BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	AS 2021-003
PETITION OF MIDWEST	)	
GENERATION, LLC FOR AN	)	
ADJUSTED STANDARD FROM	)	(Adjusted Standard)
845.740(a) AND FINDING OF	)	
INAPPLICABILITY OF PART 845 FOR	)	
THE WAUKEGAN STATION	)	

NOTICE OF FILING

To: See attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Petitioner Midwest Generation, LLC's Motion for Stay Pending Appeal and Memorandum in Support of Motion for Stay Pending Appeal, a copy of which is herewith served upon you.

Dated: April 23, 2024

MIDWEST GENERATION, LLC

By: __/s/Kristen L. Gale _____

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Petitioner Midwest Generation, LLC's Motion for Stay Pending Appeal and Memorandum in Support of Motion for Stay Pending Appeal was electronically filed on April 23, 2025 with the following:

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and that copies were sent via e-mail on April 23, 2024 to the parties on the service list.

Dated: April 23, 2024 /s/Kristen L. Gale

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	AS 2021-003
PETITION OF MIDWEST GENERATION, LLC FOR AN ADJUSTED STANDARD FROM 845.740(a) AND FINDING OF INAPPLICABILITY OF PART 845 FOR THE WAUKEGAN STATION	)	(Adjusted Standard)

MOTION FOR STAY PENDING APPEAL

Pursuant to 35 Ill. Adm. Code 101.906(c) and Illinois Supreme Court Rule 335(g), Midwest Generation, LLC ("MWG") respectfully requests that the Illinois Pollution Control Board ("Board") stay the Board's March 20, 2025 final order ("Order") pending appeal. A stay is necessary for MWG to secure the fruits of its appeal and preserve the status quo. A stay for a short additional time will not impose hardship upon or prejudice the Illinois Environmental Protection Agency ("IEPA" or "Agency") or cause environmental harm, but MWG will suffer significant hardship and irreparable prejudice without a stay. A stay is warranted because MWG has a substantial case on the merits before the appellate court. Accordingly, the balance of equitable factors strongly favors a stay pending the appeal. In the alternative, MWG requests that the Board stay the effect of the Order regarding the payment of the Illinois coal combustion residual ("CCR") surface impoundment program fees under 415 ILCS 5/22.59(j).

Concurrently with this Motion for Stay Pending Appeal, MWG has timely filed its Petition for Review with the Illinois Second District Appellate Court. 415 ILCS 5/41(a); Ill. S. Ct. R. 335(a).

In support of its Motion for Stay Pending Appeal, MWG submits its Memorandum in Support of its Motion for Stay Pending Appeal and states as follows:

1. On July 30, 2019, Illinois enacted the Coal Ash Pollution Prevention Act ("CAPP Act"), which amended the Illinois Environmental Protection Act ("Act"), adding new sections

regarding the regulation, management, and permitting of Coal Combustion Residuals ("CCR") and CCR surface impoundments. 2019 ILL. ALS 171, 2019 Ill. Laws 171, 2019 ILL. P.A. 171, 2019 Ill. SB 9. The CAPP Act defined a CCR surface impoundment as "a natural topographic depression, man-made excavation, or diked area, which is designed to hold an accumulation of CCR and liquids, and the unit treats, stores, or disposes of CCR." 415 ILCS 5/3.143. The General Assembly delegated to the IEPA the oversight and regulation of CCR surface impoundments and ordered the Board to adopt rules proposed by the Agency. 415 ILCS 5/22.59(b)(2), (d), (g).

2. On April 15, 2021, the Board adopted 35 Ill. Adm. Code 845, Illinois Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments ("Illinois CCR Rule"), with an effective date of April 21, 2021. The Board also opened a sub docket in the Illinois CCR Rulemaking in part to evaluate whether historic fill areas of CCR should be subject to additional regulation. *In the Matter of: Coal Combustion Waste (CCW) Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, PCB R20-19 (April 15, 2021).

3. On May 11, 2021, MWG filed its original petition for an adjusted standard pursuant to Section 28.1 of the Illinois Environmental Protection Act ("Act"), seeking relief from the Illinois CCR Rule with respect to two areas of MWG's power generating facility at 401 East Greenwood Ave., Waukegan, Lake County, Illinois ("Station"). 415 ILCS 5/28.1. Because MWG filed its petition within 20 days of the effective date of the Illinois CCR Rule, the operation of the rule was stayed. 415 ILCS 5/28.1(e). MWG subsequently amended its petition on September 17, 2021; July 28, 2023; and February 7, 2024, such that the only remaining relief sought was an adjusted standard for the approximately 10-acre area at the Station known as the Grassy Field.[1]

[1] In its Order, the Board refers to this area as the Former Slag/Fly Ash Storage area, or FSFS area. Order at 3.

4. MWG asserted in its petition that because the Grassy Field is a historic area of unconsolidated CCR fill, it does not satisfy the statutory definition of a CCR surface impoundment and therefore is not subject to Part 845. In addition to claiming that Part 845 does not apply to the Grassy Field, MWG's petition proposed that MWG do the following: 1) conduct quarterly groundwater monitoring at the Station; 2) report the analytical results and field measurements to the Agency quarterly; and 3) failing the timely passage of the federal Coal Combustion Residual Management Unit ("CCRMU") Rule (*see infra*), or twelve months after the Board's final order in related matter *Sierra Club et al. v. Midwest Generation, LLC,* PCB 13-15 (also addressing the proper management of the Grassy Field, *inter alia*), coordinate with IEPA on potentially installing an engineered cap over the Grassy Field or take other appropriate action in consideration of the status of the federal CCRMU Rule and/or the Board's subdocket in PCB 20-19(A) pertaining to historic areas of unconsolidated coal ash fill in Illinois. *See* Third Amended Petition at 4.

5. On February 13 and 14, 2024, the Board held a hearing on MWG's Petition.

6. On May 8, 2024, U.S. EPA finalized the federal CCRMU Rule,[2] setting forth final regulations that directly address CCR-related areas which do not fit the definition of CCR surface impoundment due to their structural and functional differences. In the CCRMU Rule, U.S. EPA established a new category of regulated units called CCRMUs, defined as "any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit." 89 Fed. Reg. at 39100.

7. On March 20, 2025, the Board issued its Order finding that that the Grassy Field meets the definition of CCR surface impoundment under the Illinois CCR Rule. In addition, the

[2] "Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments," 89 Fed. Reg. 38950 (May 8, 2024) ("CCRMU Rule").

Board acknowledged that the Grassy Field is a CCRMU: "[The Grassy Field] would be regulated under federal law as … a CCRMU." Order at 15.

8. Under the Board rules, the Board may stay the effect of a final order pending appeal. *See* 35 Ill. Adm. Code 101.906(c) ("The procedure for stay of any final Board order during appeal will be as provided in Supreme Court Rule 335."); *see also People v. Blue Ridge Const. Corp.*, PCB 02-115, slip op. 2 (Dec. 16, 2004); *People v. State Oil Co.*, PCB 97-103, slip op. 2 (May 15, 2003). Illinois Supreme Court Rule 335(g) states that an "[a]pplication for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency." *See also People v. Blue Ridge Const. Corp.*, PCB 02-115, slip op. 2 (Dec. 16, 2004); *People v. State Oil Co.*, PCB 97-103, slip op. 2 (May 15, 2003). Board decisions, including Board decisions on petitions for an adjusted standard, are such agency decisions afforded direct review in the Appellate Court. 415 ILCS 5/41(a); 415 ILCS 5/28.1(g).

9. The decision to grant or deny a motion for stay pending appeal is vested in the sound discretion of the Board. *People v. State Oil Co.*, PCB 97-103, slip op. 2 (May 15, 2003). In determining whether a stay pending appeal is justified, the Board considers equitable factors, including (1) whether a stay is necessary to secure the fruits of the appeal if the movant is successful; (2) whether the status quo should be preserved; (3) the respective rights of the litigants; and (4) whether hardship on other parties would be imposed. *Brickyard Disposal & Recycling v. IEPA*, PCB 16-66, slip op. 2-3 (April 12, 2017) (citing *People v. AET Environmental and EOR Energy LLC*, PCB 7-95, slip op. 4 (June 20, 2013), citing *Stacke v. Bates*, 138 Ill. 2d 295, 304-306 (1990)). The Board also considers whether the movant has a substantial case on the merits for its appeal (distinguished from likelihood of success on the merits), which must balance it with the other factors. *AET*, PCB 7-95, slip op. 4 (June 20, 2013), citing *Stacke* at 309. Ultimately, the

movant for a stay must "show that the balance of the equitable factors weighs in favor of granting the stay." *Id.* at 5, citing *Stacke*, 138 Ill. 2d at 309.

10. Here, the balance of the equitable factors weighs in favor of a stay.

11. Because the appeal seeks to resolve fundamental questions regarding identification of the applicable regulatory regime for the Grassy Field, a stay is necessary for MWG to secure the fruits of its appeal. Without the stay, MWG will be required to expend a great deal of effort and funds to comply with the Illinois CCR surface impoundment requirements, including initiating expensive and burdensome engineering projects to prepare permit applications and submitting the Illinois statutory CCR fee (~$200,000). At the same time, MWG will also be navigating the undisputed "logistical nightmare" of trying to comply with the related but nonidentical requirements of the federal CCRMU Rule, risking inadvertent noncompliance due to the differences in federal and Illinois regulations. 2/14/24 Tr., p. 68-69.

12. MWG will also suffer hardship and irreparable prejudice if a stay is not granted. Without maintaining the status quo, the expense, effort, and risk of noncompliance to MWG will cause it unnecessary hardship and prejudice should this appeal be successful. By contrast, the Agency will not suffer hardship from a stay. Rather, a stay will allow the Agency to instead focus on the many other CCR projects that are awaiting operating permits. To-date the Agency has only issued one CCR surface impoundment operating permit and one CCR surface impoundment construction permit for one station, out of approximately twenty-two stations in Illinois. Moreover, the statutory fees for the Grassy Field are intended to support the administrative costs associated with its CCR program. The Agency would not be prejudiced if the stay is granted and the Grassy Field does not participate in the program during the pendency of the appeal.

13. Preserving the status quo for a short additional time while MWG's appeal is resolved will also not pose appreciable risk of harm to human health or the environment. The record contains exhaustive and unrebutted technical expert testimony of the absence of risk based on years of data collected with respect to the site, including by the City of Waukegan. MWG Ex. 44 (City of Waukegan Water Quality Report); 2/13/24 Tr., p. 110-111; 126-127; 239-240. Further, the Grassy Field is a CCRMU under the recently adopted federal CCRMU Rule, as acknowledged by the Board in its Order, and MWG has already begun the process of investigating and closing the area as required by that rule, negating any claim of threat to human health and the environment.

14. Finally, MWG has a substantial case on the merits before the appellate court. The Board's determination that the Grassy Field is a CCR surface impoundment is unsupported by the evidentiary record and is directly contradicted by ample and unrebutted documentary and expert testimony to the contrary, much of which the Board misconstrued or failed to acknowledge or address. Further, the Board's determination that the Grassy Field is a CCR surface impoundment is incompatible with its finding that the Grassy Field is a CCRMU, as the two categories are mutually exclusive.

15. Should the Board decide not to stay the Order in its entirety, MWG requests in the alternative that the Board stay the effect of the Order for the statutory Illinois CCR surface impoundment program fees under 415 ILCS 5/22.59(j), for the same reasons stated above. The Board has often granted stays of its orders or portions of its orders requiring the payment of money, reasoning that monetary payments can be delayed without prejudice to the public. *See IEPA v. Northern Illinois Service Company*, PCB 12-51, slip op. 2 (April 2, 2015) (citing *Citizens for a Better Environment v. Stepan Chemical Co.*, PCB 74-201, 74-270, 74-317, slip op. 1 (June 26, 1975); grants stay of appellant's obligation to pay penalties and hearing costs pending appeal).

Even if the Board were to find that staying the Order in its entirety would threaten environmental harm or public health, a partial stay of the effect of the Order with respect to associated statutory money fees would pose no such threat.

WHEREFORE, Midwest Generation, LLC, respectfully requests that the Board grant its motion for stay of the Board's Order pending appeal. In the alternative, MWG requests that the Board stay the effect of the Order to the extent it would require MWG to pay any monetary fees as a result of the Board's determinations in the Order.

Respectfully submitted,

MIDWEST GENERATION, LLC

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PETITION OF MIDWEST GENERATION, LLC FOR AN ADJUSTED STANDARD FROM 845.740(a) AND FINDING OF INAPPLICABILITY OF PART 845 FOR THE WAUKEGAN STATION	)	(Adjusted Standard)

MEMORANDUM IN SUPPORT OF MOTION FOR STAY PENDING APPEAL

Pursuant to 35 Ill. Adm. Code 101.906(c) and Illinois Supreme Court Rule 335(g), Midwest Generation, LLC ("MWG") respectfully requests that the Illinois Pollution Control Board ("Board") stay the Board's final order in this matter dated March 20, 2025 ("Order") pending appeal. Should the Board decide not to stay the Order in its entirety, MWG requests in the alternative that the Board stay the effect of the Order to the extent MWG would be required to pay statutory fees as a result of the Board's determinations in the Order.

Concurrently with this Motion for Stay Pending Appeal, MWG has timely filed its Petition for Review with the Illinois Second District Appellate Court, 415 ILCS 5/41(a); Ill. S. Ct. R. 335(a).

I. BACKGROUND

On April 15, 2021, the Board adopted new regulations at 35 Ill. Adm. Code 845 regarding the storage and handling of coal combustion residuals ("CCR") in surface impoundments ("Illinois CCR Rule"), which implemented new sections added to the Illinois Environmental Protection Act ("Act") by the Coal Ash Pollution Prevention Act, enacted on July 30, 2019. *In the Matter of: Coal Combustion Waste (CCW) Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, PCB R20-19 (April 15, 2021).

On May 11, 2021, MWG filed a petition for an adjusted standard with the Board, seeking relief from the Illinois CCR Rule with respect to two areas of MWG's power generating facility at 401

East Greenwood Ave., Waukegan, Lake County, Illinois ("Station"). Because MWG filed its petition within 20 days of the effective date of the Illinois CCR Rule, the operation of the rule was stayed. 415 ILCS 5/28.1(e). MWG subsequently amended its petition on September 17, 2021; July 28, 2023; and February 7, 2024, such that the only remaining relief sought was an adjusted standard for the approximately 10-acre area at the Station known as the Grassy Field.[3]

MWG asserted in its petition that the Grassy Field is a historic area of unconsolidated CCR fill, and it did not satisfy the regulatory definition of a CCR surface impoundment because it never was "designed to hold an accumulation of CCR and liquids." 415 ILCS 5/3.143. MWG further proposed to: 1) conduct quarterly groundwater monitoring at the Station; 2) report the analytical results and field measurements to the Agency quarterly; and 3) failing the timely passage of the federal CCR Management Unit ("CCRMU") Rule (*see infra*), or twelve months after the Board's final order in related matter *Sierra Club et al. v. Midwest Generation, LLC,* PCB 13-15 (also addressing the proper management of the Grassy Field, *inter alia*), coordinate with IEPA on potentially installing an engineered cap over the Grassy Field or take other appropriate action in consideration of the status of the federal CCRMU Rule and/or the Board's subdocket in PCB 20-19(A) pertaining to historic areas of unconsolidated coal ash fill in Illinois. *See* Third Amended Petition at 4.

In February 2024, the Board held a two-day hearing on MWG's petition. Following the hearing, the U.S. EPA finalized the CCRMU Rule. "*Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy CCR Surface Impoundments*," 89 Fed. Reg. 38950 (May 8, 2024). U.S. EPA established CCRMUs as a new category of regulated units because they did not fit the definition of CCR surface impoundment.

[3] In its Order, the Board refers to this area as the Former Slag/Fly Ash Storage area, or FSFS area. Order at 3.

Instead, a CCRMU is defined as "any area of land on which any noncontainerized accumulation of CCR is received, is placed, or is otherwise managed, that is not a regulated CCR unit." 89 Fed. Reg. at 39100. U.S. EPA additionally advised that all owners operators CCRMUs would need to follow the self-implementing rule. *Id.* at 39094.

On March 20, 2025, the Board issued its Order, finding that the Grassy Field meets the definition of CCR surface impoundment under the Illinois CCR Rule. In addition, the Board also acknowledged that the Grassy Field is a CCRMU, stating that "[the Grassy Field] would be regulated under federal law as …a CCRMU." Order at 15.

The effect of the Order is that MWG will have to move forward with compliance activities at the Grassy Field under the Illinois CCR Rule at Part 845. In fact, the Agency has already contacted counsel for MWG "to inquire about MWG's intentions re: outstanding CCR fees" for the Grassy Field—referring to the statutory CCR surface impoundment program fees under Section 22.59(j) previously demanded by IEPA (*see* MWG Exhibit 28)—"in light of the Board's recent Order of March 20, 2025, in Adjusted Standard Case No. AS 21-3." March 26, 2025, email attached as Exhibit 1. These fees are approximately $200,000. In addition, MWG will also have to initiate the technical and engineering assessments to prepare the extensive CCR surface impoundment permit applications. At the same time, because the Grassy Field is a CCRMU, MWG has already begun the compliance process for the federal rule.

II. LEGAL STANDARD

The Board's procedural rules provide for motions to stay final Board orders during direct appeal to the Appellate Court. 35 Ill. Adm. Code 101.906(c) ("The procedure for stay of any final Board order during appeal will be as provided in Supreme Court Rule 335.") ; *see also People v. Blue Ridge Const. Corp.*, PCB 02-115, slip op. 2 (Dec. 16, 2004); *People v. State Oil Co.*, PCB

97-103, slip op. 2 (May 15, 2003). Illinois Supreme Court Rule 335(g) states that an "[a]pplication for a stay of a decision or order of an agency pending direct review in the Appellate Court shall ordinarily be made in the first instance to the agency." *See also People v. Blue Ridge Const. Corp.*, PCB 02-115, slip op. 2 (Dec. 16, 2004); *People v. State Oil Co.*, PCB 97-103, slip op. 2 (May 15, 2003). Board decisions are such agency decisions afforded direct review in the Appellate Court. 415 ILCS 5/41(a); 415 ILCS 5/28.1(g).

The decision to grant or deny a motion for stay is vested in the sound discretion of the Board. *See People v. State Oil Co.*, PCB 97-103, slip op. 2 (May 15, 2003) (granting motion for stay after petition for review filed with Appellate Court). In determining whether a stay pending appeal is justified, the Board considers equitable factors including (1) whether a stay is necessary to secure the fruits of the appeal if the movant is successful; (2) whether the status quo should be preserved; (3) the respective rights of the litigants; and (4) whether hardship on other parties would be imposed. *Brickyard Disposal & Recycling v. IEPA*, PCB 16-66, slip op. 2-3 (April 12, 2017) (citing *People v. AET Environmental and EOR Energy LLC*, PCB 7-95, slip op. 4 (June 20, 2013), citing *Stacke v. Bates*, 138 Ill. 2d 295, 304-306 (1990)). Another factor is whether the movant has a substantial case on the merits for its appeal (distinguished from the likelihood of success on the merits), and the Board must balance it with the other factors. *AET*, PCB 7-95, slip op. 4 (June 20, 2013), citing *Stacke* at 309. Ultimately, the movant for a stay must "show that the balance of the equitable factors weighs in favor of granting the stay." *Id.* at 5, citing *Stacke*, 138 Ill. 2d at 309.

III. ARGUMENT

In this case, the balance of the equitable factors favor a stay pending appeal. A stay is necessary to secure the fruits of MWG's appeal and preserve the status quo. MWG will suffer hardship and prejudice absent a stay, while granting a stay will not impose hardship upon or prejudice to MWG

or the Agency. Finally, MWG also has a substantial case on the merits on appeal. Accordingly, the Board should grant a stay of its Order pending appeal. In the alternative, for the same reasons, MWG requests that the Board stay the payment of statutory fees under 415 ILCS 5/22.59(j).

A. A Stay Is Necessary for MWG to Secure the Fruits of Its Appeal.

Because the appeal will address fundamental questions concerning what compliance standards apply to the Grassy Field, a stay is necessary. Moving forward under the Illinois CCR Rule which MWG asserts is inapplicable would defeat the core purpose of the appeal because, MWG will have to implement the CCR surface impoundment requirements that the Appellate Court may ultimately agree are inapplicable. *See Stacke v. Bates*, 138 Ill. 2d 295, 302 (1990) ("A stay issued by the appellate court...suspends enforcement of a judgment, and is intended to preserve the status quo pending the appeal and to preserve the fruits of a meritorious appeal where they might otherwise be lost."); *see also Brickyard Disposal & Recycling v. IEPA*, PCB 16-66, slip op. 2 (April 12, 2017).

If the effect of the Order is not stayed, MWG will have to undertake extensive engineering and technical assessments to prepare CCR surface impoundment permit applications. This work is time-consuming, expensive, and complicated in the best of circumstances, but is even more so in the present circumstances because, as the Board agreed, the Grassy Field is also federal CCRMU. Order at 15. If MWG must also simultaneously proceed to manage the Grassy Field as an Illinois CCR surface impoundment, MWG will find itself in an undisputed "logistical nightmare," as it tries to determine how to comply with two distinct and potentially inconsistent rules. 2/14/24 Tr., p. 68-69. MWG's Environmental Director, Sharene Shealey, testified that dealing with two sets of differing regulations is a complicated compliance task and "would leave [MWG] at risk of noncompliance." 2/13/24 Tr., p. 63. If there is an inconsistency between the rules, MWG would

have to seek regulatory relief from U.S. EPA or IEPA, which would not be practical. 2/13/24 Tr., p. 62-64. MWG's expert Thomas Dehlin similarly pointed out that the "USEPA makes it clear that there are specific regulations that do not apply to CCR management units that do apply to CCR surface impoundments." 2/14/24 Tr., p. 68. For example, with regard to compliance timeframes, the federal CCRMU Rule and the Illinois CCR surface impoundment rule imposes different deadlines for various activities, including closure, so "it is very possible that you have a federal timeline and a state timeline that do not match. And that's going to cause problems for Midwest Generation." 21 2/14/24 Tr., p. 69. In addition to the compliance challenges, MWG will also have to pay the statutory CCR surface impoundment program fees under Section 22.59(j) of $200,000.

In sum, if MWG's appeal is successful, a great deal of effort and expense will have been wasted. In addition, MWG will bear an unnecessary risk of inadvertent noncompliance or the need for yet additional regulatory relief due to the nonidentical, nature of the two sets of requirements, plus potentially a new State rule that under the subdocket for the CCR Rulemaking, *See In the Matter of: Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments: Proposed new 35 Ill. Adm. Code 845 (Sub Docket A)*, PCB R20-19(A). This would defeat the core purpose of pursuing the appeal, as MWG will have already been subjected to the very circumstances it was seeking to avoid by commencing this case.

B. MWG Will Suffer Hardship and Prejudice Without a Stay, Whereas Preserving the Status Quo Will Not Impose Hardship Upon or Prejudice Any Parties.

For similar reasons as securing the fruits of the appeal, MWG will suffer hardship and irreparable prejudice if a stay is not granted. *Stacke v. Bates*, 138 Ill. 2d 295, 307 (1990); *Brickyard Disposal & Recycling v. IEPA*, PCB 16-66, slip op. 2 (April 12, 2017). As described above, MWG will suffer significant hardship in moving forward with the expense, effort, and risk of noncompliance pending appeal as opposed to maintaining the status quo. By contrast, the Agency

will not suffer any hardship or be prejudiced if a stay is granted. Rather, maintaining the status quo will ensure the Agency's efforts and resources expended to implement Illinois' new CCR surface impoundment rules are directed efficiently and appropriately, as opposed to having been wasted on the Grassy Field should MWG's appeal be successful. Indeed, to-date the Agency has only issued one operating permit and one construction permit under the Illinois CCR surface impoundment program, so a short and productive delay in the present matter would not meaningfully impede the Agency's progress.

In addition, staying the statutory fees would not cause any harm to either party. The fees have already been stayed by the Board for nearly four years pending MWG's petition for an adjusted standard, and there is no indication in the record that the Agency has been prejudiced by not having received them. Further, because the program fees support the administrative costs associated with the Grassy Field's participation in the program, the Agency would not be prejudiced if the stay is granted and the Grassy Field does not participate in the program during the pendency of the appeal. The Board has often granted stays of its orders or portions of its orders requiring the payment of money such as penalties and other costs. See, *e.g.*, *IEPA v. Pielet Bros. Trading, Inc.*, PCB 80-185 (Feb. 4, 1982); *People v. State Oil Co.*, PCB 97-103 (May 15, 2003); *Illinois v. Prior*, PCB No. 02-177 (Sep. 16, 2004); *People v. Blue Ridge Const. Corp.*, PCB 02-115 (Dec. 16, 2004); *IEPA v. Northern Illinois Service Company*, PCB 05-40 (April 19, 2007); *IEPA v. Northern Illinois Service Company*, PCB 12-51 (April 2, 2015). Dating back to 1975, when granting such stays, the Board has reasoned that "[p]ayment of monetary penalty can be delayed without prejudice to the public and it has been our practice to allow such motions pending appeal." *See IEPA v. Northern Illinois Service Company*, PCB 12-51, slip op. 2 (April 2, 2015)) (citing *Citizens for a Better Environment v. Stepan Chemical Co.*, PCB 74-201, 74-270, 74-317, slip op. 1 (June 25, 1975). While the Illinois

CCR surface impoundment program fees under 415 ILCS 5/22.59(j) are not penalties or hearing costs, the Board's reasoning with respect to absence of prejudice is still applicable.

Further, preserving the status quo for a short additional time while MWG's appeal is resolved will not pose appreciable risk of harm to human health or the environment, especially given the Station's century-long operating history. MWG's expert Doug Dorgan analyzed the substantial data collected for decades at the Station, including analyzing trends and risks regarding the groundwater. 2/13/24 Tr., p. 99-101, 106; MWG Ex. 38, p. 73-81, and concluded that the groundwater posed little to no risk to human health or the surrounding environment. 2/13/24 Tr., p. 135-138, 140; MWG Ex. 37, p. 45, 47; MWG Ex. 38, pp. 86-88. Also, multiple studies have confirmed that there are no potable wells downgradient from or in the vicinity of the Grassy Field (2/13/24 Tr., p. 127), and the ELUCs at the Station ensure that none will be constructed on the property in the future until groundwater restoration is complete. 2/13/24 Tr., p. 110-111; 126; 239-240. Mr. Dorgan testified that the lack of potable groundwater wells onsite and the ELUCs' prevention of the construction of any future potable wells onsite eliminate the risk to potential receptors through drinking water. *Id.* The City of Waukegan has specifically tested and affirmed to its residents that its drinking water is safe, observing that the water supply's intake is 6,200 feet into the lake so has a low susceptibility to shoreline contaminants due to mixing and dilution. *See* MWG Exhibit 44.

In addition, delaying regulation of the Grassy Field as a CCR surface impoundment under the Illinois CCR Rule does not mean the area will not be managed in a manner that protects human health and the environment. As discussed *supra*, the Grassy Field is a CCRMU under the recently adopted federal CCRMU Rule, and MWG has already begun the process of complying with this extensive rule.

C. MWG Has a Substantial Case on the Merits.

In addition, the Board considers whether the movant has a substantial case on the merits. Here, there is little doubt. The Board's interpretation of the definition of "CCR surface impoundment" under the Act, including the terms "hold," "accumulation," and "design," is precedent setting not just for the Grassy Field but for other similar CCR areas at power plants across Illinois. MWG submits that the Board's decision ignores the plain meaning and context of the terms, impermissibly disregarding both legislative intent and established canons of construction. 415 ILCS 5/3.143. The Board's interpretation of the statutory definition is a question of law that is reviewed *de novo* by the reviewing court. *See Off. of the State Fire Marshal v. Ill. Pollution Control Bd.*, 2022 IL App (1st) 210507, ¶ 28 *(citing Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 211 (2008)). For a matter of such significant importance, the Board should grant a stay to allow the Appellate Court to weigh in on this matter.

Moreover, the Board's determination that the Grassy Field is a CCR surface impoundment is contrary to the manifest weight of the evidence. The Board's findings concerning how the Grassy Field "operated" are unsupported by any evidence in the record and contradicted by ample and unrebutted documentary and testimonial evidence. For example, on page 4 of the Order, the Board provides a recounting of the area's history, beginning with a finding that "[b]etween 1961 and 1974, historical photographs show that a berm was constructed along the southern and eastern border of the 30-acre area," citing Agency Exhibit 3 (1961 aerial photograph of the Station), Agency Exhibit 4 (1974 aerial photograph of the Station), and 2/13/24 Tr. at 270-271. But, three Agency witnesses admitted that they could not in fact discern the features in the 1961 aerial, *i.e.*, whether they were berms (potentially indicating an intent to hold water) or ditches (potentially indicating a design to disperse water). 2/13/24 Tr., p. 289-91; 2/13/24 Tr., p. 269-271; 2/13/24 Tr.

p. 310-313. In comparison, Mr. Dehlin testified at length and in detail that the features at issue were ditches designed and intended to disperse water from the area. MWG Ex. 27, p. 4-3 to 4-4 & Fig. A-4; MWG Ex. 41, p. 10; Agency Ex. 3; 2/14/24 Tr., p. 41, 42, 63, 136. Yet, against the manifest weight of the evidence, the Board concluded that these features were a berm in the original slag area, on which finding the Board based its determination that the Grassy Field is a CCR surface impoundment.[4]

Further, the Board's determination that the Grassy Field is a CCR surface impoundment is logically and legally incompatible with the Board's finding that the Grassy Field is also a CCRMU, since the two categories are mutually exclusive. They cannot be both. As detailed *supra*, the CCRMU Rule established CCRMU as a new category of regulated units, distinct from CCR surface impoundments.

D. In the Alternative, A Partial Stay With Respect to Fees Is Appropriate

In the alternative, MWG requests that the Board stay the effect of the Order to the extent MWG would be required to pay the statutory program fees under 415 ILCS 5/22.59(j), for the same reasons stated above. The Board has often granted stays of its orders or portions of its orders requiring the payment of money, reasoning that monetary payments can be delayed without prejudice to the public. *See IEPA v. Northern Illinois Service Company*, PCB 12-51, slip op. 2 (April 2, 2015) (citing *Citizens for a Better Environment v. Stepan Chemical Co.*, PCB 74-201, 74-270, 74-317, slip op. 1 (June 26, 1975); grants stay of appellant's obligation to pay penalties and hearing costs pending appeal). Further, even if the Board were to find that staying the Order in its entirety would threaten environmental harm or public health, a partial stay of the effect of the Order with respect to associated statutory money fees would pose no such threat.

[4] The third cite here, to the 2/13/24 hearing transcript, 2/13/24 Tr. at 270-271, in fact captures one of the Agency witnesses' admission that he could not discern whether the features shown in the 1961 aerial were berms or ditches.

IV. CONCLUSION

For the reasons stated above, MWG respectfully requests that the Board stay its Order of March 20, 2025, pending appeal. In the alternative, MWG requests that the Board stay the effect of the Order to the extent it would require MWG to pay statutory fees as a result of the Board's determinations in the Order.

Respectfully submitted,

MIDWEST GENERATION, LLC

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EXHIBIT 1

Kristen Gale

From: Neibergall, Gabriel <Gabriel.Neibergall@illinois.gov>
Sent: Wednesday, March 26, 2025 10:33 AM
To: Kristen Gale
Subject: CCR Fees Question: MWG Waukegan

Kristen:
Good morning! I am writing to inquire about MWG's intentions re: outstanding CCR fees for the Waukegan "Old Pond" (aka "Grassy Field" / "FSFS area"), in light of the Board's recent Order of March 20, 2025, in Adjusted Standard Case No. AS 21-3.

The related VN numbers are W-2020-00035 (initial fee) and W-2020-00075 (annual fees). Please let me know if you have any questions or if you would like to discuss.

Respectfully,

-Gabe Neibergall

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