

ILLINOIS POLLUTION CONTROL BOARD
September 9, 2021

MIDWEST GENERATION, LLC)	
(POWERTON STATION),)	
)	
Petitioner,)	
)	
v.)	PCB 21-109
)	(Variance - Land)
ILLINOIS ENVIRONMENTAL)	
PROTECTION AGENCY,)	
)	
Respondent.)	

OPINION AND ORDER OF THE BOARD (by C.M. Santos):

Midwest Generation, LLC (MG) owns and operates the Powerton Station (Station), a power plant in Pekin, Tazewell County. At the Station, MG uses its Metal Cleaning Basin for temporarily holding dry ash cleaned out during maintenance activities and also for holding process water from washing boilers. On April 15, 2021, the Board adopted Part 845 of its rules, which regulates coal combustion residuals (CCR) surface impoundments including the Metal Cleaning Basin. MG maintains that CCR rules adopted in 2015 by the United States Environmental Protection Agency (USEPA) do not apply to the Metal Cleaning Basin, so it does not have the groundwater monitoring network and information needed to timely comply with specified requirements of Part 845.

On May 11, 2021, MG requested that the Board grant a variance extending six specified deadlines for the Metal Cleaning Basin. MG argues that it requires additional time to gather data and submit complete information to comply with Part 845. The Illinois Environmental Protection Agency (IEPA) recommended that the Board deny two of MG's requests, which MG then agreed to withdraw. Of the four pending requests, IEPA neither supports nor opposes extending the deadlines to collect and analyze groundwater monitoring data, submit an initial operating permit application, and designate a closure priority category. However, IEPA recommends that the Board deny MG's request to extend the deadline to submit a construction permit application. For the reasons below, the Board finds that immediate compliance with the four specified deadlines would impose an arbitrary or unreasonable hardship and grants MG variances with conditions.

Below, the opinion first summarizes the procedural history and provides background on the Powerton Station. The Board then addresses the regulations from which MG seeks variances. Next, the opinion summarizes variances generally, the regulatory background for MG's requests, IEPA's recommendation, and MG's response. It then separately discusses each of the four requirements from which MG seeks relief, including MG's compliance alternatives, its requested relief, and its arguments that immediate compliance would constitute an arbitrary or unreasonable hardship. The Board then addresses the issues of compliance costs, impact on the

public or environment, and consistency with federal law. Finally, the Board considers MG's proposed variance conditions before reaching its conclusion to grant the requested variances with conditions and issuing its order.

PROCEDURAL HISTORY

On May 11, 2021, MG filed its variance petition (Pet.), which requested that the Board hold a hearing (Pet. at 24). Attached to the petition were a motion for expedited review and 17 exhibits:

- Pet. Exh. A: IEPA Statement of Reasons, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Mar. 30, 2020);
- Pet. Exh. B: Excerpt of Hearing Transcript, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Aug. 11, 2020);
- Pet. Exh. C: Excerpt of Hearing Transcript, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Aug. 13, 2020);
- Pet. Exh. D: Affidavit of Dale Green, Station Manager, Powerton Generating Station;
- Pet. Exh. E: General Flow Diagram with NPDES Outfalls;
- Pet. Exh. F: IEPA Construction Permit No. 2009-EB-2748 for Metal Cleaning Basin liner (Nov. 13, 2009);
- Pet. Exh. G: Construction Documentation for Metal Cleaning Basin and Bypass Basin Liner Replacement (June 27, 2011);
- Pet. Exh. H: NPDES Permit No. IL0002232 for Powerton Station;
- Pet. Exh. I: Affidavit of Richard Gnat, KPRG & Associates, Inc. (KPRG);
- Pet. Exh. J: KPRG Map of Well Locations;
- Pet. Exh. K: KPRG Cost Estimates;
- Pet. Exh. L: KPRG Regulation Compliance Timeline (Groundwater Monitoring);
- Pet. Exh. M: Prefiled Testimony of Richard Gnat, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R 20-19 (Aug. 27, 2020), including Attachment 4, Excerpts from USEPA Statistical Analysis of Groundwater Monitoring Data at RCRA Facilities – Unified Guidance March 2009 (EPA-530-R-09-007);
- Pet. Exh. N: KPRG Regulation Compliance Timeline (Operating Permit);
- Pet. Exh. O: KPRG Proposed Compliance Schedule (Groundwater Monitoring);
- Pet. Exh. P: KPRG Proposed Compliance Schedule (Operating Permit); and
- Pet. Exh. Q: Hydrogeologic Assessment of MG Electric Generating Stations (July 14, 2009).

On May 19, 2021, MG filed a certificate of publication of notice of filing its petition on May 15, 2021, in the *Pekin Daily Times*. See 35 Ill. Adm. Code 104.204(d); Rec. at 3. On May 20, 2021, the Board found that MG had timely published notice and accepted MG's petition for hearing. The Board also granted MG's motion for expedited review. On May 21, 2021, MG

waived its decision deadline to September 10, 2021. *See* 415 ILCS 5/38(a) (2020); 35 Ill. Adm. Code 104.232.

On June 25, 2021, IEPA filed its recommendation (Rec.). *See* 415 ILCS 5/37(a) (2020); 35 Ill. Adm. Code 104.216(b). Attached to the recommendation were 12 exhibits:

- Rec. Exh. A: IEPA Invoice for CCR Surface Impoundment at Powerton Station (Mar. 25, 2020);
- Rec. Exh. B: IEPA Water Pollution Control Permit No. 2009-EB-2748 (Nov. 13, 2009);
- Rec. Exh. C: IEPA Violation Notice (June 11, 2012);
- Rec. Exh. D: IEPA Compliance Commitment Acceptance (Oct. 24, 2012);
- Rec. Exh. E: MG Groundwater Management Zone application (Jan. 18, 2013);
- Rec. Exh. F: IEPA Groundwater Management Zone approval (Oct. 3, 2013);
- Rec. Exh. G: Quarterly Groundwater Monitoring Report (Apr. 15, 2021);
- Rec. Exh. H: Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment v. Midwest Generation, LLC, PCB 13-15 (June 20, 2019) (interim opinion and order);
- Rec. Exh. I: IEPA Invoice issued to Powerton Station (Dec. 16, 2019);
- Rec. Exh. J: MG letter to IEPA Accounts Receivable (May 8, 2020);
- Rec. Exh. K: Affidavit of Darin E. LeCrone, Manager of Permit Section in Division of Water Pollution Control, IEPA Bureau of Water; and
- Rec. Exh. L: Affidavit of Lynn E. Dunaway, Environmental Specialist IV in Hydrogeology and Compliance Unit of Groundwater Section, IEPA Bureau of Water.

On July 9, 2021, MG responded to IEPA's recommendation (Resp.). *See* 35 Ill. Adm. Code 104.220(a). Attached to the response was one exhibit:

- Pet. Exh. R: Alternate Source Demonstration CCR Groundwater Monitoring Powerton Generating Station (Mar. 25, 2019).

In an order on July 20, 2021, the Board's hearing officer submitted written questions to the parties (Board Questions).

On July 21, 2021, the Board held a hearing in Pekin. The Board received the transcript (Tr.) on July 26, 2021. Four witnesses testified during the hearing: Mr. Dale Green and Mr. Richard Gnat for MG, and Mr. Darin LeCrone and Mr. Lynn Dunaway for IEPA. At hearing, MG offered four exhibits, which the hearing officer admitted without objection:

- Pet. Exh. S: Fugitive Particulate Matter Operating Program Revision 6 (Sept. 2018);
- Pet. Exh. T: Illinois Ambient Air Monitoring 2022 Network Plan (June 2021);
- Pet. Exh. U: Excerpt of IEPA's Pre-Filed Answers, Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Aug. 3, 2020); and
- Pet. Exh. V: IEPA List of CCR Surface Impoundments.

On August 9, 2021, MG filed its post-hearing brief (MG Brief).

BACKGROUND ON POWERTON STATION

Location and History

Powerton Station “began operations as a coal-fired power plant in the 1920s.” Pet. at 7-8, citing Pet. Exh. D (¶¶3, 4). MG has owned and operated the Station since 1999, and it currently employs approximately 88 persons at Powerton. Pet. at 8, citing Pet. Exh. D (¶¶5, 6); *see* 35 Ill. Adm. Code 104.204(b)(5).

In its written questions, the Board noted that 35 Ill. Adm. Code 104.204(b)(1) requires the petitioner to provide the location of the facility. While MG provided a general location, it had not provided an address. *See* Pet. at 7, citing Pet. Exh. D. The Board requested that MG provide the address. Board Questions at 1 (¶1). Mr. Green’s testimony confirmed that the “the address of the Powerton Station is 13082 East Manito Road in Pekin.” Tr. at 12.

The Board also noted that 35 Ill. Adm. Code 104.204(b)(1) requires the petitioner to provide the area affected by the facility. The Board requested that MG describe that area, including the location of any potable wells, surface waters, or groundwater. Board Questions at 1 (¶1).

Mr. Gnat’s testimony located two potable water wells at the 2,500-foot radius around the CCR surface impoundments. *See* Pet. Exh. Q. He testified that one well to the south was upgradient. Tr. at 36-37. A second well to the west is separated from the CCR units by an intake channel. He testified that flow to the west “is in the very shallow groundwater . . . and it will be directly discharging to that intake channel, which then goes through the processing facility.” *Id.* at 37; *see id.* at 39-40. Based on these factors, he expected no impact on these wells from the Metal Cleaning Basin or CCR surface impoundments. *Id.*

Mr. Gnat’s testimony identified two bodies of surface water near the Powerton Station: the Illinois River to the north and Powerton Lake to the north-northwest. Tr. at 38. He did not expect any impact to Powerton Lake because it is also separated from the CCR units by the intake channel. Tr. at 38. He added that the Station discharges to Powerton Lake under its NPDES permit. *Id.* at 38-39. Mr. Gnat acknowledged that groundwater flow in the lower unit is generally to the north toward the river. *Id.*; *see id.* at 40 He noted the Station has “three wells which are north of what’s called the former ash basin wells 2, 3, and 4, which are closest to the Illinois River and those generally do not have any exceedances of any of the values that we’ve looked at.” *Id.* at 38.

Metal Cleaning Basin

The Metal Cleaning Basin was constructed in 1978. Pet. at 8, citing Pet. Exh. D (¶7). MG states that “[i]t is not part of the ash sluice system.” Pet. at 8, citing Pet. Exh. D (¶8). MG argues that, because it does not receive commingled ash and process water, it “therefore is not regulated by the federal CCR rule.” Pet. at 8, citing Pet. Exh. D (¶¶11, 17).

MG reports that the Metal Cleaning Basin is instead used during outages “as a temporary lay-down area for dry ash cleaned out during maintenance activities.” Pet. at 8, citing Pet. Exh. D (¶8); Tr. at 19. Mr. Green testified that the Station uses the metal cleaning basin for this purpose “about four times a year.” Tr. at 20. He added that the ash is typically hauled off-site within two to three weeks. *Id.* at 20; *see id.* at 15. When ash is removed, it “is generally beneficially used for mine reclamation.” Pet. at 8, citing Pet. Exh. D (¶8); *see* Tr. at 14.

MG adds that “the Metal Cleaning Basin occasionally holds process water when the boilers are washed.” Pet. at 8, citing Pet. Exh. D (¶10). From the boiler, process water goes into the Metal Cleaning Basin, where it is treated and discharged into the Ash Surge Basin under the Station’s NPDES permit. Pet. at 8, citing Pet. Exh. D (¶9); Pet. Exh. E; *see* Tr. at 15. MG reports that “[t]he Metal Cleaning Basin is typically dredged once per year.” Pet. at 9, citing Pet. Exh. D (¶16). Because it operates intermittently, “the Metal Cleaning Basin is often empty.” Pet. at 8, citing Pet. Exh. D (¶11); *see* Tr. at 20-21.

In its written questions, the Board noted that 35 Ill. Adm. Code 104.204(b)(6) requires the petitioner to provide information concerning material processed by a facility for which it seeks a variance. Based on using the Metal Cleaning Basin as a temporary laydown area and to hold process water, the Board asked MG to provide the “amounts of dry ash and process water stored annually” in the Metal Cleaning Basin. Board Questions at 1 (¶3). In addition, the Board noted that 35 Ill. Adm. Code 104.204(b)(8) requires the petitioner to describe the “nature and amount of emissions, discharges or releases of the constituent in question currently generated by the petitioner’s activity.” The Board requested the MG indicate the quantity of process water annually discharged from the Metal Cleaning Basin and the amount of dry ash annually dredged from it. Board Questions at 1 (¶4).

Mr. Green estimated that, during the boiler washing process, approximately one million gallons per day circulates in the metal cleaning basin for three to seven days. Tr. at 16. He added that, once the circulated water meets the requirements of the Station’s NPDES permit, it is discharged to the ash surge basin. *Id.* at 16-17.

Mr. Green also testified that Station maintenance generates approximately five dump truck loads of fly ash. Tr. at 19-20, 29-30. Comparing this volume to total facility operations, he testified that “[i]t’s probably less than a percent. It’s a very, very small, *de minimus* amount.” *Id.* at 20.

In its recommendation, IEPA states that it designated the Metal Cleaning Basin as a CCR surface impoundment because of its design and use. Rec. at 5. IEPA argues that MG’s practices, including using poz-o-pac liners and heavy equipment, threaten groundwater contamination. *Id.*, citing Pet. Exh. H at 36-40. It further argues that “[t]hese threats can persist even after a pollution source is removed.” Rec. at 6.

IEPA adds that it considers the Metal Cleaning basin a CCR surface impoundment because the record of MG’s 2009 permit “indicates ash and slag sluice water as a waste stream.” Rec. at 6, citing Rec. Exh. A, Rec. Exh. B at 5, 34-35. Also, based on process flow, IEPA argues

that “it would not be uncommon for gas side boiler wash waters received by the Metal Cleaning Basin to contain fly ash.” Rec. at 6, citing Rec. Exh. B at 33-34; Pet. Exh. E.

In its written questions, the Board requested comment on whether MG “has detected fly ash in the process waters managed in the metals cleaning basin.” Board Questions at 2 (¶5). Mr. Green testified that he was not aware that the Station had tested for fly ash, and it has not detected fly ash in boiler wash water. Tr. at 15-16, 17.

Pollution Control Equipment

The Metal Cleaning Basin was constructed “with a 12-inch poz-o-pac liner on the bottom and a plastic liner on the sides.” Pet. at 8, citing Pet. Exh. D (¶7). IEPA reports that its record shows it issued a permit on November 13, 2009, to reline the Metal Cleaning Basin. Rec. at 8. In 2010-2011, it “was relined with a 60 mil high-density polyethylene (HDPE) liner.” Pet. at 8, citing Pet. Exh. D (¶12); Pet. Exh. F; Pet. Exh. G; *see* Pet. at 8, n.6.

From bottom to top, the Metal Cleaning Basin’s liner system now consists of six layers. First, MG retained the original poz-o-pac to provide an additional barrier and support the overall liner system. Pet. at 8-9, citing Pet. Exh. D (¶15). The system then includes a geotextile cushion, the HDPE liner, and another geotextile cushion. Pet. at 8, citing Pet. Exh. D (¶13). The next layer is a 12-inch sand cushion, which helps to “avoid punctures on the geomembrane when equipment is on the liner.” Pet. at 8, citing Pet. Exh. D (¶14). Finally, the liner system includes a 6-inch limestone warning layer. “which is white and contrasts with the dark color of coal ash” to warn operators removing ash “so that they do not reach the liner.” Pet. at 8, citing Pet. Exh. D (¶14). In addition, MG installed marker posts along the edge of the basin “to mark the sides for the operators when the ponds are being dredged.” Pet. at 9, citing Pet. Exh. D (¶16).

Permits and Variances

MG “has not previously petitioned the Board for a variance concerning an extension of time to collect data or to submit a permit application.” Pet. at 9; *see* 35 Ill. Adm. Code 104.204(b)(3).

MG operates ponds at the Station including the Metal Cleaning Basin under NPDES Permit No. IL 0002232. Pet. at 9, citing Pet. Exh. H. MG states that, if the Board grants its requested variances, the permit “would not be impacted.” Pet. at 9; *see* 35 Ill. Adm. Code 104.204(b)(4).

IEPA’s recommendation must include “[t]he status of any permits or pending permit applications that are associated with or affected by the requested variance.” 35 Ill. Adm. Code 104.216(b)(8). Other than the NPDES permit cited in the petition, IEPA states that there are no IEPA water permits in effect at the Station. Rec. at 19. IEPA concludes that “[g]ranting any of the Petitioner’s variance requests will not impact the NPDES permit.” *Id.*

IEPA adds that MG’s petition affects applications for operating and construction permits for the Metal Cleaning Basin. However, the requested relief “will not impact the operating and

construction permit applications for any other CCR surface impoundment located at the Powerton Station, provided that the facility-wide plans submitted with those applications are complete.” Rec. at 19.

Past or Pending Enforcement Actions

IEPA’s recommendation must include “[a]llegations of any other facts the Agency believes relevant to the disposition of the petition, including any past or pending enforcement actions against petitioner.” 35 Ill. Adm. Code 104.216(b)(4). In addition to a violation notice issued in 2012 (Rec. Exh. C), IEPA cites a citizen enforcement action brought by environmental groups in 2012. An interim opinion and order in that case found that MG had violated the Act and groundwater quality regulations at the Powerton Station. Rec. at 8, citing Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment, PCB 13-15 (June 20, 2019); Rec. Exh. H.

IEPA also cites a violation notice issued to MG on July 28, 2020, “for failure to pay CCR surface impoundment fees related to its Service Water Basin.” Rec. at 8. While that action is unresolved, IEPA acknowledges that it “is unrelated to the Petition.” *Id.* IEPA states that it is otherwise “not aware of any other past or pending enforcement actions relevant to Petitioner’s operation of CCR surface impoundments at the Powerton Station.” Rec. at 8.

Air Monitoring

IEPA’s recommendation must include “[t]he location of the nearest air monitoring station maintained by the Agency where applicable.” 35 Ill. Adm. Code 104.216(b)(2). IEPA asserts that “[t]his requirement is not applicable in this matter.” Rec. at 4.

In its questions, the Board asked MG to “comment on whether location of an air monitoring station has any bearing on measuring the impact of fugitive dust emissions from the facility.” Board Questions at 1 (¶2). Mr. Green testified that the air monitoring station nearest to the Powerton Station is a PM_{2.5} monitor on Jefferson Street in Peoria. Tr. at 27; *see* Pet. Exh. T. He stated the opinion that, because the Station follows its fugitive dust plan, there is no fugitive dust leaving the Station boundaries that would be detected by that station. Tr. at 27-28; *see* Pet. Exh. S.

Performance Bond

Under Section 36(a) of the Act, “[i]f the hardship complained of consists solely of the need for a reasonable delay in which to correct a violation of this Act or of the Board regulations, the Board shall condition the grant of such variance upon the posting of sufficient performance bond or other security to assure the completion of the work covered by the variance.” 415 ILCS 5/36(a) (2020); 35 Ill. Adm. Code 104.246; *see* Rec. at 5. IEPA’s recommendation must include facts it “believes are relevant to whether the Board should condition a grant of variance on the posting of a performance bond under Section 104.246.” 35 Ill. Adm. Code 104.216(b)(9); *see* Rec. at 5.

IEPA stresses that Board regulations include “financial assurance for closure, post-closure care and corrective action, all of which include associated groundwater monitoring requirements.” Rec. at 8, citing 35 Ill. Adm. Code 845.Subpart I. Based on these provisions, IEPA concludes that “the Board should not have to condition the grant of a variance on any additional performance bond.” Rec. at 8.

REGULATIONS FROM WHICH MG SEEKS VARIANCES

In the following subsections of the opinion, the Board first provides a brief summary of variances under the Act and the regulatory background for MG’s requests. Next, the Board summarizes IEPA’s recommendation and MG’s response. The Board then separately discusses the four requirements from which MG requests relief. For each of them, the Board addresses MG’s compliance alternatives, its requested relief, and its arguments that immediate compliance would constitute an arbitrary or unreasonable hardship before discussing the issues presented.

Variations Generally

A “variance is a temporary exemption from any specified rule, regulation, requirement or order of the Board.” *See* 415 ILCS 5.35(a) (2020); 35 Ill. Adm. Code 104.200(a)(1). Under the Act, the Board “may grant individual variances beyond the limitations prescribed in this Act, whenever it is found, upon presentation of adequate proof, that compliance with any rule or regulation, requirement or order of the Board would impose an arbitrary or unreasonable hardship.” 415 ILCS 5/35(a) (2020); *see* 35 Ill. Adm. Code 104.200, 104.208, 104.238. The Board is authorized to grant a variance only to the extent consistent with applicable federal law and only for up to five years. *See* 415 ILCS 5/35, 36(b) (2020). In granting a variance, the Board may impose conditions that promote the policies of the Act. *See* 415 ILCS 5/36(a) (2020).

The burden of proof is on the petitioner. *See* 415 ILCS 5/37(a) (2020); 35 Ill. Adm. Code 104.200(a)(1), 104.238(a). The petitioner must prove that timely compliance with the Board rule or order would cause an arbitrary or unreasonable hardship that outweighs the public interest in timely compliance with the rule or order. *See Willowbrook Motel v. IPCB*, 135 Ill. App. 3d 343, 349-50 (1st Dist. 1985).

Regulatory Background

Section 22.59(g) of the Act required IEPA to propose and the Board to adopt standards for CCR surface impoundments. Pet. at 4, citing 415 ILCS 5/22.59(g) (2020); Public Act 101-171, eff. July 20, 2019; Pet. Exh. A (IEPA Statement of Reasons). On April 15, 2021, the Board adopted Part 845 of its rules, which includes the deadlines that are the subject of MG’s petition. Pet. at 4, citing Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19 (Apr. 15, 2021); *see* 45 Ill. Reg. 5884 (May 7, 2021); Rec. at 1.

Before the Board adopted Part 845, “CCR surface impoundments were regulated by the federal CCR rule.” Pet. at 5; *see* 40 CFR 257. MG argues that Part 845 follows the federal rule but differs significantly in several areas. Pet. at 5. MG elaborates that the definition of “CCR

surface impoundment” in Part 845 applies “more broadly to encompass ponds that are not regulated as CCR surface impoundments under the federal CCR rule.” Pet. at 5, citing 415 ILCS 5/3.143 (2020); 40 CFR 257.73.

For CCR surface impoundments already regulated by the federal rules, MG argues that owners and operators have been able to collect data needed to comply with deadlines in Part 845. Pet. at 5. MG further argues that “this is not the case for the Metal Cleaning Basin and other ponds not regulated by the federal CCR rule.” *Id.* MG asserts that IEPA recognized this category of impoundments and acknowledged that they may not have collected data needed to comply with Part 845. *Id.* at 5, citing Pet. Exh. B at 74; Pet. Exh. C at 140-41.

In the Board’s rulemaking, MG’s post-hearing brief proposed to extend the groundwater monitoring deadline for impoundments such as the Metal Cleaning Basin that had not been subject to the federal CCR rule. Pet. at 5-6, n.4. MG sought an extended deadline “to collect the same number of independent samples as had been required for existing CCR surface impoundments regulated by the federal CCR rule.” Pet. at 6, citing 40 CFR 257.94(b). However, the Board’s second-notice proposal included a 180-day deadline to collect groundwater samples and a six-month deadline to apply for an operating permit. Pet. at 6, citing Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 24, 71 (Feb. 4, 2021).

MG argues that the Board recognized that site-specific factors may warrant extended deadlines. It further argues that the Board encouraged owners and operators with site-specific factors to seek a variance. Pet. at 6, citing Standards for the Disposal of Coal Ash Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 25 (Feb. 4, 2021).

IEPA Recommendation

When it receives a petition for a variance, IEPA must “promptly investigate” it and “consider the views of persons who might be adversely affected by the grant of a variance.” 415 ILCS 5/37(a) (2020). IEPA must also “make a recommendation to the Board as to the disposition of the petition.” *Id.*; see 35 Ill. Adm. Code 104.216(b).

IEPA’s recommendation does not either support or object to MG’s “request to extend its deadlines for completing its background groundwater sampling and submitting its operating permit application and category designation for the Metal Cleaning Basin.” Rec. at 21; see *id.* at 1, 4, 22. However, IEPA recommends that the Board deny MG’s “request to extend its deadlines to complete the fugitive dust control plan and emergency action plan, and to submit its construction permit application for closure.” *Id.* at 21; see *id.* at 1, 4, 22.

Regarding the fugitive dust control and emergency action plans, IEPA argued that the requested deadline extension is “unnecessary.” Rec. at 13. IEPA stated that the Board’s rules specify that these plans “are for a facility, not individual CCR surface impoundments.” *Id.* at 12, citing 35 Ill. Adm. Code 845.500(b)(4), 845.520(c). IEPA noted that MG operates other impoundments at the Station for which it must prepare these plans by October 30, 2021. Rec. at

13. IEPA indicated that, “[i]f the Metal Cleaning Basin requires any special operational considerations regarding the facility’s fugitive dust and emergency action plan, those considerations should amount to minor additions to the facility’s overall plans. *Id.*”

MG Response

IEPA’s recommendation argued that extending the deadline to submit emergency action and fugitive dust plans “is unnecessary.” Rec. at 13. Based on IEPA’s objection, MG agreed “to withdraw its request to extend the deadline to complete the initial emergency action plan and the fugitive dust plan.” Resp. at 1; *see* Tr. at 9, 24.

Section 845.650(b)(1)(A): Groundwater Monitoring

MG seeks a variance from Section 845.650(b)(1)(A), which addresses monitoring and analysis and provides that,

[f]or existing CCR surface impoundments, a minimum of eight independent samples from each background and downgradient well must be collected and analyzed for all constituents with a groundwater protection standard listed in Section 845.600(a), calcium, and turbidity within 180 days after April 21, 2021 [the effective date of Part 845]. 35 Ill. Adm. Code 845.650(b)(1)(A); *see* Pet. at 1, 6.

MG’s Compliance Alternative

Installing Groundwater Monitoring Network. To meet the October 18, 2021 deadline to collect and analyze these samples, MG must first install a groundwater monitoring network for the Metal Cleaning Basin that meets the requirements of Part 845. Pet. at 10, citing 35 Ill. Adm. Code 845.630. MG argues that, because the Metal Cleaning Basin was not subject to the federal CCR rules, it did not have in place a monitoring well system complying with Section 845.630(c). Pet. at 10, citing Pet. Exh. I (¶4). MG reports that, although in 2010 it had installed three monitoring wells around the basin, it needed to install two new monitoring wells to meet the requirement that there be at least three downgradient wells for each pond. Pet. at 10, citing 35 Ill. Adm. Code 845.630(c); Pet. Exh. J; *see* Tr. at 43.

MG began installing the required new wells before Part 845 took effect. Pet. at 10. To install the new wells, MG needed to “clear the area and construct an access road.” *Id.*; *see* Tr. at 43-44. Once installed, the wells “had to be developed and surveyed.” Pet. at 10, citing Pet. Exh. I (¶6). MG completed well installation on March 11-12, 2021. Pet. at 10, citing Pet. Exh. I (¶7).

Collecting Samples. MG must then “collect eight independent samples to establish the representative background concentrations.” Pet. at 10. MG argues that meeting the October 18, 2021 deadline to collect and analyze samples “would require taking a sample about every 20 days.” *Id.* at 10-11, 12, citing Pet. Exhs. K, L. Because it would compress sampling between March and August, MG argues that it could not capture seasonal variations. Pet. at 11-12, citing Pet. Exhs. I (¶¶8, 12), L, M. at 11. MG also argues that independent samples must be separated

by enough time to ensure that they are not sampling what is effectively the same groundwater. Pet. at 12. If samples are too close to one another in time, it can result in autocorrelated data, which MG characterizes as “data that is similar between measurements as a function of time between the measurements.” *Id.*, citing Pet. Exh. M at 12. MG argues that the sampling deadline does not provide enough time to collect samples that are genuinely independent. Pet. at 12, citing Pet. Exhs. I (¶12), M at 11.

Analyzing Samples. MG must then analyze the sample results for each constituent listed in 35 Ill. Adm. Code 845.600. Pet. at 10. MG reports that “[i]t typically takes 14 to 21 days to receive the laboratory analytical results for the required parameters” and that radium data may require 30 or more days. Pet. at 11, citing Pet. Exh. I (¶10); *see* Tr. at 52-53. MG argues that it must receive all results, including radium data, by September 17, 2021, in order to meet the 180-day deadline in Section 845.650(b)(1). Pet. at 10, citing Pet. Exh. L.

Completing Statistical Evaluation. MG must then “complete a statistical evaluation based on all monitoring results and develop site specific groundwater protection standards for subsequent data comparisons and evaluations.” Pet. at 10. MG argues that the required statistical analysis “is estimated to take approximately two months in order to ensure a quality evaluation.” *Id.* at 11, citing Pet. Exhs. I (¶14), L; *see* Tr. at 60-61. MG argues that, even if it followed an expedited schedule to collect and analyze groundwater samples, “the statistical analysis must be completed in less than one month.” Pet. at 11. MG questions whether such an analysis “would be adequate to evaluate the full scope of the groundwater data collected.” *Id.*

MG’s Requested Relief

While MG has begun to collect required groundwater data, it estimates that complying with Section 845.650(b)(1)(A) “will take until January 2022.” Pet. at 20, citing Pet. Exh. O. MG’s compliance timeline accounts for samples to establish background concentrations. Pet. at 20, *see* Pet. Exh. L. MG argues that “the sampling events are adequately spaced in time so that they will be independent, and account for seasonal variability.” Pet. at 20, citing Pet. Exh. I (¶13). MG also argues that its timeline includes sufficient time to analyze the sampling results and “develop site specific applications of groundwater protection standards for subsequent data comparisons and evaluations.” Pet. at 20, citing Pet. Exh. I (¶¶13, 14). MG seeks to extend the groundwater monitoring deadline by approximately three months to January 31, 2022. Pet. at 6, 22; MG Brief at 2, 12.

Arbitrary or Unreasonable Hardship

MG argues that, “[t]o qualify as ‘independent samples,’ the eight groundwater monitoring events must be conducted at not less than one-month intervals, which requires a minimum of eight months to complete” after installing monitoring wells. Pet. at 3. With an October 18, 2021 deadline, MG argues that “[i]t is not feasible to collect and analyze samples that comply with the well-established principles concerning seasonal variability or truly ‘independent’ samples.” Pet. at 15, citing Pet. Exhs. I (¶12), L; *see* 35 Ill. Adm. Code 845.650(b)(1). MG states that “there is simply not enough time to thoroughly and adequately comply with the Illinois CCR Rule’s six-month deadline.” Pet. at 3.

MG acknowledges that a 180-day deadline may be adequate for impoundments that can supplement existing groundwater data required by the federal rule. Pet. at 15-16. It argues that the Metal Cleaning Basin “was not regulated by the federal CCR rule.” *Id.* at 16. MG asserts that it cannot obtain accurate and reliable groundwater data by the October 18, 2021 deadline “despite taking all reasonable efforts to do so.” *Id.* at 16. MG argues that a six-month period to collect and analyze groundwater samples arbitrarily and unreasonably shortens the time to establish background groundwater concentrations. *Id.* at 15.

In its recommendation, IEPA acknowledges that “[i]ndependent samples provide greater statistical power when adequate time between sampling events can account for temporal variation such as seasonal variation in the data.” Rec. at 10. IEPA recognizes that MG “has only recently begun collecting the required eight independent groundwater samples” and cannot meet the deadline to complete sampling. *Id.*, citing 35 Ill. Adm. Code 845.650(b)(1)(A).

IEPA acknowledges that, because MG has not considered the Metal Cleaning Basin a federally-regulated CCR surface impoundment, it does not have background water quality data meeting the requirements of Part 845. Rec. at 10. IEPA notes that MG’s available data are limited to dissolved chemical constituents, while 35 Ill. Adm. Code 845.640(i) requires total chemical constituent analysis. *Id.* IEPA also notes that the data “do not include the full list of constituents required in 35 Ill. Adm. Code 845.600.” *Id.*

IEPA agrees that the deadline “will not yield high quality background groundwater quality data.” Rec. at 9; *see* MG Brief at 2. IEPA stresses, however, that the federal rules require new CCR surface impoundments and lateral expansions of CCR surface impoundments “to collect eight independent samples from each background well within the first six months of sampling.” Rec. at 9-10, citing 40 CFR 257.94(b). IEPA argues that the quality of the background data under Part 845 would be comparable with data required by the federal rules. Rec. at 10. IEPA adds that this view is consistent with its position during the rulemaking that adopted Part 845. *Id.*, citing Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 24-25 (Aug. 5, 2020) (pre-filed answers); slip op. at 138-39 (Aug. 13, 2020) (transcript).

IEPA notes that MG began sampling new wells at the Metal Cleaning Basin, using a bailer to obtain a first sample on March 11-13, 2021 and a low flow technique to obtain a second sample on April 8, 2021, and the remainder of the samples. Rec. at 10, citing Pet. at 10; *see* Tr. at 46. IEPA argues that using different procedures “may increase error in the statistical analysis from which background quality will be determined.” Rec. at 10-11; *see* Tr. at 46. If this error calculates increased background concentrations, it may result in less protective groundwater protection standards. Rec. at 11. Because IEPA will not approve mixing techniques in a small sample set, MG must use only samples obtained with low flow procedures beginning with its April 8, 2021 sample. IEPA states that this “points to a need for additional time to collect the requisite samples.” Rec. at 11.

Based on these factors, IEPA “neither supports nor objects” to MG’s request to extend the deadline to complete background groundwater sampling data. Rec. at 21; *see* Resp. at 1; MG Brief at 2.

Board Discussion

When it adopted a 180-day deadline to develop background data at 35 Ill. Adm. Code 845.650(b)(1), the Board recognized that “a longer monitoring period would allow the consideration of seasonal and temporal changes in establishing background groundwater quality.” Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed New 35 Ill. Adm. Code 845, R20-19, slip op. at 71 (Feb. 4, 2021). However, the Board declined to extend the deadline, noting that the rules allow owners and operators to consider existing data. *Id.*

The Board agrees with MG and IEPA that existing groundwater data for the Metal Cleaning Basin are not suitable to develop background concentrations because Part 845 does not allow filtered samples. Also, while MG may have been aware of proposed CCR rules for approximately one year before the Board adopted them, the Board recognizes that MG obtained the first samples from its expanded monitoring network on April 8, 2021, a short time before the rules became effective. In addition, the Board agrees that a limited amount of additional time would allow MG to collect eight independent samples to develop representative background data. Also, IEPA’s recommendation does not oppose granting MG’s requested extension.

Based on these factors, the Board finds that the record supports MG’s position that complying with the 180-day deadline to collect and analyze required groundwater monitoring data under 35 Ill. Adm. Code 845.650(b)(1) for the Metal Cleaning Basin would impose an arbitrary or unreasonable hardship. The Board concludes to extend the deadline to comply with 35 Ill. Adm. Code 845.650(b)(1)(A) by approximately three months to January 31, 2022.

Section 845.230(d)(1): Initial Operating Permit Application

MG seeks a variance from Section 845.230(d)(1), entitled “Initial Operating Permit for Existing, Inactive and Inactive Closed CCR Surface Impoundments.” That provision requires that “[t]he owner or operator of an existing, inactive or inactive closed CCR surface impoundment who has not completed post-closure care must submit an initial operating permit application to the Agency by October 31, 2021.” 35 Ill. Adm. Code 845.230(d)(1); *see* Pet. at 1, 6.

MG’s Compliance Alternative

MG argues that an application for an operating permit “cannot be complete without the completed groundwater monitoring data.” Pet. at 13; *see* 35 Ill. Adm. Code 845.230(d)((2)(I)(iv). As summarized above, MG argues that it cannot obtain these data by the October 18, 2021 deadline. MG adds that its application must contain more than 22 different technical submissions. Pet. at 12, citing 35 Ill. Adm. Code 845.230(d)(1). MG argues that it is “infeasible” and “not logistically possible” to meet the application deadline of October 31, 2021. Pet. at 13, citing Pet. Exhs. I (¶17), N.

MG's Requested Relief

MG estimates that submitting a complete operating permit application “will take until March 31, 2022.” Pet. at 20. MG argues that its compliance timeline shows “feasible deadlines to meet the operating permit application requirements, including all required 22 technical components.” *Id.*, citing Pet. Exh. P. MG states that this timeline reflects “the resources available, and level of effort required to complete each task.” Pet. at 21, citing Pet. Exh. I (¶18). MG seeks to extend the permit application deadline by five months to March 31, 2022. Pet. at 1, 6.

Arbitrary or Unreasonable Hardship

MG argues that, because it cannot collect complete groundwater data within the 180-day deadline, enforcing the deadline to submit an operating permit application would be arbitrary or unreasonable. Pet. at 16; *see* 35 Ill. Adm. Code 845.230(d)(1). MG asserts that an application lacking this complete groundwater data “would make the rest of the submission essentially meaningless.” Pet. at 16. It stresses that the rules do not “accommodate interruptions or delays caused by adverse weather, laboratory errors/issues, the unavailability of equipment, or ongoing restrictions due to the COVID-19 pandemic.” *Id.* at 16-17. MG argues that, with a variance allowing it to collect eight independent groundwater samples, it will have data “necessary to submit a complete operating permit application.” *Id.* at 4, 7. MG asserts that the permit application deadline should not deprive owners and operators of adequate time to collect data and submit a complete and accurate application. *Id.* at 17.

In its recommendation, IEPA considers MG’s request to extend this permit application deadline as “unnecessary.” Rec. at 11. IEPA argues that 35 Ill. Adm. Code 845(d)(2)(I)(iv) allows the initial operating permit application to include “a proposed monitoring program for site-specific situations when groundwater monitoring wells, data, or statistical procedures do not yet fully exist.” Rec. at 11 (emphasis in original); *see* Tr. at 121-23 (Dunaway testimony). However, IEPA acknowledges that 35 Ill. Adm. Code 845.610(b)(1)(D) generally requires a groundwater monitoring program without using the term “proposed.” *Id.* at 11-12. IEPA also acknowledges that extending this deadline “should yield a more complete and accurate operating permit application.” *Id.* at 12; *see* MG Brief at 2. IEPA suggests that a complete application can provide environmental and public benefits and also promote administrative efficiency. *See* Pet. at 17.

MG’s response disputes IEPA’s interpretation of the permit application submission requirements. Under that interpretation, MG argues that permit applicants can meet the application deadline without groundwater monitoring data required by Part 845. Resp. at 3.

MG argues that IEPA’s interpretation lacks support. MG first asserts that it is not consistent with IEPA’s position during the rulemaking process, in which IEPA indicated that “the groundwater monitoring data and statistical procedures must be submitted with the operating permit. Resp. at 3-4.

In its questions, the Board asked MG to cite IEPA's testimony on this requirement. Board Questions at 3 (§8c). MG responded with an excerpt from pre-filed answers submitted by IEPA in the Board's CCR rulemaking. Tr. at 103-04; *see* Pet. Exh. U. In it, the Board noted that Section 845.230(d) requires "detailed groundwater monitoring information that must be submitted for Initial Operating Permit for Existing, Inactive and Inactive Closed CCR Surface Impoundments." Pet. Exh. U at 157. The Board asked IEPA to comment on why proposed Section 845.210 did not require similar information for construction permit applications or initial operating permits for new impoundments. *Id.* IEPA responded that the required groundwater monitoring data "is necessary to determining the current site characteristics and compliance status for existing CCR surface impoundments. This data will be used to determine the operational conditions or corrective action which might be necessary under the rule for these existing facilities." Pet. Exh. U at 157. For new construction, IEPA responded that it would assess the need for groundwater monitoring when reviewing operating or construction permit applications. *Id.*

MG also argues that IEPA's position contradicts Part 845. *Id.* at 3. Under 35 Ill. Adm. Code 845.230(d)(2)(I)(iii), the initial operating permit application "requires a groundwater sampling and analysis program that includes selection of the statistical procedures for evaluating the groundwater monitoring data under Section 845.640." Resp. at 3. MG adds that 35 Ill. Adm. Code 845.640(f)(3) provides that an applicant must submit the chosen statistical method "in an operating permit application." *Id.*; *see* Tr. at 102, 123-24.

In its questions, the Board sought comment to clarify "whether statistical procedures for evaluating groundwater data are selected only after data collection is completed." Board Questions at 2 (§8a). Mr. Gnat testified that eight complete rounds of groundwater sampling are needed before beginning statistical calculations. Tr. at 53. He added that relying on incomplete data "doesn't fulfill the purpose or the need or the requirement for that statistical evaluation." *Id.*

The Board also sought comment on "whether the statistical procedures could be chosen on the basis of existing groundwater monitoring data." Board Questions at 3 (§8b). Mr. Gnat testified that, "[u]ntil you have all of your background data, you don't know exactly the statistical method you're going to use." Tr. at 56. Mr. Gnat also addressed monitoring well 14, installed approximately 10 years ago at the northwest side of the metal cleaning basin. He noted that it is sampled for dissolved metals while the federal and Illinois CCR rules require sampling for total metals. *Id.* at 58. Mr. Gnat testified that data from monitoring well 14 do not provide a basis to begin a statistical analysis. While the separate monitoring results may be similar, he testified that "they're not the same" and that any differences would be significant in statistical evaluations. *Id.* at 58-59.

Based on these factors, IEPA "neither supports nor opposes" MG's request to extend the deadline to submit its initial operating permit application. Rec. at 12, 21.

Board Discussion

While IEPA argues that 35 Ill. Adm. Code 845.230(d) refers to a proposed groundwater monitoring program, the Board is not persuaded that this is consistent with the intent of the CCR

rules. In addition, the Board agrees that it would be beneficial for MG and IEPA to have a complete and accurate operating permit application rather than submitting information on a piecemeal basis. As noted above, MG persuasively argued that necessary groundwater monitoring information and statistical procedures will not be available until January 31, 2022. Also, IEPA's recommendation does not oppose granting MG's request.

Because the Board concluded above to extend the deadline to collect and analyze groundwater quality data, the Board finds that requiring MG to submit its initial operating permit application by October 30, 2021, would impose an arbitrary or unreasonable hardship. The Board concludes to extend the deadline to file the initial operating permit for the Metal Cleaning Basin by five months from October 30, 2021 to March 31, 2022.

Section 845.700(c): Designating Closure Priority Category

MG requests a variance from Section 845.700(c), which addresses closing or retrofitting CCR surface impoundments and provides that,

[b]eginning on April 21, 2021, the owner or operator of the CCR surface impoundment required to close under subsection (a) [Required Closure], or electing to close under subsection (b) [Required Closure or Retrofit], must immediately take steps to categorize the CCR surface impoundment under subsection (g) [Closure Prioritization] and to comply with the closure alternatives analysis requirements in Section 845.710. Within 30 days after April 21, 2021, the owner or operator must send the category designation, including a justification for the category designation, for each CCR surface impoundment to the Agency for review. The owner or operator of the CCR surface impoundment must submit a construction permit application containing a final closure plan under the schedule in subsection (h). 35 Ill. Adm. Code 845.700(c); *see* Pet. at 1, 6.

MG's Compliance Alternative

MG projects that the Metal Cleaning Basin may be either Category 5 "existing CCR surface impoundments that have exceeded groundwater protection standards" or Category 7, "existing CCR surface impoundments that are in compliance with the groundwater protection standards." 35 Ill. Adm. Code 845.700(g); *see* Pet. at 13. MG argues that categorization depends on groundwater monitoring results that cannot be available by the May 21, 2021 deadline. Pet. at 13, citing Pet. Exhs. L, N.

MG's Requested Relief

For the Metal Cleaning Basin, MG expects to designate a closure priority category when it submits its operating permit application on March 31, 2022. Pet. at 21. Citing its proposed compliance timelines, MG states that, by the end of March 2022, it will collect necessary groundwater data and technical documents for its permit application. *Id.*, citing Exhs. O, P. MG projects that, at that time, it will have the information it needs to designate a closure priority category to include in an operating permit application. Pet. at 21. MG seeks to extend the

deadline to designate closure priority by approximately 10 months “to March 31, 2022, concurrent with the initial operating permit application.” *Id.* at 6.

Arbitrary or Unreasonable Hardship

MG requests a variance from this requirement to designate a closure priority because it lacks “sufficient data on which to make that designation.” Pet. at 19; *see* 35 Ill. Adm. Code 845.700(c). MG explains that, without the underlying groundwater data, designating a category “would defeat the purpose of prioritization entirely.” *Id.*, citing 415 ILCS 5.22.59(g)(9); Pet. Exh. A at 26. MG argues that it would face an arbitrary or unreasonable hardship if it is required to make this designation by the deadline of May 21, 2021. Pet. at 18.

As noted above, MG argues that it cannot complete eight independent groundwater samples by the May 21, 2021 deadline. Pet. at 3. Without these monitoring data, MG argues that its “only potential compliance option would be to guess at what the correct closure priority category designation should be for this pond based on underdeveloped or incomplete information for the sake of making a timely submission.” *Id.* at 3; *see* Tr. at 64-65.

In its recommendation, IEPA argues that, under 35 Ill. Adm. Code 845.700(g), every existing and inactive CCR surface impoundment falls in at least one closure prioritization category. Rec. at 13. “If a CCR surface impoundment can be categorized in more than one category, the owner or operator of the CCR surface impoundment must assign the CCR surface impoundment the highest priority category,” *i.e.*, the category requiring closure sooner. 35 Ill. Adm. Code 845.700(g)(2); *see* Rec. at 14. IEPA asserts that the Metal Cleaning Basin falls into either Category 5 or 7. Rec. at 14.

IEPA’s recommendation asserts that the Station “has conducted significant historical groundwater monitoring since at least 2010.” *Id.* at 6. IEPA argues that a 2009 permit required installing three wells specifically for the Metal Cleaning Basin. *Id.*, citing Rec. Exh. B. IEPA cites a 2012 violation notice that included exceedances of Class I groundwater quality standards in a well downgradient of the Metal Cleaning Basin. Rec. at 6-7, citing Rec. Exh. C. MG entered into a Compliance Commitment Agreement (CCA), which included a requirement to establish a Groundwater Monitoring Zone (GMZ). Rec. at 7, citing Rec. Exh. D. The GMZ includes the Metal Cleaning Basin, where associated wells are monitored to evaluate the efficacy of the HDPE liner. Rec. at 7, citing Rec. Exhs. B, E, F. IEPA argues that recent monitoring data for sulfate and total dissolved solids (TDS) show that the Metal Cleaning Basin “may be, or may have been prior to HDPE liner installation, contributing to groundwater contamination.” Rec. at 7, 14, citing Rec. Exh. B, C, G, L.

IEPA states that Class I groundwater quality standards for sulfate and TDS are the same concentrations as those in Part 845. Rec. at 7, citing 35 Ill. Adm. Code 620.410, 845.600. IEPA acknowledges that current groundwater quality data for the Metal Cleaning Basin are “limited to dissolved (filtered) chemical constituents, instead of total (not filtered) chemical constituent analysis as required by 35 Ill. Adm. Code 845.640(i), and does not include the full list of constituents required in 35 Ill. Adm. Code 845.600.” Rec. at 7. However, IEPA argues that, “[e]xcept for natural variation in groundwater quality and laboratory or sampling variability, the

concentrations of filtered sulfate and TDS samples should not yield higher concentrations than total analysis for those constituents.” *Id.* IEPA concludes that MG “could make informed conclusions to conservatively categorize the Metal Cleaning Basin as Category 5 based on existing data.” *Id.* at 8. IEPA concludes that “choosing the higher Category 5 and respective construction permit application submission date would be conservative but appropriately protective.” *Id.* at 14.

MG discounts IEPA’s position that it could speculate on a category for the Metal Cleaning basin based on existing partial groundwater data. *Resp.* at 4. It argues that IEPA’s approach lacks sense when a five-month extension to collect additional data would provide an accurate designation without resulting in harm. *Id.*

The Board sought comment on whether Part 845 would allow MG to redesignate the Metal Cleaning Basin if MG originally designated it as Category 5 and new data support that redesignation. Board Questions at 2 (¶7a). MG contends that Part 845 may allow this redesignation. *Tr.* at 104. The Board also sought comment on unfavorable consequences that redesignation may have on closing the Metal Cleaning Basin and on MG more generally. Board Questions at 2 (¶7b). MG argued that, if it now begins preparing a construction permit application with incomplete data, some of that preparation may require revision or prove to be unnecessary. *See Tr.* at 89-90, 93, 105-06.

IEPA agrees that categorizing a closure priority “will be more accurate if it considers established groundwater quality background.” *Rec.* at 15; *see MG. Brief* at 2. IEPA adds that extending the deadline to designate the closure prioritization category “will not ultimately affect the closure timeline regardless of whether the Board extends the construction permit deadline.” *Rec.* at 15. IEPA concludes that, if the Board grants MG’s request to extend the deadline to submit the initial operating permit application, it “neither supports nor opposes submission of the category designation for the Metal Cleaning Basin with the initial operating permit application.” *Id.*

Board Discussion

The Board agrees that designating the Metal Cleaning Basin as a Category 5 CCR surface impoundment based on existing groundwater data would be premature because an alternate source determination may designate it as Category 7. While IEPA may be able to redesignate the Metal Cleaning Basin’s closure category based on new data, the Board agrees that redesignation could have significant adverse consequences for MG without benefitting the environment or accelerating closure. The Board finds that requiring MG to designate the Metal Cleaning Basin based on existing groundwater data would pose an arbitrary or unreasonable hardship. Also, since the Board has agreed to extend MG’s deadline to submit its initial operation permit application, IEPA does not oppose MG’s requested extension.

Above, the Board concluded to extend the deadlines to collect and analyze required groundwater monitoring data and to submit the operating permit application. The Board agrees with MG that sufficient groundwater data meeting the requirements of Part 845 will not be available before May 21, 2021, to designate the closure priority category for the Metal Cleaning

Basin. Based on these factors, the Board extends the deadline to designate the closure priority of the Metal Cleaning Basin by approximately 10 months to March 31, 2022.

Section 845.700(h)(1): Construction Permit Application

MG seeks a variance from Section 845.700(h)(1), which establishes an application schedule for closing and retrofitting and provides in its entirety that

Category 1, Category 2, Category 3, and Category 4 CCR surface impoundment owners or operators must submit either a construction permit application containing a final closure plan or a construction permit application to retrofit the CCR surface impoundment in accordance with the requirements of this Part by February 1, 2022. 35 Ill. Adm. Code 845.700(h)(1); *see* Pet. at 1, 6-7.

MG's Compliance Alternative

The closure priority category determines the construction permit application deadline. Pet. at 14, citing 35 Ill. Adm. Code 845.770(h). If groundwater monitoring results place the Metal Cleaning Basin into Category 5, then MG must submit a construction permit application by August 1, 2022, approximately nine months after MG's deadline to submit an operating permit application. Pet. at 14, citing 35 Ill. Adm. Code 845.700(h)(1). As summarized above, MG argues that it cannot meet the operating permit application deadline.

If the Metal Cleaning Basin is in Category 7, then MG does not need an extension of the August 1, 2023 construction permit application deadline. Pet. at 14; *see* 35 Ill. Adm. Code 845.700(h)(3). MG limits its variance request to the designation of the Metal Cleaning Basin as a Category 5 CCR surface impoundment. Pet. at 14. MG states that it included this "prospective variance request" to save Board resources "instead of initiating an additional variance petition proceeding in the future." *Id.*

MG's Requested Relief

If the Metal Cleaning Basin is designated as Category 5, then MG projects that "it can submit the construction permit application by December 1, 2022." Pet. at 21. MG states that this is nine months later than its requested operating permit application deadline of March 31, 2022." *Id.* MG argues that "[t]his is simply a request for the same amount of time to complete the construction permit application after the operating permit application is submitted that is provided in the Illinois CCR Rule." *Id.* MG seeks to extend the construction permit application deadline by approximately four months to December 1, 2022. Pet. at 1-2, 7.

Arbitrary or Unreasonable Hardship

MG states that, once it has necessary groundwater data, it can designate an accurate closure priority for the Metal Cleaning Basin. Pet. at 3. Because this designation determines the applicable construction permit application deadline under 35 Ill. Adm. Code 845.700(h), it must have the data to establish the deadline. *Id.* at 3-4.

MG argues that, because it cannot determine a closure priority designation for the Metal Cleaning Basin until approximately March 2022, “it will not know what the applicable construction permit application deadline would be until then.” Pet. at 19; *see* 35 Ill. Adm. Code 845.700(h). MG argues that an extension to December 1, 2022, allows it to determine the appropriate construction permit application deadline. Pet. at 2, 7. MG argues that “it would be arbitrary or unreasonable to require MG to rush to comply with a construction permit deadline that is significantly shortened from what the rule intends to provide.” *Id.* at 19; *see* Resp. at 2.

In its recommendation, IEPA argues that the construction permit application deadline for a Category 5 CCR surface impoundment is August 1, 2022, approximately six months after the date by which MG proposed to complete its background groundwater quality assessment. Rec. at 7, 15; *see* 35 Ill. Adm. Code 845.700(h)(2). IEPA argues that both federal and state rules generally recognize six months as a sufficient amount of time to initiate closure. Rec. at 15, citing 40 CFR 257.101, 35 Ill. Adm. Code 845.700(d)(1). IEPA stresses that, if Category 7 applies to the Metal Cleaning Basin, then MG would not be required to submit a closure plan until August 1, 2023. Rec. at 16; *see* 35 Ill. Adm. Code 845.700(h)(3). IEPA does not agree that complying with the construction permit application deadline is an undue hardship, and it recommends that the Board deny this request. Rec. at 16.

MG responds that a construction permit application requires significantly more information than an operating permit application. Resp. at 2, citing 35 Ill. Adm. Code 845.220(a), (d). A complete application includes groundwater modeling. The model establishes groundwater flow to assess contaminant transport. Mr. Gnat testified that groundwater modeling requires 400 or more hours to complete. MG Brief at 7, citing Tr. at 70-72. An application also includes a closure alternatives analysis. Based on the groundwater modeling, an owner or operator evaluates a number of closure options to determine how each affects groundwater over time. MG Brief at 7, citing Tr. at 71-71. Mr. Gnat testified that a thorough analysis of closure alternatives takes four to eight weeks to complete. MG Brief at 8, citing Tr. at 75-76. An application also includes a closure plan. Mr. Gnat testified that the closure plan cannot be prepared until the alternatives analysis is complete. MG Brief at 8, citing Tr. at 77. Submitting a sufficiently detailed plan requires three to four weeks. MG Brief at 8, citing Tr. at 77-78.

MG argues that the groundwater modeling, closure alternatives analysis, and draft closure plan require as long as 17 weeks to prepare without including other required elements of a construction permit application. MG Brief at 8. MG notes that this estimate assumes IEPA approved the groundwater information in its operating permit application. *Id.* at 9. If it does not approve, MG suggests that it would prepare supplemental submissions requiring additional time. *Id.* MG adds that these estimated times do not include the risk of delays in obtaining materials or lab results. *Id.*, n.3. In addition, because of deadlines for public notice and hearing, Part 845 “actually requires that a construction permit be effectively completed at least 60 days before” the submission deadline. Resp. at 2, citing 35 Ill. Adm. Code 845.240(a), (e); *see* Tr. at 65-66; MG Brief at 5.

Also, MG states that its deadline to submit a construction permit application depends on whether the Metal Cleaning Basin is causing groundwater contamination. *See* 35 Ill. Adm. Code 845.700(g); MG Brief at 6. An alternative source demonstration (ASD) determines whether

there is another source of contaminants detected by groundwater monitoring. MG Brief at 6. MG projects that, if the Board grants a variance to extend the deadline to collect and analyze groundwater data, it would likely complete its alternative source demonstration in April 2022. MG Brief at 6, citing Tr. at 68. If the demonstration concludes that there is no alternative source, then MG states that it would have only approximately one month to draft a construction permit application. MG Brief at 6, citing Tr. at 68. It argues that this does not allow sufficient time to prepare an application. MG Brief at 6. Even if it did not perform an alternative source demonstration, MG asserts that it would not have sufficient time. *Id.* at 7.

MG states that, “if the Metal Cleaning Basin is designated as a Category 5 on March 31, 2022, the permit application would have to be completed by June 2, 2022 - only two months after the Category designation was made.” Resp. at 2. MG argues that “[t]here is simply no reasonable way” for it to prepare a complete construction permit application only two months after submitting its operating permit application. MG Brief at 8; *see* Resp. at 2. MG argues that other Category 5 CCR surface impoundments have seven months from October 30, 2021 to June 2, 2022 to apply. *Id.*; MG Brief at 8. MG concludes that it would cause no harm to allow it the same amount of time as other Category 5 impoundments to prepare a complete and accurate application. Resp. at 2

MG argues that the Board has found a petitioner justified a variance when “a possible significant change to a permit application would require duplication of effort.” MG Brief at 9, citing USA Waste Services v. IEPA, PCB 94-92 (July 21, 1994). MG adds that the Board also has “granted variances from permit application deadlines due to site specific circumstances that necessitated additional time.” MG Brief at 9, n.4 (citations omitted).

In its written questions, the Board asked MG to clarify whether “harm” refers to any adverse environmental consequences resulting from a four-month extension of the deadline to submit a construction permit application. Board Questions at 2 (¶6a). Mr. Gnat testified that the Station controls access to the property and that there are no receptors downgradient from the Metal Cleaning Basin. Tr. at 79. Based on these factors, he concluded that an extended deadline would not pose an imminent threat to public health or the environment. *Id.* at 79-80. MG stressed Mr. Green’s testimony that it intends to comply with all substantive requirements of the Board’s CCR rules. MG Brief at 3, citing Tr. at 28.

Also in its written questions, the Board noted that IEPA’s recommendation referred to exceedances of Class I groundwater quality standards for sulfate and TDS in certain monitoring wells. Board Questions at 2, citing Rec. at 14. The Board sought comment on the consequences “of extending the deadline for submitting a construction permit application on mitigating potential groundwater impacts.” Board Questions at 2 (¶6b).

Mr. Gnat testified that, although there are some exceedances of groundwater standards in downgradient monitoring well 14, there are also exceedances in the upgradient as well. Tr. at 81. He also stressed that MG is just starting to develop background concentrations at monitoring well 14, suggesting that it does not yet provide a basis for statistical comparison. *See id.* He also testified that the Metal Cleaning Basin has no downgradient receptors. *Id.* at 82. Based on these factors, he testified that an extended deadline would not result in harm. *Id.*

Board Discussion

IEPA's position that MG would have six months after January 31, 2022, to complete the construction permit application is misplaced, as MG would not designate the Metal Cleaning Basin's closure category by that date. Under its requested variance, MG would designate the closure category by March 31, 2022. If MG designates the Metal Cleaning Basin as Category 5 by March 31, 2022, then MG will have only approximately two months to conduct an ASD and prepare all required technical documents before submitting its construction permit application to a 60-day period of public notice and comments. MG persuasively argues that two months is insufficient time to prepare a thorough application.

The Board concludes that MG's requested extension of four months to December 1, 2022, provides MG with time to complete an ASD, prepare all required technical documents as summarized above, and submit its construction permit application. For Category 5 impoundments, the Board notes that Part 845 allows nine months after submitting the initial operating permit application to submit the construction permit application. Based on these factors, the Board finds that the record supports MG's argument that complying with the August 1, 2022 deadline to submit its construction permit application for the Metal Cleaning Basin would impose an arbitrary or unreasonable hardship. The Board concludes to extend the deadline to submit the construction permit application for the Metal Cleaning Basin by four months from August 1, 2022, to December 1, 2022.

Compliance Costs

MG estimates total costs of \$61,900 to implement its proposed compliance plan, including installing new monitoring wells, performing eight rounds of sampling, conducting statistical data evaluation, and building an access road. Pet. at 21, citing Pet. Exhs. D (¶20), I (¶20), K. MG clarifies that groundwater monitoring cost estimates do not include an "estimate for the analytical results because these results would be part of a larger package of results for Powerton Station." Pet. at 21, n.12.

MG also estimates costs of approximately \$50,000 to prepare an operating permit application and \$150,000 to prepare a construction permit application. Pet. at 21, citing Pet. Exh. I (¶21).

IEPA's recommendation must include its "estimate of the costs that compliance would impose on the petitioner and on others." 35 Ill. Adm. Code 104.216(b)(5). IEPA "does not challenge Petitioner's costs estimates provided by its consultant for complying with the respective Part 845 requirements." Rec. at 5. However, IEPA clarifies that its "review of costs estimates submitted pursuant to Subpart I of Part 845 [Financial Assurance] is separate and distinct" and will not be limited by its position in the Recommendation. *Id.*, n.1.

MG states that immediate compliance with the deadlines for data collection and submission requirements would not increase monetary costs. Pet. at 21, citing Pet. Exh. I (¶19). IEPA's recommendation "does not believe there are any increased costs associated with

immediate compliance.” Rec. at 5. MG argues that the cost would instead be “in the quality and thoroughness of the data collected and the information submitted.” Pet. at 21.

Harm to the Public or the Environment

MG argues that its requested variance will not adversely affect the environment. MG stresses that the Metal Cleaning Basin has for decades been subject to various federal and state requirements, including the Station’s NPDES permit. Pet. at 22; *see id.* at 4. It argues that its petition proposes to extend the time to comply with specific requirements but does not propose to change any substantive requirement in any way. Pet. at 22; *see id.* at 4.

MG states that the Metal Cleaning Basin is used only intermittently. Pet. at 4. MG states that “[t]here is no commingled water and ash, or ‘head’ in the Metal Cleaning Basin that could cause a release of ash constituents to groundwater.” Pet. at 19. It adds that “there are no potable downgradient wells that could potentially have an impact to human health.” *Id.* at 4, 22.

Based on these factors, MG argues that enforcing the specified deadlines in Part 845 would confer “no additional environmental benefit.” *Id.* at 19. It adds that its variance petition addresses only the timing of data collection and submission requirements and not the substantive requirements of Part 845. *Id.*; *see id.* at 4.

MG argues that its requested variance “will not result in any adverse impacts to public health or the environment.” Pet. at 22. MG concludes that “[t]he environment is better served by allowing MG the time it reasonably needs to collect the required information.” *Id.* at 19; *see id.* at 4. MG asserts that it would be arbitrary to require meeting strict deadlines that would result in submitting “underdeveloped or potentially inaccurate information that does not reasonably inform or guide future permitting decisions.” Pet. at 19.

IEPA’s recommendation must include its “estimate of the injury that the grant of the variance would impose on the public, including the effect that continued discharge of contaminants will have on the environment.” 35 Ill. Adm. Code 104.216(b)(6). IEPA argues that “the Board is required to balance the petitioner’s hardship in complying with the Board’s regulations against the impact that the requested variance will have on the environment.” Rec. at 16, citing Monsanto Co. v. PCB, 67 Ill.2d 276, 292 (1977). IEPA adds that MG must establish that hardship resulting from denying its petition outweighs injury to the public and the environment from granting it and that “[o]nly if the hardship outweighs the injury does the evidence rise to the level of an arbitrary and unreasonable hardship.” Rec. at 16, citing Marathon Oil Co. v. EPA, 242 Ill. App. 3d200, 206 (5th Dist. 1993).

IEPA reports that it surveyed potable water wells through the publicly-available Source Water Assessment Protection Program (SWAP) website. Rec. at 17. The survey did not identify any downgradient potable water wells. *Id.*

However, IEPA notes that “CCR can sit in the Metal Cleaning Basin for up to one year before it is removed.” Rec. at 17, citing Pet. at 9. IEPA argues that CCR in a surface impoundment can affect groundwater and that contamination can persist after CCR is removed.

Rec. at 17., citing Rec. Exh. L. IEPA stresses that monitoring wells both upgradient and downgradient from the Metal Cleaning Basin show exceedances of Class I groundwater quality standards. Rec. at 17, citing 35 Ill. Adm. Code 620.410; Rec. Exh. G, Table 2.

IEPA argues that placing CCR surface impoundment under enforceable operating permits would provide benefits to the public and the environment. Rec. at 17, citing 415 ILCS 5/22.59(a)(3), (a)(4), (g). IEPA stresses that these operating permits “are intended to go well beyond the scope of the facility’s NPDES permit” to address CCR surface impoundments. Rec. at 17, citing Pet. Exh. H. While IEPA acknowledges that establishing background concentrations provides a benefit, “delaying the permitting and closure of CCR surface impoundments does have implications for the public and the environment.” *Id.* at 18.

The Board notes that MG uses the Metal Cleaning Basin only temporarily and for short periods of time. The Board also notes that MG has established a GMZ for the Station including IEPA oversight. Rec. at 7, citing Exhs. B, E, D, F. Also, both MG and IEPA agree that there are no potable water wells in the downgradient vicinity of the Metal Cleaning Basin. Finally, while the Board agrees that placing CCR surface impoundments under enforceable permits within regulatory deadlines benefits the public and the environment, the Board believes that these permits are best based on fully developed and accurate information.

The Board finds that extending the regulatory deadlines by four to 10 months to collect and analyze groundwater data, designate a closure priority category, and submit permit applications will not result in any significant adverse environmental impact when weighed against the arbitrary or unreasonable hardship posed by immediately complying with the regulatory deadlines. The Board agrees that extending regulatory deadlines by four to 10 months will allow MG to obtain and submit full and accurate information.

Consistency with Federal Law

The Board’s procedural rules require that “[a]ll petitions for variances from Title V of the Act or from 35 Ill. Adm. Code.Subtitle G, Ch. I “Waste Disposal” must indicate whether the Board may grant the requested relief consistent with RCRA (42 USC 6902 *et seq.*) and the federal regulations adopted under RCRA (40 CFR 256 through 258, 260 through 268, 273, 279, and 280).” 35 Ill. Adm. Code 104.208(d); *see* 35 Ill. Adm. Code 104.204(1); Rec. at 18.

MG argues that the Metal Cleaning Basin is not federally-regulated as a CCR surface impoundment. Pet. at 23. Because any regulation of these ponds exceeds the requirements of 40 CFR 257, MG argues that its proposed variance is consistent with federal law. *Id.* IEPA’s recommendation stresses that Part 257 is a self-implementing program: “whether a particular unit is considered regulated is a determination made by the owner or operator unless challenged.” Rec. at 18-19.

MG stresses that its proposed variance seeks less than one year to collect eight groundwater samples required by 35 Ill. Adm. Code 845.650(b)(1)(A). Pet. at 23. It adds that this “is less than the two years permitted by the federal CCR rule.” *Id.* MG argues that its proposed variance is “more consistent with federal requirements” because it allows MG to

collect groundwater samples that are independent of one another. *Id.*, citing Pet. Exh. M (USEPA guidance). IEPA’s recommendation states that “the quality of the background data would be on par with the data required under Part 257.” Rec. at 19, citing 40 CFR 257.94(b).

IEPA’s recommendation must include its “analysis of applicable federal laws and regulations and an opinion concerning the consistency of the petition with those federal laws and regulations.” 35 Ill. Adm. Code 104.216(b)(7). IEPA concludes by agreeing with MG that “the requested variances are not inconsistent with 40 CFR 257 and federal law does not provide any barrier to the granting of the relief requested.” Rec. at 19.

The Board agrees that the MG’s requested extensions are not inconsistent with federal rules for CCR surface impoundments and that these rules do not provide a basis to deny MGs request.

MG’s Proposed Variance Conditions

MG proposed that the Board grant its requested variance subject to the following conditions:

- a) The variance applies only to the Metal Cleaning Basin at MG’s Powerton Station.
- b) MG shall collect and analyze eight independent samples from each background and downgradient well for all constituents with a groundwater protection standard listed in Section 845.600(a) and also for Calcium, and Turbidity by January 31, 2022.
- c) MG shall submit the operating permit application required by Section 845.230 for the Metal Cleaning Basin by March 31, 2022.
- d) MG shall submit the closure category designation required by Section 845.700(c) for the Metal Cleaning Basin to the Illinois EPA by March 31, 2022.
- e) If MG designates the Metal Cleaning Basin as a Category 5 CCR surface impoundment, then it shall submit the construction permit application pursuant to Section 845.220 by December 1, 2022.
- f) If the Metal Cleaning Basin is not designated as a Category 5 CCR surface impoundment, no variance relief from the construction permit application deadline has been requested or granted.
- g) The variance shall begin on May 11, 2021.
- h) The variance ends on March 31, 2022 if the Metal Cleaning Basin is not designated as Category 5 CCR Surface Impoundments pursuant to Section

845.700(g). The variance ends on December 1, 2022 if the Metal Cleaning Basin is instead designated as Category 5 CCR Surface Impoundment. Pet. at 22-23.

IEPA's recommendation "neither supports nor objects to [conditions] (a) through (d) and (g). Rec. at 21; *see* 35 Ill. Adm. Code 104.216(b)(11).

Regarding condition (b), IEPA requests that, "if the Board grants Petitioner's request to extend its time to collect the eight samples, it require MG to use only samples obtained with low flow procedures, beginning [with] the first of its eight samples with the April 8, 2021 sampling event." Rec. at 21. MG installed two additional monitoring wells at the Metal Cleaning Basin on March 11-12, 2021, and collected a sample using bailers. Pet. at 10, citing Exh. I at 2 (¶8); *see* Tr. at 46. MG then installed dedicated sampling pumps on April 8, 2021 and obtained a sample at that time. Pet. at 10, citing Pet. Exh I at 2 (¶9). In its recommendation, IEPA stressed that it "will not approve mixing of sample collection techniques on a small sample set; therefore, the owner or operator must use only the samples collected with low flow procedures." Rec. at 11; *see* Tr. at 46. IEPA indicated that MG would use a low flow procedure for remaining sampling events. *Id.*, citing Pet. at 10; *see* Tr. at 46-47. As a result, IEPA considers MG's April 8, 2021 sample the first of its sampling events. IEPA cited these factors as support for extending MG's sampling deadline. Rec. at 11. Mr. Gnat testified that, if the Board extends its sampling deadline, MG does not intend to rely on the sample obtained by the bailer. Tr. at 47. The record indicates that IEPA's proposed condition reflects MG's intent and practice, and the Board includes the condition in its order below.

IEPA states that it "does object to [conditions] (e), (f), and (h) and recommends the Board deny Petitioner's request to extend the construction permit application deadline, regardless of whether the Metal Cleaning Basin is ultimately classified as a Category 5 or Category 7 CCR surface impoundment." Rec. at 21; *see* 35 Ill. Adm. Code 104.216(b)(11).

Finally, based on its recommendation, IEPA argues that "any variance granted should expire on March 31, 2022." Rec. at 21; *see* 415 ILCS 5/37(a); 35 Ill. Adm. Code 104.216(b)(11).

For the reasons above, the Board concluded to grant MG's request for a variance extending its deadline to submit a construction permit application. The Board finds that MG's proposed conditions appropriately implement its requested relief with additional language suggested by IEPA to address groundwater sampling. In its order below, the Board incorporates those conditions with nonsubstantive clarifications.

CONCLUSION

The Board finds that requiring MG to comply immediately with regulatory deadlines to collect and analyze required groundwater monitoring data, submit an initial operating permit application, designate a closure priority category, and submit a construction permit application for the Metal Cleaning Basin would impose an arbitrary or unreasonable hardship. The Board also finds that granting the requested relief will not result in significant adverse environmental

impact when weighed against the arbitrary or unreasonable hardship posed by immediate compliance with the regulatory deadlines. In addition, the Board finds that the requested relief is consistent with federal law. The Board therefore grants MG a variance from specified deadlines in 35 Ill. Adm. Code 845, subject to conditions specified in its order below.

This opinion constitutes the Board's findings of fact and conclusions of law.

ORDER

The Board grants Midwest Generation, LLC (MG) a variance from regulatory deadlines to collect and analyze required groundwater quality monitoring data (35 Ill. Adm. Code 845.650(b)(1)(A)), submit an initial operating permit application (35 Ill. Adm. Code 845.230(d)(1)), designate a closure priority category (35 Ill. Adm. Code 845.700(c)), and submit a construction permit application (35 Ill. Adm. Code 845.700(h)(1)) for the Metal Cleaning Basin at its Powerton Station, located at 13082 East Manito Road, Pekin, subject to the following conditions:

1. The variance applies only to the Metal Cleaning Basin at MG's Powerton Station.
2. MG must collect and analyze eight independent samples from each background and downgradient well for all constituents with a groundwater protection standard listed in Section 845.600(a) and also for Calcium and Turbidity as required by 35 Ill. Adm. Code 845.650(b)(1)(A) by January 31, 2022. The groundwater samples must be obtained by using low flow procedures, beginning with the April 8, 2021 sampling event.
3. MG must submit the operating permit application required by 35 Ill. Adm. Code 845.230 for the Metal Cleaning Basin to the Illinois Environmental Protection Agency (IEPA) by March 31, 2022.
4. MG must submit the closure category designation required by 35 Ill. Adm. Code 845.700(c) for the Metal Cleaning Basin to IEPA by March 31, 2022.
5. If MG designates the Metal Cleaning Basin as a Category 5 CCR surface impoundment, then it must submit the construction permit application required by 35 Ill. Adm. Code 845.700(h)(1) to IEPA by December 1, 2022.
6. If MG does not designate the Metal Cleaning Basin as a Category 5 CCR surface impoundment, no variance relief from the construction permit application deadline has been requested or granted.
7. The variance begins on May 11, 2021.

8. The variance ends on March 31, 2022, if MG does not designate the Metal Cleaning Basin as a Category 5 CCR surface impoundment under 35 Ill. Adm. Code 845.700(g). The variance ends on December 1, 2022, if MG instead designates the Metal Cleaning Basin as a Category 5 CCR surface impoundment.

IT IS SO ORDERED.

If the petitioner accepts this variance, the petitioner must within 35 days of the date of this opinion and order, on or before Thursday, October 14, 2021, file with the Board, and serve upon IEPA, an executed certificate of acceptance, signifying the petitioner's agreement to be bound by all terms and conditions of the variance. "A variance and its conditions are not binding upon the petitioner until the executed certificate is filed with the Board and served on the Agency. Failure to timely file the executed certificate with the Board and serve a copy on the Agency renders the variance void." 35 Ill. Adm. Code 104.240. The certificate form follows this Board order as an appendix.

Section 41(a) of the Environmental Protection Act provides that final Board orders may be appealed directly to the Illinois Appellate Court within 35 days after the Board serves the order. 415 ILCS 5/41(a) (2020); *see also* 35 Ill. Adm. Code 101.300(d)(2), 101.906, 102.706. Illinois Supreme Court Rule 335 establishes filing requirements that apply when the Illinois Appellate Court, by statute, directly reviews administrative orders. 172 Ill. 2d R. 335. The Board's procedural rules provide that motions for the Board to reconsider or modify its final orders may be filed with the Board within 35 days after the order is received. 35 Ill. Adm. Code 101.520; *see also* 35 Ill. Adm. Code 101.902, 102.700, 102.702. Filing a motion asking that the Board reconsider this final order is not a prerequisite to appealing the order. 35 Ill. Adm. Code 101.902.

Names and Addresses for Receiving Service of Any Petition for Review Filed with the Appellate Court	
Parties	Board
Midwest Generation, LLC Attn: Kristin L. Gale Susan M. Franzetti Molly Snittjer Nijman Franzetti, LLP 10 S. LaSalle St., Suite 3600 Chicago, Illinois 60603 kg@nijmanfranzetti.com sf@nijmanfranzetti.com ms@nijmanfranzetti.com	Illinois Pollution Control Board Attn: Don A. Brown, Clerk James R. Thompson Center 100 West Randolph Street, Suite 11-500 Chicago, Illinois 60601 don.brown@illinois.gov
Illinois Environmental Protection Agency Attn: Christine Zeivel	

<p>Stefanie Diers Clayton Ankney 1021 North Grand Ave. East Springfield, Illinois 62794-9276 Christine.Zeivel@Illinois.gov Stefanie.Diers@Illinois.gov Clayton.Ankney@Illinois.gov</p>	
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I, Timothy J. Fox, Acting Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above opinion and order on September 9, 2021 by a vote of 4-0.



Timothy J. Fox, Acting Clerk
Illinois Pollution Control Board

APPENDIX

CERTIFICATE OF ACCEPTANCE

I, _____, having read the opinion and order of the Illinois Pollution Control Board in docket PCB 21-109, dated September 9, 2021, understand and accept the opinion and order, realizing that this acceptance renders all terms and conditions of the variance set forth in that order binding and enforceable.

Petitioner: MIDWEST GENERATION, LLC

By: _____
Authorized Agent

Title: _____

Date: _____