details, a defined schedule, or data showing that CCR meets the Act's Beneficial Use Criteria (its "shake test" submittal in Pet. Ex. 29, Table 9 reports results for 6 of the 24 metals identified in Section 3.135). SIPC Ex. 29, Table 9; 415 ILCS 5/3.135. The Agency is not categorically opposed to Beneficial Use where lawful and supported, but on this record, Petitioner has not provided sufficient information to evaluate feasibility or to conclude that environmental harm would be avoided. Granting an adjusted standard on this showing would permit extended noncompliance without assurance of environmental protection.

84. Given the inadequate monitoring network and unlined CCR units, and Petitioner's undeveloped "Beneficial Use" showing, Petitioner has not met its burden under 415 ILCS 5/28.1(c)(3) to demonstrate that the requested relief would not result in environmental harm.

X. AN ADJUSTED STANDARD WOULD BE INCONSISTENT WITH FEDERAL LAW

85. The fourth element requires the Petitioner to show the requested relief is consistent with applicable federal law. 415 ILCS 5/28.1(c)(4).

86. In order to be consistent with federal law, Agency enforcement of Part 845 must at least as stringent as the federal Part 257. *See* Coal Combustion Residuals State Permit Program Guidance Document; Interim Final, p. 2-10 (82 FR 38685, August 15, 2017). The Agency cannot grant Petitioner any deviations from Part 845 that would not also be permissible under Part 257.

87. As demonstrated above, all nine ponds at issue in this matter are CCR surface impoundments. Therefore, all nine ponds are subject to all of the requirements of CCR surface impoundments under Part 257. Granting an adjusted standard exempting these ponds from regulation under Part 845 would be inconsistent.

88. The September 3, 2025 USEPA letter recently filed in this matter explains that USEPA must determine whether each CCR unit complies with the federal CCR requirements or with other State requirements that USEPA determines are at least as protective, and that USEPA cannot delegate those determinations to the State. USEPA Letter, (Sept. 3, 2025), filed Sept. 10, 2025.

89. When USEPA approves a State CCR program, it must be able to "find, and defend," that any approved alternative State requirements are at least as protective as the federal CCR regulations. The letter further states it is unclear whether there would be sufficient factual evidence – at the time USEPA reviews Illinois' application – to support such findings for Illinois' adjusted standards provisions, and that reviewing those provisions and the associated variance history would take additional time. *Id.*

90. To simplify the application process, Illinois EPA has decided not to seek approval of the State's adjusted standards provision in its CCR program submission. *Id*.

91. Because those provisions will not be a part of the federally approved program, any Board-granted adjusted standard or finding of inapplicability would fall outside the approved program and would not be recognized by USEPA for federal compliance. *Id.* Relief that cannot be recognized by USEPA cannot be considered consistent with federal law.

92. Therefore, Petitioner has not shown the requested relief is consistent with federal law as required by 415 ILCS 5/28.1(c)(4).

XI. PETITIONER HAS NOT PROVEN ITS BURDEN FOR AN ADJUSTED STANDARD

93. In order to receive an adjusted standard, Petitioner must prevail on all four elements for an adjusted standard. 415 ILCS 5/28.1(c). If any one of the four elements is not met, Petitioner will not have satisfied its burden of proof. Here, Petitioner has failed to meet any of the four elements, therefore the adjusted standard request must be denied.

WHEREFORE, for the reasons stated above, Illinois EPA respectfully reiterates its recommendation that the Board DENY Petitioner's request for a Board finding of inapplicability from Part 845 and likewise DENY Petitioner's request for an adjusted standard.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

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DATED: October 10, 2025

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THIS FILING IS SUBMITTED ELECTRONICALLY

CERTIFICATE OF SERVICE

I, the undersigned, on affirmation certify the following:

That I have electronically served the attached **NOTICE OF ELECTRONIC FILING** and **ILLINOIS EPA'S POST-HEARING BRIEF** upon those listed on the Service List before 4:30 p.m. on October 10, 2025.

ILLINOIS ENVIRONMENTAL
PROTECTION AGENCY

BY: /s/Rebecca Strauss
Rebecca Strauss
Assistant Counsel
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DATED: October 10, 2025

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