BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	PCB No-2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE NEED FOR A REMEDY AT THE HISTORIC AREAS OF CCR AT JOLIET 29, MWG MOTION IN LIMINE TO EXCLUDE THE FORMER ASH BASIN AT THE POWERTON STATION FROM CONSIDERATION OF A REMEDY, AND MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE NEED FOR A REMEDY AT THE FORMER SLAG AND BOTTOM ASH PLACEMENT AREA AT WILL COUNTY STATION** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

Faith E. Bugel

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Dated: March 4, 2022

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COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE NEED FOR A REMEDY AT THE HISTORIC AREAS OF CCR AT JOLIET 29, MOTION IN LIMINE TO EXCLUDE THE FORMER ASH BASIN AT THE POWERTON STATION FROM CONSIDERATION OF A REMEDY, AND MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE NEED FOR A REMEDY AT THE FORMER SLAG AND BOTTOM ASH PLACEMENT AREA AT WILL COUNTY STATION

MWG has filed three motions seeking to "exclude [certain coal ash disposal areas] from consideration of a remedy." MWG Motion *In Limine* to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29 ("Joliet Motion"); MWG Motion *In Limine* to Exclude the Former Ash Basin at the Powerton Station From Consideration of a Remedy ("Powerton Motion"); Motion *In Limine* to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station ("Will County Motion").

The Board should deny all three motions because each one improperly attempts to challenge the Board's 2019 liability order, misstates the effect of Sections 21(d) and 21(r) of the

Illinois Environmental Protection Act, and would frustrate the goals of these proceedings by preventing a remedy that cures the violations found by the Board.

Since the three Motions are substantially the same, Complainants provide here a single response to all three Motions. Complainants set forth our arguments in full with respect to the Joliet Motion, and then briefly recapitulate these arguments, as applied to specific facts in each case, in response to the Powerton and Will County Motions.

I. MWG Improperly Seeks to Avoid a Remedy for Open Dumping of Coal Ash at Joliet 29

MWG seeks to exclude all "evidence relating to the need for a remedy, or remedy" for all of the historic fill areas at Joliet 29. Joliet Mot. at 1. These fill areas include (1) the "Northeast Area," (2) the "Southwest Area," and (3) the "Northwest Area." Interim Order at 26.

Regarding these areas, the Board found that "the evidence establishes that it is more probable than not that these historical coal ash storage and fill areas are contributing to the groundwater contamination" at Joliet. *Id.* at 28. The Board also found that "MWG violated Section 21(a) of the Act at all four Stations by allowing coal ash to consolidate in the fill areas around the ash ponds and in historical coal ash storage areas," and that "MWG did not take measures to remove [the coal ash] or prevent its leaking of contaminants into the groundwaters." *Id.* at 92 (emphasis added). In support of its Section 21(a) holding, the Board made several significant findings:

- "[C]oal ash at all four Stations left in areas outside of the ash ponds is "discarded" and constitutes "waste" for the purposes of Section 21(a) of the Act." *Id.* at 89.
- "None of the fill areas of the historic coal ash storage areas has any permits at all." *Id.* at 90–91.
- "None of [the fill areas] "confine the refuse" to ensure that no nuisances or hazards to public health or safety exists because, other than ash ponds, none of the other areas separate the coal ash from the ground or surface water infiltration and leaking into the groundwater." *Id.* at 91.

- "[T]he areas that contain coal ash at the four Stations do not fulfill requirements of sanitary landfill." *Id.*
- "MWG, as the owner or operator at the four Stations had control over the areas that contain coal ash since 1999, when it began operating the Stations." *Id.*
- "[T]he record does not support MWG 'took extensive precautions to prevent open dumping' and 'has not been passive in its response to the coal ash at its Stations.'" *Id.* In other words, MWG did not take extensive precautions to prevent open dumping, and was passive in its response to the coal ash at its Stations.
- "The record in this case shows the presence of coal ash in the fill areas and historic storage sites that have no liners, covers or any other protection from the surface of groundwaters." *Id.*
- "The record shows no actions by MWG to remove the coal ash from those areas or prevent leaking of contaminants from those areas in any other way." *Id.*
- MWG was aware of ongoing contamination that persisted after the corrective actions required by the sites' Compliance Commitment Agreements and Groundwater Management Zones, "but is not undertaking any further actions to stop or even identify the specific source." *Id.* at 79 (emphasis added).
- "No further investigation of historic areas is taking place." *Id.*

Ultimately, the Board found that MWG violated Section 21(a) by, among other things, "failing to remove [coal ash]" from historical fill and storage areas. *Id.* at 91.

A. MWG Improperly Seeks to Challenge the Board's Liability Holding at Joliet 29

MWG argues that "[t]here is no evidence to support the need for a remedy for the historic fill areas at Joliet 29." Joliet Mot. at 3. This fundamentally misconstrues the procedural posture of this case. MWG cannot avoid its responsibility for a remedy by second-guessing the Board's liability findings. Regardless of whether the historic fill areas are a source of the contamination identified in a given groundwater monitoring well,[1] they are violating Section 21(a) of the Act for all of the reasons set forth by the Board (and summarized above). This alone constitutes "the need for a remedy."

[1] *See* Interim Order at 79 ("It is immaterial whether any specific ash pond or any specific historic ash fill area can be pinpointed as a source to find MWG liable").

It has been established through multiple lines of evidence, including MWG admissions, that these areas contain coal ash, as described by the Board:

> [T]he instant record shows that historic ash landfills at all four Stations contain ash, as evidenced by testing for CCB compliance, boring results, MWG admissions and testimony, and groundwater monitoring results. At Joliet 29, MWG admitted that all three historic coal ash sites (Northwest, Northeast, and Southeast areas) contain historic ash.

Interim Order at 90. This is simply not a fact that requires further review by the Board.

Similarly, it is frivolous and vexatious for MWG to argue that Complainants must re-establish liability after the Board has already made a liability determination. *See* Joliet Mot. at 3–5 ("It is the Complainants' duty and responsibility to prove their case"). Complainants have already "prove[d] their case" by demonstrating to the Board's satisfaction that MWG engaged in open dumping at all three historic fill areas at Joliet 29, in violation of Section 21(a). It is now MWG's responsibility to remedy these violations.

Nor is it Complainants' "burden to prove that a remedy is required." Joliet 29 Mot. at 5. Again, the fact that a remedy is required has already been established by the Board. The question before the Board now is what kinds of relief are "appropriate." *See* Interim Order at 92–93. The appropriate relief should be informed by a more thorough characterization of the nature and extent of the historic fill areas, and this is something that MWG—not Complainants—should do. Indeed, these are exactly the kinds of "precautions" that the Board has faulted MWG for not taking, and one of the bases for MWG's liability. *See* Interim Order at 91. Among other things,

- "No monitoring wells are installed around any of these areas." Interim Order at 26.
- "MWG possesses only partial knowledge of the content of these areas or their potential to contaminate the groundwater." *Id.*
- Other than visual inspections, MWG did not investigate the area [the "Northeast Area"] or the soil cover to determine if it was impermeable. *Id.* at 27.
- MWG also never took samples from this area. *Id.*
- "No further investigation of historic areas is taking place." *Id.* at 79.

It is outrageous for MWG to now suggest that it is Complainants' burden to do what the Board clearly expected MWG to do. It was, and remains, MWG's obligation to "take measures to remove [the coal ash] or prevent its leaking of contaminants into the groundwaters," Interim Order at 92, and this must necessarily include characterizing the nature and extent of the improperly stored and disposed coal ash.

To provide one more example of MWG attempting to re-litigate issues that the Board has already decided, MWG is once again arguing that its voluntary actions in response to a separate enforcement action somehow constitute an adequate investigation of the sites. *See, e.g.*, Joliet Mot. at 4–5. The Board addressed this argument directly in 2019:

> MWG knew that contaminants that include coal ash constituents are leaking from its property but did not fully investigate specific source or prevent further release, claiming that IEPA did not ask it to do so. MWG, however, cannot use IEPA's actions to excuse for MWG's violations of the Act or the Board rules.

Interim Order at 79. For years, MWG has failed to adequately investigate the sites, and has been faulted by the Board for failing to do so, yet now makes the outrageous claim that it is somehow Complainants' obligation to do so. This is simply neither a valid nor reasonable line of argument.

B. Section 21(r) of the Act does not absolve MWG of its liability under Section 21(a)

MWG twists the language and operation of Section 21 and ignores crucial precedent to seek an escape route from Section 21(a) liability. 415 ILCS 5/21. These arguments suggest nonsensical conclusions and fail to hold water.

MWG argues, incorrectly, that Sections 21(r) and 21(d) of the Act allow unpermitted disposal of coal combustion waste that was generated by the site owner and disposed at the site, even when that storage or disposal would otherwise violate Section 21(a) of the Act. Joliet Mot.

at 5–7; Powerton Mot. at 2–4; Will County Mot. at 6–8. As described below, this is not true, and also amounts to an attempt to relitigate the liability determinations at these locations.

MWG provides no serious justification for the notion that the Act's open dumping prohibition is somehow waived by Section 21(r). Instead, MWG relies on a misunderstanding of a common canon of construction. It is generally understood that if there is a conflict between statutes, or statutory provisions, then the specific provision should control over the general provision. However, MWG cites *Knolls Condominium Ass'n v. Harms* for a very different proposition, which is that specific provisions always control over general provisions, regardless of whether there is a conflict. MWG has missed the mark. A fair reading of both the case cited by MWG, and the case cited in the case cited by MWG, reveals that they echo the familiar canon of construction regarding conflicting language.

To start with *Knolls Condo Ass'n.*, the cited language comes from the following paragraph:

> A court presumes that the legislature intended that two or more statutes which relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative. Statutes relating to the same subject must be compared and construed with reference to each other so that effect may be given to all of the provisions of each if possible. Even when an apparent conflict between statutes exists, they must be construed in harmony with one another if reasonably possible. It is also a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision, either in the same or in another act, both relating to the same subject, the specific provision controls and should be applied.

Knolls Condo. Ass'n v. Harms, 202 Ill. 2d 450, 459 (2002) (internal citations omitted). Clearly the emphasis here is on reading language harmoniously, "so that no provisions are rendered inoperative." *Id.*

Turning to the case cited for the specific language excerpted by MWG, *People v. Villarreal*, the cited paragraph reads in full:

> It is a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision, either in the same or another act, which both relate to the same subject, the specific provision controls and should be applied. Since both sections 7–7 and 31–1 are very specific, as they relate solely to use of force against police officers, whereas section 7–2 relates to use of force against anyone, we conclude that where the provisions conflict, such as here, sections 31–1 and 7–7 prevail. Consequently, defendants could not use physical force to prevent the police from entering their residence for the sole purpose of completing the arrest of Upson.

People v. Villarreal, 152 Ill.2d 368, 379–380 (internal citations omitted, emphasis added). Again, the court was clearly wrestling with provisions in conflict. These cases do not help MWG for the simple reason that there is no conflict between Sections 21(a) and 21(r) of the Act. It is possible to read both provisions harmoniously, as required by *Knolls Condo Ass'n*, 202 Ill. 2d at 459, to mean that "the storage or disposal of coal combustion waste" must meet both the specific requirements of 21(r) and the general open dumping prohibition in Section 21(a). 415 ILCS 5/21. Indeed, while Section 21(r) explicitly exempts coal ash used in mine reclamation (pursuant to Sections 21(r)(2) and (r)(3))[2] from "the other provisions of this Title V," it does not provide this exemption for Section 21(r)(1), the provision cited by MWG. Joliet Mot. at 6. *Id.* This confirms that both Sections 21(a) and 21(r) apply to the historic ash at the MWG plants. *Id.*

MWG also misconstrues the effects of Sections 21(r) and 21(d). 415 ILCS 5/21. Section 21(r) generally prohibits coal ash storage or disposal. *Id.* Section 21(r)(1) only provides an exemption from that general prohibition for two circumstances—where either the facility has a permit, or a permit is not required pursuant to Section 21(d)—and neither of these circumstances apply here. *Id.*

First, as the Board has already determined, these historic ash areas lack permits. Interim Order at 90–91. Second, Section 21(d)(1), which MWG cites (Joliet Mot. at 6), generally

[2] No party has alleged that Sections 21(r)(2) or (r)(3) apply here.

requires a permit for waste storage, treatment or disposal, but waives the permit requirement for "wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated." 415 ILCS 5/21(d)(1). However, this permit waiver is not nearly as broad as MWG would like it to be. Indeed, such a broad waiver would make no sense at all, as it would incentivize widespread, unpermitted onsite waste disposal. MWG fails to acknowledge abundant precedent that dramatically narrows the scope of this permit waiver to "minor amounts" of waste. *See, e.g.*, *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163, 175 (2003) ("[W]e construe section 21(d)(1) as providing an exemption to those on-site facilities that generate minor amounts of waste that can be disposed of without a significant threat of environmental harm"); *Pielet Bros. Trading v. Pollution Control Bd.*, 110 Ill. App. 3d 752, 756–57 (1982) ("[T]he Board has at least twice interpreted the section 21(e) [as Section 21(d) was then known] exemption as applicable only to minor amounts of refuse which could be disposed of without environmental harm on the site where generated. . . . [I]n light of the exemptive language used and the evils the act is directed to remedy, such construction is reasonable."). MWG has not argued, and could not plausibly argue, that the large historic ash disposal areas at Joliet 29 constitute "minor amounts" of waste. This means that Section 21(d) does not waive the permit requirement, and therefore Section 21(r)(1) does not exempt MWG from that section's general prohibition against the storage or disposal of coal combustion waste.

Finally, we should note that a citation MWG presents as apparent case support for the notion that allowances for "the storage or disposal of CCW outside of a permitted landfill . . . are protections that the General Assembly intended for generators of CCW to have" is nothing of the sort. *See* Joliet Mot. at 7; Powerton Mot. at 4; Will County Mot. at 8. The case cited immediately following that sentence is *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶ 17, 91

N.E.3d 865, 871, a case about racial discrimination in real estate transactions. This case does not illuminate the intent of the legislature with respect to coal ash, and MWG has presented no evidence that the legislature intended to waive the open dumping prohibition with respect to coal ash.

Taken together, the foregoing show that Sections 21(a) and 21(r) both apply to MWG, that MWG is prohibited from open dumping of coal ash pursuant to Section 21(a), and that MWG is also prohibited from storing or disposing of coal combustion waste without a permit pursuant to Section 21(r)(1). 415 ILCS 5/21.

II. MWG Improperly Seeks to Avoid a Remedy for Open Dumping of Coal Ash at Powerton

MWG seeks to exclude "evidence relating to the need for a remedy, or remedy" for the Former Ash Basin at Powerton. Powerton Mot. at 1. The Former Ash Basin is one of three listed "Historical Coal Ash Sites" (also described as "historical coal ash storage areas") at Powerton. Interim Order at 40.

The Board found that "MWG violated Section 21(a) of the Act at all four Stations [including Powerton] by allowing coal ash to consolidate in the fill areas around the ash ponds and in historical coal ash storage areas," and that "MWG did not take measures to remove [the coal ash] or prevent its leaking of contaminants into the groundwaters." Interim Order at 92 (emphasis added). It is clear from the Board's Interim Order that the Section 21(a) violations included the Former Ash Basin. *See* Interim Order at 87 (stating that Environmental Groups' open dumping allegations included the Former Ash Basin); *id.* at 89 (identifying "discarded" coal ash in two different categories at Powerton—"fill areas" and "historic storage areas"). In support of its Section 21(a) holding, the Board made several significant findings; these are listed above in the section discussing the Joliet Motion, but four bear repeating here:

- "None of the fill areas [or] the historic coal ash storage areas has any permits at all." *Id.* at 90–91.
- "[T]he areas that contain coal ash at the four Stations do not fulfill requirements of sanitary landfill." *Id.* at 91.
- "MWG, as the owner or operator at the four Stations had control over the areas that contain coal ash since 1999, when it began operating the Stations." *Id.*
- "[T]he record does not support MWG 'took extensive precautions to prevent open dumping' and 'has not been passive in its response to the coal ash at its Stations.'" *Id.* In other words, MWG did not take extensive precautions to prevent open dumping, and was passive in its response to the coal ash at its Stations.

Ultimately, the Board found that MWG violated Section 21(a) by, among other things, "failing to remove [coal ash]" from historical fill and storage areas. *Id.* The open dumping violations found by the Board derived from poor management of coal ash in multiple locations at each site. These include the Former Ash Basin at Powerton.

A. MWG Improperly Seeks to Challenge the Board's Liability Holding at Powerton

MWG argues that there is no need for a remedy at the Former Ash Basin because Complainants failed to prove that the Former Ash Basin is a source of groundwater contamination. Powerton Mot. at 2. This ignores the fact that the Board did find open dumping violations with respect to the Former Ash Basin. These violations must be remedied, regardless of whether Complainants were able to establish conclusive links between the Former Ash Basin and the evidence of contamination in certain monitoring wells. The question of liability is settled, and MWG may not now rewind the clock to avoid a remedy.

B. Section 21(r) of the Act does not absolve MWG of its liability under Section 21(a) for the Former Ash Basin at Powerton

MWG argues that Section 21(r) absolves MWG of any need to perform a remedy at the Former Ash Basin at Powerton. Powerton Mot. at 2–4. As described in greater detail above (with respect to the Joliet Motion), MWG has misconstrued the language and effect of Section 21. 415

ILCS 5/21. There is no conflict between Sections 21(a) and 21(r), no evidence that the legislature intended to waive the applicability of Section 21(a) to coal ash sites, and no reason to render Section 21(a) "inoperative." *Knolls Condo. Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002). It is possible to read both provisions harmoniously, as required by *Knolls Condo Ass'n*, to mean that "the storage or disposal of coal combustion waste" must meet both the specific requirements of 21(r) and the general open dumping prohibition in Section 21(a). 415 ILCS 5/21.

In any case, Section 21(r)(1) does not exempt the Former Ash Basin from the Section 21(r) general prohibition against coal ash storage and disposal. 415 ILCS 5/21(r). Again, Section 21(r)(1) only provides an exemption from that Section's general prohibition against coal ash storage or disposal for two circumstances—where either the facility has a permit, or a permit is not required pursuant to Section 21(d). 415 ILCS 5/21. Neither of these circumstances apply here. First, the facility does not have a permit. Interim Order at 90-91 ("None of the fill areas [or] the historic coal ash storage areas has any permits at all"). Second, MWG does not argue, not could it argue, that the Former Ash Basin only contains a "minor amount" of ash, so the permit requirement in Section 21(d)(1) cannot be waived. See *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill.App.3d 163, 175 (2003).

Taken together, the foregoing show that Sections 21(a) and 21(r) both apply to MWG, that the Board's finding of Section 21(a) liability is sound, and that MWG must remedy this violation. 415 ILCS 5/21.

III. MWG Improperly Seeks to Avoid a Remedy for Open Dumping of Coal Ash at Will County

MWG seeks to exclude "evidence relating to the need for a remedy, or remedy for the Former Slag and Bottom Ash Placement Area ("Former Placement Area")" at Will County. Will

County Mot. at 1. The Former Placement Area is one of three listed "Historical Coal Ash Sites" at Will County. Interim Order at 55–56.

The Board found that "MWG violated Section 21(a) of the Act at all four Stations [including Will County] by allowing coal ash to consolidate in the fill areas around the ash ponds and in historical coal ash storage areas," and that "MWG did not take measures to remove [the coal ash] or prevent its leaking of contaminants into the groundwaters." *Id.* at 92 (emphasis added). In support of its Section 21(a) holding, the Board made several significant findings; these are listed above in the section discussing the Joliet Motion, but four bear repeating here:

- "None of the fill areas [or] the historic coal ash storage areas has any permits at all." *Id.* at 90–91.
- "[T]he areas that contain coal ash at the four Stations do not fulfill requirements of sanitary landfill." *Id.* at 91.
- "MWG, as the owner or operator at the four Stations had control over the areas that contain coal ash since 1999, when it began operating the Stations." *Id.*
- "[T]he record does not support MWG 'took extensive precautions to prevent open dumping' and 'has not been passive in its response to the coal ash at its Stations.'" *Id.* In other words, MWG did not take extensive precautions to prevent open dumping, and was passive in its response to the coal ash at its Stations.

Ultimately, the Board found that MWG violated Section 21(a) by, among other things, "failing to remove [coal ash]" from historical fill and storage areas. *Id.* The open dumping violations found by the Board derived from poor management of coal ash in multiple locations at each site. These include the Former Placement Area at Will County.

A. MWG Improperly Seeks to Challenge the Board's Liability Holding at Will County

MWG argues that there is no need for a remedy at the Former Placement Area because Complainants failed to prove that the Former Placement Area is a source of groundwater contamination, because there is no evidence that the area contains coal ash, and because the record contains evidence that the area does not contain coal ash. Will County Mot. at 3–6. Each

of these arguments is either beside the point or inaccurate. The first argument, regarding the lack of a direct connection between the Former Placement Area and groundwater contamination, ignores the fact that the Board did find open dumping violations with respect to this area. These violations must be remedied, regardless of whether there are conclusive links between the Former Placement Area and the evidence of contamination in certain monitoring wells. The question of liability is settled, and MWG may not now rewind the clock to avoid a remedy.

It is also important to clarify that with respect to groundwater quality, we are dealing with the 'absence of evidence' rather than 'evidence of absence.' MWG suggests that the evidence shows a lack of coal ash constituents in groundwater near the Former Placement Area. Will County Motion at 3–4. However, this evidence—presented in Table 5 in Exhibit 1 to the Will County Motion—is from 1998, from one well, and does not include many of the most ubiquitous coal ash constituents. For example, Exhibit 1 says nothing about the concentrations of boron and sulfate, which the parties agree are "typical indicators of coal ash." Interim Order at 20. The truth is that the record is largely silent about the presence or absence of coal ash constituents in the groundwater near the Former Placement Area, particularly over the past twenty years. In any case, the lack of groundwater quality data has already been weighed by the Board, which found open dumping violations under Section 21(a) of the Act for other reasons.

MWG implies that there is no evidence of coal ash in the Former Placement Area. *See, e.g.*, Will County Motion at 6 ("Without evidence that the Former Placement Area is a source. . . ."). This is false. To the contrary, the Board noted that "[b]orings taken from this area in 1998 (B-1 through B-4) show coal ash mixed with gravel as deep as three feet below surface." Interim Order at 57. The record therefore shows that there was, and very likely still is, coal ash in this area.

MWG next implies that the record establishes that the ash in this area has been removed. *See, e.g.*, Will County Mot. at 4 ("[A]ny ash was gone by at least 1999. . . ."). But the record says no such thing. MWG's evidence merely establishes that the area was not a coal ash dumping area between 1999 and 2012, and instead resembled "an open field." *Id.* This says nothing about the presence or absence of buried coal ash, placed in the Former Placement Area before 1999. It is entirely possible, and likely, that the area resembles an open field and also has coal ash buried beneath the surface. In short, the record shows evidence of coal ash buried at the Former Placement Area, and MWG has failed to rebut or contradict that evidence.

In short, the evidentiary issues raised by MWG have already been weighed by the Board. It is improper for MWG to attempt to relitigate the issue of liability during the remedy phase of this proceeding. The Board held MWG liable for coal ash storage and disposal in violation of Section 21(a), and MWG must now remedy that violation.

B. Section 21(r) of the Act does not absolve MWG of its liability under Section 21(a) for the Former Placement Area at Will County

MWG argues that Section 21(r) absolves MWG of any need to perform a remedy at the Former Placement Area at Will County. Will County Mot. at 6–8. As described in greater detail above (with respect to the Joliet Motion), MWG has misconstrued the language and effect of Section 21. 415 ILCS 5/21. There is no conflict between Sections 21(a) and 21(r), no evidence that the legislature intended to waive the applicability of Section 21(a) to coal ash sites, and no reason to render Section 21(a) "inoperative." *Knolls Condo. Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002). It is possible to read both provisions harmoniously, as required by *Knolls Condo Ass'n*, to mean that "the storage or disposal of coal combustion waste" must meet both the specific requirements of 21(r) and the general open dumping prohibition in Section 21(a). 415 ILCS 5/21.

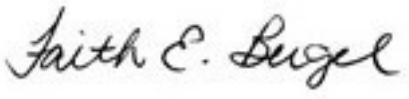
In any case, Section 21(r)(1) does not, as MWG argues, exempt the Former Placement Area from Section 21(r)'s general prohibition against coal ash storage and disposal. 415 ILCS 5/21(r). Again, Section 21(r)(1) only provides an exemption from that Section's general prohibition against coal ash storage or disposal for two circumstances—where either the facility has a permit, or a permit is not required pursuant to Section 21(d). 415 ILCS 5/21. Neither of these circumstances apply here. First, the facility does not have a permit. Interim Order at 90–91 ("None of the fill areas [or] the historic coal ash storage areas has any permits at all"). Second, MWG does not argue that the Former Placement Area only contains a "minor amount" of ash, so the permit requirement in Section 21(d)(1) cannot be waived. See *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill.App.3d 163, 175 (2003).

Taken together, the foregoing must mean that Sections 21(a) and 21(r) both apply to MWG, and that MWG must remedy the Section 21(a) violation found by the Board. 415 ILCS 5/21.

IV. Conclusion

For the foregoing reasons, Complainants respectfully request that the Hearing Officer deny the Joliet Motion, the Powerton Motion, and the Will County Motion.

Respectfully submitted,



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Dated: March 4, 2022

CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE NEED FOR A REMEDY AT THE HISTORIC AREAS OF CCR AT JOLIET 29, MWG MOTION IN LIMINE TO EXCLUDE THE FORMER ASH BASIN AT THE POWERTON STATION FROM CONSIDERATION OF A REMEDY, AND MOTION IN LIMINE TO EXCLUDE EVIDENCE OF THE NEED FOR A REMEDY AT THE FORMER SLAG AND BOTTOM ASH PLACEMENT AREA AT WILL COUNTY STATION** before 5 p.m. Central Time on March 4, 2022 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 19 pages.

Respectfully submitted,

Faith E. Bugel

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