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 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

NOTICE OF FILING

TO: Don Brown, Clerk
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer Order Denying Three Motions to Exclude Evidence of Remedy and Memorandum in Support of Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer Order Denying Three Motions to Exclude Evidence of Remedy, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 27, 2022

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5255

SERVICE LIST

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

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
CJones@elpc.org
KCourtney@elpc.org

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Greg.wannier@sierraclub.org

Peter Morgan
Sierra Club
1536 Wynkoop St., Ste. 200
Denver, CO 80202
Peter.morgan@sierraclub.org

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service, and Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer Order Denying Three Motions to Exclude Evidence of Remedy and Memorandum in Support of Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer Order Denying Three Motions to Exclude Evidence of Remedy, a copy of which is hereby served upon you was filed on July 27, 2022 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

and that true copies of the Notice of Filing, Certificate of Service, and Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer Order Denying Three Motions to Exclude Evidence of Remedy and Memorandum in Support of Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer Order Denying Three Motions to Exclude Evidence of Remedy were emailed on July 27, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER ORDER DENYING THREE MOTIONS TO EXCLUDE EVIDENCE OF REMEDY

Respondent Midwest Generation, LLC ("MWG") submits to the Illinois Pollution Control Board ("Board") this Motion for Interlocutory Appeal from the Hearing Officer's ruling denying MWG's three motions to exclude evidence (35 Ill. Adm. Code 101.518). In support of its Motion, MWG submits its Memorandum in Support and states as follows:

1. After 10 days of hearings, the Board entered an Interim Order finding that MWG violated the Illinois Environmental Protection Act (Act), including Sections 12(a), 12(d), and 21(a) of the Act, and Sections 620.115, 620.301(a), and 620.405 of the Board's regulations. The Board further found that an additional hearing was required because the record lacked significant information to determine the appropriate relief and any remedy, considering Sections 33(a) and 42(h) of the Act (415 ILCS 5/33(c) and 42(h)).

2. On February 4, 2022, MWG timely filed three motions *in limine* seeking to exclude evidence pertaining to specific areas at three sites owned by MWG: the Former Ash Basin at the

Powerton Station, the Former Slag and Bottom Ash Placement Area at Will County Station, and the Historic Areas of CCR at Joliet 29. MWG contended that based on the Interim Order, Illinois law and the facts of the case, no reasonable remedy could be imposed with regard to those locations.

3. Each motion maintained that the damages phase must be grounded in the fact that MWG's conduct at these specific locations conformed to an exception contained in Section 21(r) of the Act. This meant, in turn, that no remedy or penalty would be appropriate, because Illinois law deemed the coal combustion waste (as deposited by former operators) "reasonable," as that term is applied in Section 33(c) of the Act. 415 ILCS 5/33(c) ("In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved."). As such, any evidence related to advocating particular removal or remediation projects, or the imposition of monetary penalties, would be irrelevant.

4. In addition to the arguments premised on Section 21(r), each of the Motions contained a unique argument related to the site identified by the motion. With each of the locations at issue, the Board found or inferred that Complainants had failed to introduce evidence showing coal-ash contaminated groundwater in those particular areas.

5. The Motions also noted that, to the extent that the Complainants had been given an opportunity to meet their evidentiary burden by collecting additional groundwater data, they had failed to do so prior to the close of discovery on December 15, 2021. (See Hearing Officer Order, dated Dec. 10, 2021.) As such, no evidence of a remedy regarding the locations could be relevant, because no violations had been demonstrated.

6. On July 13, the Hearing Officer entered an Order denying all three motions.

7. The Hearing Officer's ruling misapplies Illinois law and deems the motions untimely based on mischaracterizations of the relief requested in the motions.

8. Additionally, the ruling is in error because it suggests that irrelevant evidence about possible remedy can be admitted due to the possibility that the Board will recognize its irrelevance at some future date.

WHEREFORE, MWG requests that the Board reverse the Hearing Officer's Order, and grant the following motions:

- Midwest Generation, LLC's Motion *In Limine* to Exclude the Former Ash Basin at the Powerton Station From Consideration of a Remedy (filed Feb. 4, 2022);
- Midwest Generation, LLC's 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 (filed Feb. 4, 2022);
- 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 (filed Feb. 4, 2022).

Respectfully submitted,
Midwest Generation, LLC
By: /s/ Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

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 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MEMORANDUM IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER ORDER DENYING THREE MOTIONS TO EXCLUDE EVIDENCE OF REMEDY

Acting in compliance with a deadline set by the Hearing Officer for prehearing motions, Midwest Generation, LLC ("MWG") filed three pretrial motions (the "Motions") seeking to prevent the Complainants from prolonging these proceedings by submitting irrelevant evidence related to certain areas of the properties subject to this proceeding. The Hearing Officer issued an order (the "Order") rejecting MWG's primary argument—that any remedy determination must be centered on the fact that MWG's conduct complied with the Act's provisions concerning the open dumping of coal combustion waste (CCW)—in a single, conclusory, sentence. He also deemed MWG's evidentiary motion untimely, suggesting that MWG's motion concerning the exclusion of certain evidence from the damages hearing should have been filed during the liability hearings. Finally, the Hearing Officer maintained that the Complainants were entitled to submit evidence of possible remedies at certain areas even though the Board's previous rulings in this case noted, either explicitly or by implication, that the Complainants had failed to establish the presence of

coal-ash groundwater contamination in those areas. The Complainants were allowed to proceed even though they had had an opportunity to access MWG's properties to collect evidence of coal-ash groundwater contamination and declined to do so.

The Board should grant MWG's Motions for the reasons stated in this Memorandum, and for the reasons stated in prior briefing, which MWG incorporates by reference and attaches hereto as Exhibits A-D.

BRIEF BACKGROUND

Complainants' initial complaint alleged that MWG violated a collection of Act provisions and Board regulations related to groundwater contamination at four properties: (1) Powerton Generating Station ("Powerton") in Pekin, Illinois; (2) Waukegan Generating Station ("Waukegan") in Waukegan, Illinois; and (3) Will County Generating Station ("Will County") in Romeoville, Illinois. The Complaint did not allege any violations related to "open dumping."

In 2015 the Complainants filed an Amended Complaint that added three counts: 1) Open Dumping at Powerton, 2) Open Dumping at Waukegan, and 3) Open Dumping at Will County. Each cited Section 21(a) of the Act (415 ILCS 5/21(a)) as the legal basis of the violation. The Complaint did not allege an Open Dumping violation at Joliet. Nonetheless, in an Interim Order dated June 20, 2019, the Board found that MWG had violated Section 21(a) at all four sites. ("The 2019 Interim Order".) The Board subsequently issued a clarifying order on February 6, 2020, but that order did not change any of the findings relevant to this interlocutory appeal. ("2020 Interim Order".)[1]

[1] With regard to the Section 21(a) findings, MWG maintains they were erroneous, both with regard to the facts produced at the hearing and with regard to Illinois law. Specifically, as to Joliet, the Board exceeded its authority by finding open dumping when no such claim was made in the Complaint.

The 2019 Interim Order additionally found that for various reasons, the Complainants had failed to prove the existence of coal ash groundwater contamination at the Former Ash Basin at the Powerton Station. Additionally, none of the Board's factual determinations tended to show that the Complainants had meet their burden to prove groundwater contamination at either the Former Slag and Bottom Ash Placement Area at Will County Station, or the Historic Areas of CCR at the Joliet Station. Collectively, these are referred to as the "Three Locations."[2]

On December 10, 2021, the Hearing Officer set a schedule for the remainder of the remedy phase of this enforcement proceeding. Fact discovery was ordered closed as of December 15, 2021. Parties were directed to file pre-hearing motions by February 4, 2022.

On February 4, 2022, MWG filed three motions at issue in this interlocutory appeal, which are incorporated by reference:

1) A Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy.

2) A 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.

3) A Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at the Joliet Station.

Each motion maintained that the damages phase must be grounded in the fact that MWG's conduct at the Three Locations conformed to an exception contained in Section 21(r) of the Act. This meant, in turn, that no remedy or penalty would be appropriate, because Illinois law deemed the CCW in these areas (which was deposited by previous operators) "reasonable," as that term is applied in Section 33(c) of the Act. 415 ILCS 5/33(c) ("In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the

[2] The "Historic Areas of CCR at the Joliet Station" are sometimes subdivided into three separate areas: The Northeast Area, Northwest Area, and Southwest Area.

reasonableness of the emissions, discharges or deposits involved."). As such, any evidence related to advocating particular removal or remediation projects, or the imposition of monetary penalties, would be irrelevant.

In addition to the arguments premised on Section 21(r), each of the Motions contained a unique argument related to the site identified by the motion. With each of the Three Locations, the Complainants had failed to introduce evidence showing coal-ash contaminated groundwater in those particular areas. The Motions also noted that, to the extent that the Complainants had been given an opportunity to meet their evidentiary burden by collecting additional groundwater data, they had failed to do so prior to the close of discovery on December 15, 2021. (See Hearing Officer Order, dated Dec. 10, 2021.) As such, no evidence of a remedy regarding the Three Locations could be relevant, because no violations had been demonstrated either before or after the 2019 Interim Order.

None of the Motions called for either the 2019 or the 2020 Interim Order to be vacated or modified in any way. They did not call for the Hearing Officer to overrule the Board and determine that MWG was not liable under Section 21(a).

On July 13, 2022, the Hearing Officer entered an order (the "Order") denying all three Motions. With regard to the Section 21(r) arguments, he offered a single sentence claiming that "no exemptions exist for the areas in question." (Order, at 7.) This "exemption" referred to a permitting exemption found in Section 21(d)(1) of the Act. *See* 415 ILCS 5/21(d)(1) (2018). He also claimed that the Motions were untimely because they sought to "absolve [MWG] from liability" under Section 21(a).

Finally, in response to MWG's position that Complainants failed to meet their burden-of-proof, the Hearing Officer relied on generalized statements from the 2019 Interim Order to

conclude that the Board *had* found the possibility of groundwater contamination at each of the Three Locations. (Order, at 7.) He did not address MWG's contentions that the Board's own summary of the facts made this interpretation untenable. Instead, he suggested that these relevancy issues could simply be decided by the Board sometime in the future.

ARGUMENT

A. Self-Generated CCW at the Site Where it was Generated is Reasonable Per Se under Section 21(r), and Complainants Cannot Override the Law by Proffering Evidence about Remedies Contrary to the Act.

Subsection 21(r) mirrors Section 21(a), in that it prohibits persons from causing or allowing the open dumping of CCW. 415 ILCS 5/21(r). Section 21(r), however, is specific to the disposal of CCW, and therefore it is the General Assembly's clearest statement on how to treat a party that has "allowed" CCW to remain on its property. *Knolls Condo. Ass'n v. Harms*, 202 Ill. 2d 450, 459 (2002) ("It is … a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision . . . both relating to the same subject the specific provision controls and should be applied.").

A second difference between Section 21(r) and Section 21(a) is that Section 21(r) contains a carve-out whereby the unpermitted deposit of CCW will not violate the Act. This is a safe harbor that applies to no other "waste" material covered by the Act. It states, in relevant part:

> No person shall:
>
> * * *
>
> (r) Cause or allow the storage or disposal of coal combustion waste unless:
>
> (1) such waste is stored or disposed of at a site or facility for which a permit has been obtained or <u>is not otherwise required under subsection (d) of this Section</u>;

415 ILCS 5/21(r)(1) (emphasis added)

Subsection 21(d) of the Act, as referenced in Section 21(r) above, states, in relevant part:

> No person shall:
>
> * * *
>
> (d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:
>
> (1) without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, that, except for municipal solid waste landfill units that receive waste on or after October 9, 1993, no permit shall be required for (i) any person conducting a waste-storage, waste-treatment, or waste-disposal operation 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) (2018) (emphasis added).

Thus, the Act did not require a permit for self-generated wastes, so long as the wastes remained at the site where they were generated. And, in turn, Section 21(r)(1) treats CCW deposits not requiring a landfill permit under Section 21(d)(1) as if they *did* have a landfill permit. It is undisputed that the CCW allegedly at the Powerton Former Ash Basin, the Will County Former Slag and Bottom Placement Area, and the Historic Areas of CCR at the Joliet Station was self-generated: It was produced by a historic owner's "own activities" and the CCW was "stored, treated, or disposed within the site where such wastes are generated."

To the extent that the Board has made an interim determination that MWG can be said to be "allowing" the storage or disposal of CCW at the Three Locations, at this remedy phase the Board must consider whether: (1) allowing the deposits of CCW to remain would be "reasonable" and (2) whether MWG's conduct upon taking ownership of the Three Locations was "reasonable." *See* 415 ILCS 5/33(c) ("In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved.").

In both instances, the General Assembly's answer—as shown by its enactment of Section 21(r) —is yes. As MWG's Motions explained in detail, the undisputed facts of this case, and the plain text of Sections 21(d) and 21(r)(1), establish that MWG's predecessor deposited the CCW in a manner deemed copacetic by Illinois lawmakers, even though they lacked a landfill permit. If the General Assembly found it reasonable for parties to store or dispose of self-generated CCW without a permit (but subject to Section 21(d)(1)'s self-generation requirements,) then no evidence relating to damages or remedy is required for the Three Locations. No evidence can override the General Assembly's judgment. Excluding irrelevant evidence that will not assist the Board in reaching a reasoned decision is what motions to exclude are *for*.

1. *The Hearing Officer's conclusory finding that "no exemptions exist" for the CCW at the Three Locations is not a valid basis for denying MWG's Motions.*

The Hearing Officer's conclusory statement that "no exemptions exist for the areas in question" provides no reasoning that the Board can review for an abuse of discretion. Although an earlier portion of the Hearing Officer's Order describes the Complainants' arguments for why the Section 21(r)(1) exclusion would not apply, at no point does the Hearing Officer endorse those arguments. Indeed, MWG's Reply in Support detailed why the Complainants' arguments were meritless: They advanced an interpretation of Section 21(r) that was contrary to the intentions of the General Assembly as shown by both the plain language of the Act and the legislative history of Section 21(r). (See Reply, attached as Ex. D, at pp. 3-8.) Additionally, in passing Section 21(r)(1), the General Assembly determined how to regulate disposal practices for self-generated CCW. Its decision will not result in "operators disposing their waste…indiscriminately…and without accountability for the resulting pollution…" *People ex rel. Madigan v. Dixon-Marquette Cement, Inc*., 343 Ill. App. 3d 163, 173 (2d Dist. 2003). Elected representatives simply concluded that the risk of "serious hazards to public health and safety" (415 ILCS 5/20(2)) that might

accompany CCW disposal could be effectively managed through enforcement actions under other portions of the Act, such as Section 12(a)'s prohibition on water pollution and Section 12(d)'s prohibition on water pollution hazards. MWG's position is that no remedy is needed in the Three Locations just because coal ash was historically deposited in an area, without a showing of "pollution" related thereto.

The Hearing Officer refused to allow MWG to file its Reply Brief rebutting the Complainant's interpretation of Section 21(r). (Order, at 7.) This suggests some entirely separate rationale that was not disclosed in the evidentiary order. Whatever that undisclosed rationale was, the Board should not defer to it.

2. *MWG did not "waive" its right to argue that its compliance with applicable Illinois law makes certain categories evidence irrelevant to the damages phase.*

The Hearing Officer also stated that: "MWG's argument that Section 21(d) absolves it from liability is waived" because MWG "could have raised a Section 21(r) argument in the liability proceeding along with other affirmative defenses." (Order at 7.) This lacks support from this Board's precedents and misunderstands the nature of MWG's motion.

MWG's motions to exclude evidence did not, and obviously could not at this time, overturn the Board's interim findings of Section 21(a) violations at the Three Locations. The Motions are founded instead on the Board's principle that even if a party has been found liable, this does not require imposing a remedy, or even a penalty. *People of the State of Illinois v. CSX Transportation, Inc.*, PCB 07-16, at 17 (July 12, 2007); *Union v. Caterpillar*, PCB 94-240, at 30 (Aug. 1, 1996); *Shelton v. Crown*, PCB 96-53 (Oct. 2, 1997). Even if the Board's finding of Section 21(a) violations is left untouched, it remains the case that the Act requires the Board to adopt the remedy that is most "reasonable." And if the General Assembly has already defined what is reasonable under a particular set of circumstances, then the Board must accede to that determination. Section

21(r) embodies the General Assembly's assessment that it is reasonable for a party to cause or allow the deposit of self-generated CCW waste without a permit. MWG's position is not radical: The Board has found that MWG violated the Act's prohibition on open dumping, and it should follow the Act's assessment of what is necessary to bring MWG into compliance with the Act's prohibition on the open dumping of CCW. Because the Act speaks clearly on this issue, and says that MWG's conduct was reasonable because the CCW in question was self-generated CCW, no other evidence of possible "remedies" can have legal relevance for these Three Locations.

There was no earlier point in time where MWG could assert that the deposits of CCW in specific areas were in compliance with Section 21(r), because the Complainants had never argued a *violation* of Section 21(r).[3] Nor could MWG raise the corollary argument that, because Illinois law recognizes no problem to be remedied under these circumstances, evidence related to non-nominal damages or removal projects is irrelevant. It cannot be argued that MWG was somehow waiving damages-phase evidentiary arguments by failing to raise them during the liabilities phase.

Indeed, the Hearing Officer's Order—which does not cite any Board precedents or regulations in support —misunderstands and overstates the significance of an "Interim Order." An interlocutory order, like the Board's 2019 Interim Order, is a non-final order issued during the course of litigation.[4] "[A]n interlocutory order may be modified or vacated at any time before final judgment and set aside to correct an error." *Leopold v. Levin,* 45 Ill. 2d 434, 446 (1970); *Berry v. Chade Fashions, Inc.*, 383 Ill. App. 3d 1005, 1009 (1st Dist. 2008) (same). And because the relief

[3] It was first stated in the Board's Interim Order that the CCR was CCW, in any case.

[4] The 2019 Interim Order is interlocutory, both in name and in substance. It does not "settle or finalize any rights between the parties." *Towns v. Yellow Cab Co.*, 73 Ill. 2d 113, 120 (1978). Indeed, it specifies that the order does not "determine the appropriate relief in this proceeding," because the record is insufficient requires further development. (2019 Interim Order, at 92.) Nor is there any language designating the "Interim Order" as appealable. *Compare Beck v. Stepp*, 144 Ill. 2d 232, 236 (1991) (order granting summary judgment stated that there is "No Just Cause to Prevent Appeal" and that it is an "Appealable Order") (cleaned-up).

requested is one that the court can grant at "any time before final judgment," motions for such relief are timely at any point prior to entry of a final judgment. *Berry*, 383 Ill. App. 3d at 1009-10 (reversing trial court's finding that motion to vacate needed to be filed 30 days after entry of summary judgment). While interlocutory orders should not be overturned without a good reason, they do not establish *res judicata*, or bar certain issues from being revisited. *People v. Taylor*, 6 Ill. App. 3d 961, 963 (4th Dist. 1972) ("*Res judicata* does not apply to an interlocutory order."). *All. Syndicate v. Parsec, Inc.*, 318 Ill. App. 3d 590, 602 (1st Dist. 2000) ("Interlocutory orders cannot form the basis for claims of either *res judicata* or collateral estoppel.").

As noted, MWG's Motions *in limine* did *not* seek to change the findings of liability in the 2019 Interim Order at this time. Moreover, applicable Illinois law specifically allows adding defenses prior to final judgment. Section 101.100(b) of the Board's procedural rules allows the Board to look to the Illinois Code when the Board's rules are silent. 35 Ill. Adm. Code 101.100(b); *People of the State of Illinois v. Inverse Investments, LLC*. PCB 11-79 (June 21, 2021), *slip op.* p. 6. Section 2-616(a) of the Illinois Code of Civil Procedure states "At any time before final judgment, amendments may be allowed on just and reasonable terms, … adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable . . . the defendant to make a defense or assert a cross claim." 735 ILCS 5/2-616(a). And, Illinois courts applying Section 2-616(a) have held that judges should "liberally construe[]" this rule in favor of the party amending its responses. *People ex rel. Foreman v. Round Lake Park*, 171 Ill. App. 3d 443, 447 (2d Dist. 1988).

The Hearing Officer's conclusory statement that MWG waived its right to argue that 21(r) is applicable in the remedy phase of this case should be overruled as contrary to Illinois law.

B. Exclusion of Remedy Evidence Related to the Three Locations is Required by the Board's Factual Findings in the 2019 Interim Order.

In addition to the Section 21(r) arguments, MWG's Motions *in limine* noted that each of the Three Locations were excluded from the damages phase by the Board's own findings. Therefore, any evidence related to "remedies" at those Locations was irrelevant and must be excluded. The Hearing Officer rejected each of these arguments. In each case, the Hearing Officer interpreted general statements from the Board in a manner that that cannot be reconciled with the Board's own summary of the evidence.

First, even though he acknowledged that the 2019 Interim Order directly states that the Complainants "did not prove that it is more likely than not that the [Former Ash Basin at the Powerton Station] is a source of contamination at the Station", the Hearing Officer maintained that this was somehow countermanded by the 2019 Interim Order's general finding that "the coal ash is spread out across the Stations and in the fill and is contributing to the [groundwater quality standards] exceedances in the Station's monitoring wells." (Order, at 7, citing 2019 Interim Order at 41-42.) This ruling opens the door to the Complainants proving up a remedy for a location where they have not established any impact or basis for a remedy. In fact, the Board recognized that groundwater wells placed around the Former Ash Basin showed no groundwater contamination – which is true regardless of whether there might, possibly (without proof) be fill material somewhere in the area as the Hearing Officer suggests. The 2019 Interim Order found that "[g]roundwater samples taken downgradient from [the Powerton Former Ash Basin] showed no coal ash constituents" and consequently "the [Complainants] did not prove that it is more likely than not that this basin is a source of contamination at the Station." (2019 Interim Order, at 41.)

Similarly, the 2019 Interim Order found that there is only one monitoring well at the site relevant to former placement area at Will County Station (see 2019 Interim Order at 57), and the

record shows that no coal ash constituents were found at that well. (See Ex. B, Exhibit 1, tbl. 6). But, again, the Hearing Officer relied exclusively on a single generalized statement from the Interim Order, that "the historic areas and coal ash in the fill areas at the station are causing or contributing to GQS exceedances at the Station." (Order, at 7, citing 2019 Interim Order at 56-57.) If the groundwater shows no evidence, it is irrelevant whether there might, possibly, be some fill somewhere in the area. Again, this ruling opens the door to the Complainants proving up a remedy for a location where they cannot prove an impact.

Finally, the 2019 Interim Order acknowledges that there is no evidence of groundwater contamination at the Historic Areas of CCR at the Joliet Station because the monitoring wells nearest to the Historic Areas are "unlikely to show conclusive results of any contaminants emanating from this historical area." See 2019 Interim Order, p. 27 (referring to the Northeast Area); p. 27, para. 1 (referring to the Southwest Area) and p. 28, para. 1 (referring to the Northwest Area). In fact, MWG pointed out to the Hearing Officer that MWG had submitted historical evidence showing that, in the "Northeast Area" (one of the three historical areas), all of the coal ash had already been removed, mooting any discussion of "remedy" at that location. (Ex. C, at ¶5.)

Again, the Hearing Officer relied on a single sentence from the Interim Order finding it "probable" that "these historical coal ash storage and fill areas are contributing to the groundwater contamination. (Order, at 7, citing 2019 Interim Order at 28.) The Order does not mention MWG's reference to the uncontradicted evidence showing the complete removal of coal ash from the Northeast Area, or the Board's acknowledgement that no wells exist near the other areas. Complainants did not meet their burden to show a contamination at the three historical fill areas and with no evidence of contamination, no evidence regarding the need for a "remedy" at the three historical fill areas could be relevant. Allowing Complainants the opportunity, after a finding of

no proof, to have the opportunity to present a remedy flies in the face of due process and procedural requirements for trial.

The Hearing Officer may have recognized that reading generalized statements from the 2019 Interim Order out of context was a thin justification for rejecting MWG's Motions. So, in each case, he added that this outcome would not be prejudicial because "[t]he Board will exercise its judgment in determining the relevance and import of the evidence in determining an appropriate remedy." (Order at 7.) But merely because the Board might accept MWG's relevancy objections at some future date, is not an adequate basis for denying a motion to exclude. If it were the case that the Hearing Officer could defer judgment on such matters to the Board, then motions to exclude evidence would *never* be granted.

While motions to exclude are not granted lightly, they are a powerful tool in economizing the resources expended by the parties and the Board, and the Hearing Officer must grant such motions when appropriate. Indeed, the idea that determinations of relevance should be punted to the Board has things backwards: "Where the evidence could be prejudicial, an order granting a motion *in limine* may be safer than an order denying it; the evidence will then be kept out until it is clear it should be admitted." *Cunningham v. Millers Gen. Ins. Co.*, 227 Ill. App. 3d 201, 206 (4th Dist. 1992). The Hearing Officer did not assess whether the evidence would be prejudicial to MWG, only that the Board can decide the issue later. It is certainly prejudicial to allow Complainants to submit evidence of remedy (or suggest that MWG must collect such evidence) in areas where Complainants failed to establish any basis for a remedy. The Hearing Officer's Order placed an excessively high standard on MWG's motions to exclude.

Conclusion

MWG requests that the Board reverse the Hearing Officer's Order, and grant the following motions:

- Midwest Generation, LLC's Motion *In Limine* to Exclude the Former Ash Basin at the Powerton Station From Consideration of a Remedy (filed Feb. 4, 2022);
- Midwest Generation, LLC's 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 (filed Feb. 4, 2022);
- 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 (filed Feb. 4, 2022).

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

EXHIBIT A

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 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE THE FORMER ASH BASIN AT THE POWERTON STATION FROM CONSIDERATION OF A REMEDY

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC ("MWG"), submits this Motion *In Limine* requesting the Hearing Officer enter an order barring evidence relating to the need for a remedy, or remedy for the Former Ash Basin ("FAB") at the Powerton Station because the Illinois Pollution Control Board ("Board") found that the FAB was not a source of contamination at the Station. 2019 Order, p. 41. Additionally, the Board found that the ash in the historic fill areas was coal combustion *waste*, over MWG's objections. 2019 Order, p. 89. Pursuant to Section 21(r) of the Act, coal combustion *waste* may remain in place, further obviating the need to consider a remedy.

In support of its Motion, MWG states as follows:

A. Background

1. In October 2017 and continuing to January 2018, the parties participated in a lengthy and extensive hearing regarding Complainants' allegations that MWG violated the Illinois Environmental Protection Act ("Act").

2. On June 20, 2019, the Board entered an Interim Order and Opinion, which it reconsidered and revised on February 6, 2020.

B. Because the Board Concluded the FAB is Not a Source of Contamination, No Evidence of a Remedy Should Admitted

3. In its 2019 Order, the Board found that "Groundwater samples taken downgradient of [the FAB] showed no coal ash constituents." 2019 Interim Order, p.41.

4. Based upon that finding, the Board concluded that "that the Environmental Groups did not prove that it is more likely than not that this basin is a source of contamination at the Station." 2019 Interim Order, p. 41.

5. In its February 6, 2020 Order, the Board's opinion regarding the FAB did not change. 2020 Order, p. 14-15.

6. Because the Board found that the groundwater downgradient of the FAB showed no coal ash constituents, and thus was not a source of contamination at the Station, evidence concerning the need for a remedy, or a remedy, should be excluded for the FAB.

C. Section 21(r) of the Act Allows Disposal of Coal Combustion Waste Onsite Negating Any Remedy Requirement

7. Subsection 21(r) of the Act, coupled with Section 21(d), allows disposal of coal combustion waste on a person's property that was generated by a person's own activities. Thus, the material may remain in place.

8. Subsection 21(r) states, in relevant part:

> No person shall:
>
> * * *
>
> (r) Cause or allow the storage or disposal of coal combustion waste unless:
>
> (1) such waste is stored or disposed of at a site or facility for which a permit has been obtained or is not otherwise required under subsection (d) of this Section; (emphasis added)
> 415 ILCS 5/21(r)(1)

9. Subsection 21(d) of the Act, as referenced in Section 21(r) above, states, in relevant part:

No person shall:

* * *

(d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

(1) without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, that, except for municipal solid waste landfill units that receive waste on or after October 9, 1993, no permit shall be required for (i) any person conducting a waste-storage, waste-treatment, or waste-disposal operation 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) (emphasis added).

10. The FAB was previously used as an ash impoundment before the Ash Surge Basin existed. 2019 Interim Order, p. 41 and 1/30/18 Tr., p. 61:21-22, attached as Ex. 1. As the Ash Surge Basin was constructed in 1978 (2019 Interim Order, p. 36) and the Powerton Station began operations in the 1920s (2019 Interim Order, p. 35), the FAB was used by the former owner of the Station from its coal-fired power generation at the Station. 2019 Interim Order, p. 41 and 1/30/18 Tr., p. 61:21-22, Ex. 1. While MWG asserted that the CCR was not "waste", the Board specifically found that the coal ash at the Stations was "coal combustion waste" as defined in 415 ILCS 5/3.140. *Id.* at pp. 87-88. (Board stated that while MWG may send some coal ash to be used beneficially by third parties, that is not the case for historic areas).

11. Section 21(r) of the Act is specific to coal combustion waste ("CCW"), which the Board concluded was at issue in the historic areas (among other areas). As such, Section 21(r) is the provision that is applicable to the historic fill areas at Powerton, not Section 21(a) of the Act. "It is…a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision…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).

12. Section 21(r) allows the storage or disposal of CCW outside of a permitted landfill. These are protections that the General Assembly intended for generators of CCW to have. *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶17. ("When construing a statute, [a] court's fundamental objective is to ascertain and give effect to the intent of the legislature.").

13. In this case, the prior owner conducted "a waste-storage…or waste disposal operation for wastes generated by" its own activities, and "stored [or] disposed]" the waste "within the site where such wastes are generated." 415 ILCS 5/21(d). Section 21(d) allowed the prior owner to do so without a permit, and under the plain text of Section 21(r), this was an acceptable practice. To the extent that MWG can be said to have "allowed" the storage or disposal of CCW at the FAB, the CCW was in compliance with Section 21(r) of the Act. Accordingly, because the CCW in the FAB is in compliance with the Act, any evidence concerning a remedy for those areas should be excluded.[1]

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order barring evidence relating to the need for, or remedy for, the FAB at the Powerton Station.

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

[1] MWG further reserves the right to claim that other areas of historic ash are in compliance with Section 21(r) of the Act, and thus there is no basis for a remedy.

EXHIBIT 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

SIERRA CLUB,
ENVIRONMENTAL LAW &
POLICY CENTER; PRAIRIE
RIVERS NETWORK and
CITIZENS AGAINST RUINING PCB No. 2013-015
THE ENVIRONMENT,

Complainants,

vs.

MIDWEST GENERATION LLC,

Respondent.

TRANSCRIPT OF PROCEEDINGS at the hearing of the above-entitled cause, held at 100 West Randolph Street, Chicago, Illinois on January 30, 2018, at the hour of 9:00 a.m.

MR. BRADLEY P. HALLORAN,

Hearing Officer

REPORTED BY: CHERYL L. SANDECKI, CSR, RPR
LICENSE NO.: 084-03710

cleaning basin. What is its purpose?

A. It is there for materials that are cleaned out of equipment in the power plant.

MS. FRANZETTI: And we have Stipulation 25, the metal cleaning basin was constructed in 1978 with a Poz-o-Pac liner on the bottom and a Hypalon liner on the sides. Stipulation 26, in 2010 Midwest Gen relined the metal cleaning basin with a 60-millimeter HDPE liner. And Stipulation 27, the ash in the metal cleaning basin is dredged approximately on an annual basis.

BY MS. FRANZETTI:

Q. Turn to the former ash basin. What's its purpose?

A. The former ash basin is currently an emergency overflow for the ash surge basin.

Q. Did it have any different purpose before?

A. Yes. It once was the settling basin for the ash impoundment. I mean, it was the ash impoundment before the ash surge basin existed.

Q. Is it lined?

A. I don't know. I don't think it is.

EXHIBIT B

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 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S 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

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC ("MWG"), submits this Motion *In Limine* requesting the Hearing Officer enter an order barring evidence relating to the need for a remedy, or remedy for the Former Slag and Bottom Ash Placement Area ("Former Placement Area") at the Will County Station from because there is no evidence that the area is a source of contamination and because Section 21(r) of the Illinois Environmental Protection Act ("Act") allows disposal of coal combustion waste that was generated by the site owner and disposed at the site.

In its 2019 Interim Order, the Illinois Pollution Control Board ("Board") found there was one monitoring well installed in 1998. Interim Order, p. 57. The 1998 monitoring well showed no contamination from coal ash. Hearing Ex. 18D, Table 6, attached as Ex. 1. Further, testimony at the hearing showed that even though the former owner used the area to temporarily store ash, no other ash existed in the area. Ex. 2, 1/31/18 Tr. p.255-256. Accordingly, while the area may have temporarily had historic ash in the past, there is no groundwater data to show that the area is

causing contamination nor any data to show that there is any ash present. Because the groundwater data shows that the Former Placement Area is not a source, the record shows that the area does not contain ash, and because Complainants failed to develop evidence that the Former Placement Area is a source or still contains ash, the Board should exclude evidence regarding the need for a remedy or remedy for the area.

Additionally, the Board found that the ash in the historic fill areas was coal combustion *waste*, over MWG's objections. 2019 Order, p. 89. Pursuant to Section 21(r) of the Act, coal combustion *waste* may remain in place, further supporting the exclusion of evidence regarding the need for a remedy.

In support of its Motion, MWG states as follows:

A. Background

1. In October 2017 and continuing to January 2018, the parties participated in a lengthy and extensive hearing regarding Complainants' allegations that MWG violated the Illinois Environmental Protection Act ("Act").

2. On June 20, 2019, the Board entered an Interim Order and Opinion, which it reconsidered and revised on February 6, 2020. The Board found that the record lacked sufficient information to determine an appropriate remedy and directed the parties to proceed to hearing to determine the appropriate relief and whether a remedy is required, considering the Section 33(c) and 42(h) factors under the Act.

3. In its June 2019 Interim Order, the Board discussed the Former Placement Area located on the southeast corner of the Will County Station. Interim Order, pp. 56-57.

4. In discussing the Former Placement Area, the Board found that the area was identified in the 1998 Phase II Environmental Site Assessment, and that there was a monitoring well (MW-1) in the area in 1998. Interim Order, p. 57.

5. Pursuant to the Board's Interim Order, the Parties engaged in additional discovery to develop information to determine the appropriate relief. An additional approximately 60,000 pages of documents were exchanged, and eleven witnesses were deposed including six expert witnesses.

6. Despite being allowed under Illinois Supreme Court Rule 214, Complainants did not conduct any investigation of the Former Placement Area at the Will County Station during discovery to determine whether it is a current source of groundwater contamination knowing that it was not when sampled in 1998. Il. S. C. R. 214(a) (a party may have access "to real estate for the purpose of making surface or subsurface inspections…").

B. There is no Evidence to Support the Need for a Remedy for the Former Placement Area at Will County

7. It is the Complainants' duty and responsibility to prove their case. *Northern Illinois Anglers' Assoc. v. Kankakee Water Co., Inc.*, PCB 81-127, 1981 WL 21931 (September 24, 1981), *1. Here, Complainants made no attempt to prove that Former Placement Area is a source of contamination, and it is certainly not MWG's duty to disprove the allegations.

8. While the Board noted that there was a monitoring well installed near the Former Placement Area (MW-1), the Board did not include in the Interim Order the results from the sampling of the well. Table 6 of the 1998 Phase II Report is the groundwater analytical results. Hearing Ex. 18D, Table 6 (MWG13-15_5736), attached here as Exhibit 1. Table 6 shows that the

groundwater in MW-1 showed no coal ash constituents. *Id.* In fact, all of the constituents analyzed were not detected. *Id.*[1]

9. Additionally, Frederick Veenbaas, who worked at the Will County Station from 1999 to 2012 (1/31/18 Tr. p. 222:2-8) reviewed the Phase II Report and testified that he had never heard of a slag and bottom ash dumping area when he worked at Will County. 1/31/18 Tr. p. 255:13-15, 256:10-14, attached here as Ex. 2. He specifically testified that when he worked at the Will County Station the southeast corner of the property – the same area as the Former Placement Area – was not a slag and bottom ash dumping area. *Id*, p. 256:10-14. He stated "it was an open field. It was away from the primary processes of the plant. It was basically a road where the ash trucks went by and went to the ash site." *Id.* p. 256:16-19. He further stated that there was no pathway or mechanism for ash to get to the southeast area. *Id.* p. 256:20-22.

10. Thus, even if that area was a storage area for ash long before MWG began operating the site, any ash was gone by at least 1999 when Mr. Veenbaas began working at the Station.

11. Because there is no evidence that shows the Former Placement Area is a source, and because the only evidence in the record shows that it is not a source and that there is no ash in the area, the Board should exclude all evidence concerning that area.

12. In addition, samples of historic ash at other locations on the Will County Station show that the leachate from historical ash in fill materials is not adversely impacting the groundwater. Hearing Ex. 903, pp. 48, attached as Ex. 3. The leaching data from the historic ash at Will County found nothing in the historic ash was above the groundwater Class I quality criteria. MWG Ex. 901, p. 9, attached as Ex. 4. In its 2019 Interim Order, the Board agreed that the coal ash at each of the MWG Stations possessed similar constituents. 2019 Order, p. 20. Here, the

[1] The Hearing Officer entered Exhibit 18D over MWG's objection. 10/23/2017 Tr., p. 112:4-5, 126:6-14. MWG continues to object to the admission of the ENSR reports.

record contains samples from one of the historic coal ash areas at Will County which shows the historic ash is not a source and analysis of the groundwater at the Former Placement Area shows there is no contamination there. In short, there is no evidence that the Former Placement Area is a potential source of contamination, and the totality of the evidence demonstrates that it is not.

13. Complainants cannot assert that MWG either should have sampled or should be required to sample the area as part of an investigation.[2] To date, there has been no regulatory requirement to sample and no Illinois EPA order. A party is not required to simply investigate its property when there is no apparent reason or requirement to do so. Additionally, MWG has a groundwater sample showing that there was no contamination in the groundwater in the Former Placement Area. A party cannot be forced to develop additional evidence to *disprove* allegations against them, particularly when they already have evidence that does just that. If a party were so required, then all litigation would be turned on its head. A complainant would be able to make blind factual statements, without any proof or support, that a certain area is a source of contamination, and demand the respondent investigate and present proof to deny or disprove the alleged facts. That is simply not how environmental enforcement in Illinois works. When Illinois EPA suspects a site might be a source of environmental contamination, it does not rush to the Board or a Court to force the owner/operator conduct an investigation to determine whether it is a source. Instead, it conducts an investigation, prepares a report, and if its investigation results in evidence that there is contamination, the Illinois EPA pursues enforcement.[3] That the Agency gets

[2] The pending regulations in PCB20-19 Subdocket A may ultimately require MWG to investigate the historic fill areas to confirm that they are not a source of contamination. If the Board passes the regulations, then MWG will comply.

[3] For example, In *N.Ill. Serv. Co. v. Ill. EPA*, 2016 IL App (2d) 150172 (2nd Dist. 2916), Illinois EPA conducted an inspection, and pursued enforcement against the owner following the inspection. Similarly, in *People of the State of Illinois v. D'Angelo Enterprises, Inc.*, PCB97-66, 2002 Ill.ENV LEXIS 533, the Illinois EPA conducted an inspection of a facility that contained waste, and prepared an inspection report identifying alleged violations of the Act. *18-19. Relying upon the results of the inspection, the People of the State of Illinois brought an enforcement action. *Id.**4. *See also James Reichert Ltd. Family P'ship v. Ill. Pollution Control Bd.*, 2018 IL App (5th) 160533-U, (published under

its authority to conduct the investigations under Section 4(d) of the Act makes no difference. 415 ILCS 5/4(d). Here, Illinois Supreme Court Rule 214 allows a private party in litigation to enter and even sample property to present evidence to prove their allegations.

14. In fact, in this case, the Agency *asked* MWG to voluntarily undertake sampling at its Stations, specifically identifying the CCR impoundments (and not the known ash fill areas) as possible sources. MWG elected to voluntarily perform that sampling, which resulted in the violation notices that started this case.

15. Complainants cannot be allowed to put the cart before the horse. Just as it is Complainants' burden to prove the liability portion of their case, it is similarly their burden to prove that a remedy is required. The Board's finding that MWG "allowed" groundwater contamination at its Stations does not equate to forcing a remedy in those locations where there is no proof of a source, and in this case proof of the absence of a source.[4]

16. Without evidence that the Former Placement Area is a source and with evidence that it is *not* a source, any evidence of the purported need for a remedy for area should be excluded. Complainants cannot be permitted to demand that a respondent must go out and find the evidence (that Complainants should have presented) that might, or might not, lead to a remedy.

C. Section 21(r) of the Act Allows Disposal of Coal Combustion Waste Onsite Negating Any Remedy Requirement

17. Subsection 21(r) of the Act, coupled with Section 21(d), allows disposal of coal combustion waste on a person's property that was generated by a person's own activities. Thus, no remedy is required.

Rule 23(e)) (Illinois EPA conducted an inspection of a property following review of overhead satellite image of site that showed potential violations, and pursued enforcement following the inspection.)

[4] *See* MWG's Response to Complainants' Post-Hearing Brief (Aug. 30, 2018), p. 9 and MWG's Memorandum in Support of its Motion to Reconsider (Sept. 9, 2019), p. 25.

18. Subsection 21(r) states, in relevant part:

No person shall:

* * *

(r) Cause or allow the storage or disposal of coal combustion waste unless:

(1) such waste is stored or disposed of at a site or facility for which a permit has been obtained or is not otherwise required under subsection (d) of this Section; (emphasis added)
415 ILCS 5/21(r)(1)

19. Subsection 21(d) of the Act, as referenced in Section 21(r) above, states, in relevant part:

No person shall:

* * *

(d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

(1) without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, that, except for municipal solid waste landfill units that receive waste on or after October 9, 1993, no permit shall be required for (i) any person conducting a waste-storage, waste-treatment, or waste-disposal operation 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) (emphasis added).

20. The Phase II Report states that the former owner of the Station used the Former Placement Area as a temporary storage area before the ash was transported offsite. Ex. 1, Hearing Ex. 18D, p. 6. While MWG asserted that the CCR was not "waste", the Board specifically found that the coal ash at the Stations was "coal combustion waste" as defined in 415 ILCS 5/3.140. *Id.* at pp. 87-88. (Board stated that while MWG may send some coal ash to be used beneficially by third parties, that is not the case for historic areas).

21. Section 21(r) of the Act is specific to coal combustion waste ("CCW"), which the Board concluded was at issue in the historic areas (among other areas). As such, Section 21(r) is the provision that is applicable to the Former Placement Area, not Section 21(a) of the Act. "It is

…a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision…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).

22. Section 21(r) allows the storage or disposal of CCW outside of a permitted landfill. These are protections that the General Assembly intended for generators of CCW to have. *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶17. ("When construing a statute, [a] court's fundamental objective is to ascertain and give effect to the intent of the legislature.").

23. In this case, the prior owner conducted "a waste-storage…operation for wastes generated by" its own activities, and "stored" the waste "within the site where such wastes are generated." Section 21(d) allowed the prior owner to do so without a permit, and under the plain text of Section 21(r), this was an acceptable practice. To the extent that MWG can be said to have "allowed" the storage or disposal of CCW at the Former Placement Area (even though the record shows that it no longer contains coal ash), it was in compliance with Section 21(r) of the Act. Accordingly, because the CCW in the Former Placement Area is in compliance with the Act, any evidence of a remedy for those areas should be excluded.[5]

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order barring evidence relating to the need for, or remedy for, the Former Placement Area at the Will County Station.

Respectfully submitted,

Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

[5] MWG further reserves the right to claim that the other areas of historic ash are in compliance with Section 21(r) of the Act, and thus not in violation of the Act.

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

EXHIBIT 1

COMMONWEALTH EDISON COMPANY

PHASE II ENVIRONMENTAL SITE ASSESSMENT

Will County Generating Station
529 East Romeo Road
Romeoville, Illinois

ENSR
Consulting * Engineering * Remediation

December 1998
File Number 1801-023-710

2.0 INVESTIGATION METHODS

Prior to initiation of field investigations, a site reconnaissance was performed during the Phase I ESA to define the study area. Field investigation activities were subsequently conducted to obtain site specific information and data pertaining to site geology and hydrogeology, groundwater quality, soil properties, and potential contaminant source(s).

The sampling locations were recommended based on the preliminary Phase I ESA findings. A sampling location summary listing is presented in **Table 1**. A summary of the identified potential areas of concern is presented below.

1. **Ash Disposal Areas.** Three ash disposal areas are located on the southern portion of the facility. These areas are used to store ash prior to having it transported off-site. Two soil borings (B-1 and B-2) were advanced and one monitoring well (MW-1) was installed in the southeastern ash disposal area. Two soil borings were (B-3 and B-4) were advanced in the southwestern ash disposal area. One surface soil sample (S-1) was collected in the western ash disposal area by the Ash Settling Ponds.

2. **Stormwater Runoff Ponds.** There are 3 ponds at the facility which collect surface stormwater runoff. The ponds are located to the south of the main building and construction offices. One sediment sample (X-6) was collected from the pond located to the southwest of the construction offices. One sediment sample (X-7) was collected from the pond located to the south of the construction offices. One sediment sample (X-13) was collected from the pond located to the west of the construction offices.

3. **Ash Settling Ponds.** There are 4 ponds at the facility which are used to collect ash wastewater. The ponds are located on the western portion of the facility. One sediment sample (X-3) was collected from the southern pond, and one sediment sample (X-4) was collected from the pond directly north of the southern pond. In addition, one soil boring (B-5) was advanced and one monitoring well (MW-2) was installed between these two southern ponds. One sediment sample (X-5) was collected from the northern pond. One sediment sample (X-8) was collected from the pond located to the north of the Sluice Water Pump Building.

4. **Former Sulfur Dioxide Scrubber Ponds.** A former sulfur dioxide scrubber system was previously located in the southwestern corner of the facility. Two ponds associated with this former system are located to the south of the Ash Settling Ponds. One sediment sample (X-1) was collected from the western pond, and one sediment sample (X-2) was collected from the eastern pond.

5. **Sluice Water Pumping Area.** A Sluice Water Pump Building and Sluice Water Retention Pond, which are used to recycle sluice water back into the system, are located to the north of the southern Ash Settling Ponds. One surface soil sample (S-24) was collected on the west side of the building, and one sediment sample (X-14) was collected

Table 5
Groundwater Sampling
Groundwater Analytical Results in Milligrams per Liter (mg/l)
Commonwealth Edison Company - Will County Generating Station
529 East Romeo Road
Romeoville, Illinois

Sample I.D. / Lab I.D. / Sample Date	MW-1 (B-2) 499952 10/26/98	MW-2 (B-5) 499953 10/26/98	MW-3 (B-8) 499954 10/26/98	MW-4 (B-13) 499955 10/26/98	MW-5 (B-10) 499956 10/26/98	IEPA Groundwater (Class I) Cleanup Objectives
Parameters						
BTEX						
Benzene	< 0.001	< 0.001	< 0.001	< 0.001	**0.031**	**0.005**
Toluene	< 0.001	< 0.001	< 0.001	< 0.001	0.037	**1.0**
Ethyl Benzene	< 0.001	< 0.001	< 0.001	< 0.001	0.066	**0.7**
Total Xylenes	< 0.001	< 0.001	0.0016	< 0.001	0.058	**10.0**
PNAs						
Acenaphthene	< 0.0005	< 0.0005	< 0.0005	< 0.0005	< 0.051	**0.42**
Acenaphthylene	< 0.0005	< 0.0005	< 0.0005	< 0.0005	< 0.0020	**NA[1]**
Anthracene	< 0.0005	< 0.0005	< 0.0013	< 0.0005	< 0.17	**2.1**
Benzo(a)anthracene	< 0.00013	< 0.00013	< 0.00013	< 0.00013	**< 0.020**	**0.00013**
Benzo(a)pyrene	< 0.00023	< 0.00023	< 0.00023	< 0.00023	< 0.00023	**0.0002**
Benzo(b)fluoranthene	< 0.00018	< 0.00018	< 0.00018	< 0.00018	**< 0.0022**	**0.00018**
Benzo(g,h,i)perylene	< 0.00076	< 0.00076	< 0.00076	< 0.00076	< 0.00076	**NA**
Benzo(k)fluoranthene	< 0.00017	< 0.00017	< 0.00017	< 0.00017	< 0.00017	**0.00017**
Chrysene	< 0.0005	< 0.0005	< 0.0005	< 0.0005	**< 0.013**	**0.0015**
Dibenzo(a,h)anthracene	< 0.00030	< 0.00030	< 0.00030	< 0.00030	< 0.00030	**0.0003**
Fluoranthene	< 0.0005	< 0.0005	< 0.00087	< 0.0005	< 0.17	**0.28**
Fluorene	< 0.0005	< 0.0005	< 0.0005	< 0.0005	0.19	**0.28**
Indeno(1,2,3-c,d)pyrene	< 0.00043	< 0.00043	< 0.00043	< 0.00043	< 0.00043	**0.00043**
Naphthalene	< 0.0005	< 0.0005	< 0.0020	< 0.0005	**0.46**	**0.025**
Phenanthrene	< 0.0010	< 0.0010	< 0.0010	< 0.0010	< 0.30	**NA**
Pyrene	< 0.0005	< 0.0005	< 0.0005	< 0.0005	**< 0.28**	**0.21**
RCRA Metals						
Arsenic	< 0.0050	0.0054	< 0.0050	< 0.0050	< 0.0050	**0.05**
Barium	0.059	0.379	0.137	0.069	0.157	**2.0**
Cadmium	**< 0.010**	**< 0.010**	**< 0.010**	**< 0.010**	**< 0.010**	**0.005**
Chromium	< 0.040	< 0.040	< 0.040	< 0.040	< 0.040	**0.1**
Lead	< 0.0050	**0.0148**	< 0.0050	< 0.0050	< 0.0050	**0.0075**
Mercury	< 0.0002	< 0.0002	< 0.0002	< 0.0002	< 0.0002	**0.002**
Selenium	< 0.0050	< 0.0050	< 0.0050	0.0102	< 0.0050	**0.05**
Silver	< 0.040	< 0.040	< 0.040	< 0.040	< 0.040	**0.05**
Total PCBs	< 0.0005	< 0.0005	< 0.0005	< 0.0005	< 0.0005	**0.0005**
pH	6.87	7.80	7.09	7.34	6.62	**NA**
Specific Conductivity (mol)	150.7	96.0	0.235	103.1	144.4	**NA**
Temperature (C)	18.3	19.4	17.2	18.3	20.0	**NA**

Notes:
Cleanup objectives were derived from Illinois Environmental Protection Agency Section 742 Appendix B-Table E: Tier 1 Groundwater Remediation Objectives for the Groundwater Component of the Groundwater Ingestion Route.

[1] NA indicates not applicable, cleanup objectives have not been established for these parameters.

r:\chicago\project\h171\comed\fossil\willcounty\table(groundwater).xls

MWG13-15_5736

EXHIBIT 2

ILLINOIS POLLUTION CONTROL BOARD
August 31, 2017

SIERRA CLUB, ENVIRONMENTAL LAW & POLICY CENTER, PRAIRIE RIVERS NETWORK AND CITIZENS AGAINST RUINING THE ENVIRONMENT,	)	No. PCB 13-15
Complainants,	)	
vs	)	
MIDWEST GENERATION, LLC,	)	
Respondent.	)	

REPORT OF THE PROCEEDINGS had at the hearing on a motion of the above-entitled cause before the Honorable BRADLEY HALLORAN, Hearing Officer of said Court, Room 9-040, The Thompson Center, Chicago, Illinois, on the 31st day of January, 2018, at the hour of 9:00 a.m.

Waukegan?

A. I arrived late in 2012. I've been there since then.

Q. And did you work at a Midwest Generation station before then?

A. Yes, I worked at Will County station between December of '99 to when I went to Waukegan.

Q. And what was your position at Will County?

A. I was a chemistry systems specialist there.

Q. What did you do when you were at Will County?

A. I -- I was the -- I was the certified wastewater operator. I also handled the process chemistry and the water treatment area.

Q. I'm going to put the aerial of Waukegan station on the screen, please. Do you recognize what is shown on the screen?

A. Yes, that's an aerial of Waukegan station.

Q. And, to your knowledge, can you generally describe the area around the Waukegan

Q. When it was one north receiving water, was it receiving ash?

A. No, it was not.

MS. GALE: I didn't think we'd get this far. Can we go off the record for just a moment?

(Whereupon, a break was taken after which the following proceedings were had.)

HEARING OFFICER HALLORAN: We're back on the record.

BY MS. GALE:

Q. When you were at Will County, had you ever heard of a slag dumping area?

A. No.

Q. Okay. Can you please look at Exhibit 18-D, look at page 5739. Are you there?

A. Yes.

Q. In the center of this map next to the switch yard, when you were at Will County, was that a slag dumping area?

A. No, it was not.

Q. What was in that area?

A. Gravel. It was just a way -- piping

was there, but there was some gravel between the road and the switch yard.

Q. Was there a pathway or mechanism for ash to get to that area?

A. No.

Q. Okay. Staying on the same page. When you were at Will County, had you ever heard of a slag and bottom ash dumping area?

A. No.

Q. Looking at the same page on the bottom right of the map at the southeast corner of the property, when you were at Will County, was that a slag and bottom ash dumping area?

A. No.

Q. What was in that area?

A. It was an open field. It was away from the primary processes of the plant. It was basically a road where the ash trucks went by and went to the ash site.

Q. And was there a pathway or mechanism for ash to get to that area?

A. No.

Q. You can put that down. Thank you. When you were at Will County, was deicing material

EXHIBIT 3

Expert Report of John Seymour, P.E.

I have prepared this Expert Report on behalf of Midwest Generation, LLC (MWG) to present my opinions and to address the two expert reports issued by M. James R. Kunkel in the Matter of:

SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT
Complainants,
v
MIDWEST GENERATION, LLC,
Respondent
PCB 2013-0015

Section 1: INTRODUCTION

1.1. Background

Since 1999, MWG has operated four electric generating stations at issue in this matter: the Joliet #29 Generating Station ("Joliet #29") located in Joliet, Will County, Illinois; the Powerton Generating Station ("Powerton") located in Pekin, Tazewell County, Illinois; the Waukegan Generating Station ("Waukegan") located in Waukegan, Lake County, Illinois; and the Will County Generating Station ("Will County") located in Romeoville, Will County, Illinois. Prior to 1999, the stations were operated by other entities and pre-1999 documents identify historic areas where ash was placed.[1]

Each of the generating stations includes active ash ponds as an integral part of the generating stations' wastewater treatment systems (MWG Facility NPDES Permits).[2] All of the ash ponds are permitted pursuant to MWG's NPDES permits (IL0064254, IL0002232, IL0002259, and IL0002208) and operate pursuant to the limits, terms, and conditions of the permits. All of the active ash ponds at the MWG facilities are fully lined with 60 mil-thick high density polyethylene (HDPE) liners.

In 2010, MWG voluntarily agreed to Illinois EPA's request to perform hydrogeological assessments around the ash ponds at its generating stations.[3] On June 11, 2012, based on the results of the hydrogeological assessments, Illinois EPA issued Violation Notices (VN) to MWG alleging violations of

[1] MWG13-15_8502-8536, MWG13-15_11966-12040, MWG13-15_29502-29532, MWG13-15_25139-25167
[2] MWG's Answer and Defenses to Second Complaint, Answers to Complaint ¶¶1, 3, 5, 7
[3] MWG13-15_364; MWG13-15_384; MWG13-15_407; MWG13-15_421

EXHIBIT
tabbies MWG 903

quarterly groundwater monitoring in 2014 were all below IEPA Class I groundwater standards, indicating no impacts of selenium or chromium. Thus, it is my opinion based on this analysis, that leachate from historical ash in fill materials at Powerton is not adversely impacting the groundwater.

5.7.2.3. Will County Investigation

On behalf of MWG, KPRG performed an investigation in June and August 2015 of historical ash in fill materials at Will County.[146] This investigation included the collection of 20 historical ash samples from 20 soil borings at the Will County site. Historical ash samples were analyzed using a neutral leachable procedure (NLET) for metals. KPRG's report documented the following conclusions:

- "The ash deposits are consistent and homogenous consisting bottom ash/slag from the coal combustion process."
- "There were no outlier samples, and all samples collected were used in the calculations."
- "The NLET metals data from the 20 sample locations indicate with a high degree of statistical certainty that the criteria established in 415 ILCS 5/3.135 (formerly 415 ILCS 5/3.94) a-5(B) are met and that the material may be considered CCB relative to this criterion for engineering/beneficial reuse."
- "The data set is sufficiently large to support the statistical evaluations based on the variance and specific regulatory threshold relationships."

Thus, it is my opinion that leachate from historical ash in fill materials at Will County is not adversely impacting the groundwater.

5.8. Bottom Ash in Inactive Ponds is Not a Source of Groundwater Concentrations

Data obtained from recent samples of bottom ash accumulated in ash ponds from multiple sites show that leachate from the bottom ash meets IEPA Class I standards based on leaching from the pond environment (NLET) (see Section 5.5.1.1). Based on these data, it is reasonable to conclude that bottom ash accumulated in inactive ash ponds are not a source of groundwater concentrations.[147]

---

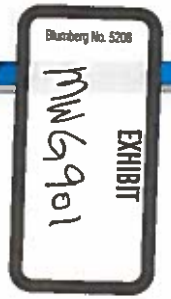
[146] KPRG, 2015

[147] The Will County inactive ash ponds 1N and 1S have been modified to prevent more than one foot of standing water. This pond modification will reduce the volume of potential leachate at the Will County inactive ash ponds.

EXHIBIT 4

Sierra Club Environmental, et al. v. Midwest Generation, LLC.

Respondent Expert John Seymour



Potential Leaching Characteristics of Historical Ash in Fill Materials

Generating station:	Joliet #29	Powerton	Will County
Sample Date:	July 2005 KPRG	May 2004 Andrews Engineering	June/August 2015 KPRG
Sample location:	15 soil borings from former ash placement area	8 ash samples from test pits in the Limestone Runoff Basin	20 soil borings at the Will County site
Findings:	-high degree of statistical certainty that the criteria established in 415 ILCS 5/3.135 (formerly 415 ILCS 5/3.94) a-5(B) are met and that the material may be considered CCB for engineering/ beneficial reuse	Metals were less than the IEPA Class I groundwater standards except selenium and chromium (2 wells); no impacts of selenium or chromium above groundwater standards	High degree of statistical certainty that the criteria established in 415 ILCS 5/3.135 (formerly 415 ILCS 5/3.94) a-5(B) are met and that the material may be considered CCB for engineering/ beneficial reuse
Sources:	MWG13-15_19486-668	MWG13-15_11302-492	MWG13-15_49565-649

EXHIBIT C

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 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
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

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC ("MWG"), submits this Motion *In Limine* requesting the Hearing Officer enter an order barring evidence relating to the need for a remedy, or remedy for the historic fill areas at the Joliet 29 Station because there is no evidence that the areas are a source of contamination and because Section 21(r) of the Illinois Environmental Protection Act ("Act") allows disposal of coal combustion waste that was generated by the site owner and disposed at the site.

In its 2019 Interim Order, the Illinois Pollution Control Board ("Board") found no wells were installed around the historic fill areas at Joliet 29 historic fill areas and the monitoring wells at the Station were unlikely to show any contamination from the areas. While the areas contain historic ash, there is no groundwater data to show that the areas are causing contamination. Because Complainants failed to develop evidence that the areas are a source, the Board should exclude evidence regarding the need for a remedy or remedy for the areas.

Additionally, the Board found that the ash in the historic fill areas was coal combustion *waste*, over MWG's objections. 2019 Order, p. 89. Pursuant to Section 21(r) of the Act, coal combustion *waste* may remain in place, further supporting the exclusion of evidence regarding the need for a remedy.

In support of its Motion, MWG states as follows:

A. Background

1. In October 2017 and continuing to January 2018, the parties participated in a lengthy and extensive hearing regarding Complainants' allegations that MWG violated the Illinois Environmental Protection Act ("Act").

2. On June 20, 2019, the Board entered an Interim Order and Opinion, which it reconsidered and revised on February 6, 2020. The Board found that the record lacked sufficient information to determine an appropriate remedy and directed the parties to proceed to hearing to determine the appropriate relief and whether a remedy is required, considering the Section 33(c) and 42(h) factors under the Act.

3. In its June 2019 Interim Order, the Board discussed three historic fill areas at the Joliet 29 Station "where coal ash was deposited before MWG began operating" – the Northeast Area, Northwest Area, and Southwest Area. Interim Order, pp. 26-28.

4. In discussing the three historic areas, the Board correctly found that "no monitoring wells are installed around any of these areas." Interim Order, p 26, para 3. Then, for each of the three historic areas, the Board found that the monitoring wells nearest to the historic fill areas are "unlikely to show conclusive results of any contaminants emanating from this historical area." See Interim Order, p. 27 (referring to the Northeast Area); p. 27, para. 1 (referring to the Southwest Area) and p. 28, para. 1 (referring to the Northwest Area).

5. Pursuant to the Board's Interim Order, the Parties engaged in additional discovery to develop information to determine the appropriate remedy. An additional approximately 60,000 pages of documents were exchanged, and eleven witnesses were deposed including six expert witnesses. The documents exchanged include annual inspections of the Northeast Area, including photographs, which show no release or discharge of material from the area. Also, the record shows that ash in the Northwest Area was removed in 2005 shortly after the material was analyzed. Hearing Ex. 903, p. 47 (MWG's Expert Report) ("Approximately 1,068 tons of fill material containing historical ash was excavated and disposed off-site at a landfill during the week of November 21, 2005") citing KPRG and Associates Inc. Coal Ash and Slag Removal - Joliet Station #29 Report, December 6, 2005, excerpt attached here as Ex. 1.

6. Despite being allowed under Illinois Supreme Court Rule 214, Complainants did not conduct any investigation of the historic fill areas at Joliet 29 during discovery to determine whether they were a source of groundwater contamination. Il. S. C. R. 214(a) (a party may have access "to real estate for the purpose of making surface or subsurface inspections…").

B. There is no Evidence to Support the Need for a Remedy for the Historic Fill Areas at Joliet 29

7. It is the Complainants' duty and responsibility to prove their case. *Northern Illinois Anglers' Assoc. v. Kankakee Water Co., Inc.*, PCB 81-127, 1981 WL 21931 (September 24, 1981), *1. Here, Complainants made no attempt to prove that the historic fill areas are causing contamination, and it is certainly not MWG's duty to disprove the allegations.

8. Because there is no evidence that shows the historic fill areas are a source, a remedy should not be considered. In fact, samples of historic ash from the Northwest Area at Joliet 29 showed that the leachate from historical ash in fill materials is not adversely impacting the groundwater. Ex. 1, Hearing Ex. 903, pp. 46-47. The leaching data found nothing in the historic

ash was above the groundwater Class I quality criteria. MWG Ex. 901, p. 9, excerpt attached as Ex. 2. In its 2019 Interim Order, the Board agreed that the coal ash at each of the MWG Stations possessed similar constituents. Interim Order, p. 20. Here, the record contains samples from one of the historic coal ash areas at Joliet 29. In short, there is no evidence that the historic areas are a potential source of contamination, and the totality of the evidence demonstrates that they are not.

9. Complainants cannot assert that MWG either should have sampled or should be required to sample these areas as part of an investigation.[1] To date, there has been no regulatory requirement to sample and no Illinois EPA order. A party is not required to simply investigate its property when there is no apparent reason or requirement to do so. Similarly, a party cannot be forced to develop evidence to *disprove* allegations against them. If so, then all litigation would be turned on its head. A complainant would be able to make blind factual statements, without any proof or support, that a certain area is a source of contamination, and demand the respondent investigate and present proof to deny or disprove the alleged facts. That is simply not how environmental enforcement in Illinois works. For instance, when Illinois EPA suspects a site might be a source of environmental contamination but there is no evidence, it does not rush to the Board or a Court to force the owner/operator conduct an investigation. Instead, it conducts an investigation, prepares a report, and if its investigation results in evidence that there is contamination, the Illinois EPA pursues enforcement.[2] That the Agency gets its authority to

[1] The pending regulations in PCB20-19 Subdocket A may ultimately require MWG to investigate the historic fill areas to confirm that they are not a source of contamination. If the Board passes the regulations, then MWG will comply.

[2] For example, in *N.Ill. Serv. Co. v. Ill. EPA*, 2016 IL App (2d) 150172 (2nd Dist. 2916), Illinois EPA conducted an inspection, and pursued enforcement against the owner following the inspection. Similarly, in *People of the State of Illinois v. D'Angelo Enterprises, Inc.*, PCB97-66, 2002 Ill.ENV LEXIS 533, the Illinois EPA conducted an inspection of a facility that contained waste, and prepared an inspection report identifying alleged violations of the Act. *18-19. Relying upon the results of the inspection, the People of the State of Illinois brought an enforcement action. *Id.**4. *See also James Reichert Ltd. Family P'ship v. Ill. Pollution Control Bd.*, 2018 IL App (5th) 160533-U, (published under Rule 23(e)) (Illinois EPA conducted an inspection of a property following review of overhead satellite image of site that showed potential violations, and pursued enforcement following the inspection.)

conduct the investigations under Section 4(d) of the Act makes no difference. 415 ILCS 5/4(d). Here, Illinois Supreme Court Rule 214 allows a private party in litigation to enter and even sample property to present evidence to prove their allegations.

10. In fact, in this case, the Agency *asked* MWG to voluntarily undertake sampling at its Stations, specifically identifying the CCR impoundments (and not the known ash fill areas)[3] as possible sources. MWG elected to voluntarily perform that sampling, which resulted in the violation notices that started this case.

11. Complainants cannot be allowed to put the cart before the horse. Just as it is Complainants' burden to prove the liability portion of their case, it is similarly their burden to prove that a remedy is required. The Board's finding that MWG "allowed" groundwater contamination at its Stations does not equate to forcing a remedy in those locations where there is no proof of a source.[4]

12. Without evidence that the three historic areas are a source, any evidence of the purported need for a remedy for those areas should be excluded. Complainants cannot be permitted to demand that a respondent must go out and find the evidence (that Complainants should have presented) that might, or might not, lead to a remedy.

C. Section 21(r) of the Act Allows Disposal of Coal Combustion Waste Onsite Negating Any Remedy Requirement

13. Subsection 21(r) of the Act, coupled with Section 21(d), allows disposal of coal combustion waste on a person's property that was generated by a person's own activities. Thus, no remedy is required.

[3] The northeast area at Joliet 29 is a part of the Joliet 29 NPDES stormwater permit, and pursuant to that permit MWG ensures that the area is covered. 1/29/18 Tr. 183:17-21 (Testimony of Race), attached as Ex. 3.
[4]. *See* MWG's Response to Complainants' Post-Hearing Brief (Aug. 30, 2018), p. 9 and MWG's Memorandum in Support of its Motion to Reconsider (Sept. 9, 2019), p. 25.

14. Subsection 21(r) states, in relevant part:

No person shall:

* * *

(r) Cause or allow the storage or disposal of coal combustion waste unless:

(1) such waste is stored or disposed of at a site or facility for which a permit has been obtained or is not otherwise required under subsection (d) of this Section; (emphasis added)
415 ILCS 5/21(r)(1)

15. Subsection 21(d) of the Act, as referenced in Section 21(r) above, states, in relevant part:

No person shall:

* * *

(d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

(1) without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, that, except for municipal solid waste landfill units that receive waste on or after October 9, 1993, no permit shall be required for (i) any person conducting a waste-storage, waste-treatment, or waste-disposal operation 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) (emphasis added).

16. The Board found that the coal ash in the historic fill areas was deposited before MWG began operating the Joliet 29 Station. Interim Order, p. 26. The ash in the historic fill areas was deposited by the former owner of the Station from its coal-fired power generation at the Station.[5] Hearing Ex. 21, p. 2-4, excerpt attached as Exhibit 4.[6] While MWG asserted that the CCR was not "waste", the Board specifically found that the coal ash at the Stations was "coal

[5] The historic coal ash was reportedly from Joliet 9, which Illinois EPA regards as the same station. For instance, IEPA issues permits for the "Joliet Generating Station", covering three boilers, two located at Joliet 29 and one located at Joliet 9. See Illinois EPA's Document Explorer, Illinois EPA Permit I.D. No.: 197809AAO, Issued July 9, 2020 and located at https://external.epa.illinois.gov/DocumentExplorer/Documents/Index/170000162525,

[6] The Hearing Officer entered Exhibit 21 over MWG's objection. 10/23/2017 Tr., p. 124:10-13, 126:6-14. MWG continues to object to the admission of the ENSR reports.

combustion waste" as defined in 415 ILCS 5/3.140. *Id.* at pp. 87-88. (Board stated that while MWG may send some coal ash to be used beneficially by third parties, that is not the case for historic areas).

17. Section 21(r) of the Act is specific to coal combustion waste ("CCW"), which the Board concluded was at issue in the historic areas (among other areas). As such, Section 21(r) is the provision that is applicable to the historic fill areas at Joliet 29, not Section 21(a) of the Act. "It is…a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision…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).

18. Section 21(r) allows the storage or disposal of CCW outside of a permitted landfill. These are protections that the General Assembly intended for generators of CCW to have. *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶17. ("When construing a statute, [a] court's fundamental objective is to ascertain and give effect to the intent of the legislature.").

19. In this case, the prior owner conducted "a waste-storage…or waste disposal operation for wastes generated by" its own activities, and "stored [or] disposed]" the waste "within the site where such wastes are generated." 415 ILCS 5/21(d). Section 21(d) allowed the prior owner to do so without a permit, and under the plain text of Section 21(r), this was an acceptable practice. To the extent that MWG can be said to have "allowed" the storage or disposal of CCW at the historic fill areas at Joliet 29, the CCW was in compliance with Section 21(r) of the Act. Accordingly, because the CCW in the historic fill areas are in compliance with the Act, any evidence of a remedy for those areas should be excluded.[7]

[7] MWG further reserves the right to claim that other areas of historic ash at its Stations are in compliance with Section 21(r) of the Act, and thus that there is no basis for a remedy.

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order barring evidence relating to the need for a remedy, or remedy for, the historic fill areas at the Joliet 29 Station.

Respectfully submitted,

Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

EXHIBIT 1

Expert Report of John Seymour, P.E.

I have prepared this Expert Report on behalf of Midwest Generation, LLC (MWG) to present my opinions and to address the two expert reports issued by M. James R. Kunkel in the Matter of:

SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT
Complainants,
v
MIDWEST GENERATION, LLC,
Respondent
PCB 2013-0015

Section 1: INTRODUCTION

1.1. Background

Since 1999, MWG has operated four electric generating stations at issue in this matter: the Joliet #29 Generating Station ("Joliet #29") located in Joliet, Will County, Illinois; the Powerton Generating Station ("Powerton") located in Pekin, Tazewell County, Illinois; the Waukegan Generating Station ("Waukegan") located in Waukegan, Lake County, Illinois; and the Will County Generating Station ("Will County") located in Romeoville, Will County, Illinois. Prior to 1999, the stations were operated by other entities and pre-1999 documents identify historic areas where ash was placed.[1]

Each of the generating stations includes active ash ponds as an integral part of the generating stations' wastewater treatment systems (MWG Facility NPDES Permits).[2] All of the ash ponds are permitted pursuant to MWG's NPDES permits (IL0064254, IL0002232, IL0002259, and IL0002208) and operate pursuant to the limits, terms, and conditions of the permits. All of the active ash ponds at the MWG facilities are fully lined with 60 mil-thick high density polyethylene (HDPE) liners.

In 2010, MWG voluntarily agreed to Illinois EPA's request to perform hydrogeological assessments around the ash ponds at its generating stations.[3] On June 11, 2012, based on the results of the hydrogeological assessments, Illinois EPA issued Violation Notices (VN) to MWG alleging violations of

[1] MWG13-15_8502-8536, MWG13-15_11966-12040, MWG13-15_29502-29532, MWG13-15_25139-25167
[2] MWG's Answer and Defenses to Second Complaint, Answers to Complaint ¶¶1, 3, 5, 7
[3] MWG13-15_364; MWG13-15_384; MWG13-15_407; MWG13-15_421

EXHIBIT
tabbies MWG 903

conditions of the existing weathered ash are not contributing to groundwater exceedances at the four sites based on leaching analyses of actual ash fill at the sites.

5.7.1. Coal Ash may be Classified as Coal Combustion Byproducts to Allow Beneficial Use

Structural fill and import fill ("fill") at the sites was placed historically, as long as 38 years ago. Ash generated by coal combustion may be classified as CCB when there is beneficial use determined by IEPA as established in 415 Illinois Compiled Statutes 5/3.135. Although the current IEPA criteria were not applicable when the CCB was placed, it is analogous to compare the current condition of CCB to the current IEPA criteria. Additionally, the design and construction of coal ash structural fills is a standard practice, and procedures for using coal combustion products, including fly ash, bottom ash, and boiler slag, to achieve desired geotechnical properties are described in ASTM E2277-14 (2014). In my opinion, the presence of CCB outside of the pond areas is considered an acceptable use when compared to Illinois requirements and the standard ASTM practice.

5.7.2. Investigations of Potential Leaching Characteristics of Historical Ash in Fill Materials at Sites

Data obtained from recent samples of ash used as fill from multiple sites show that leachate from the ash in its current condition meets IEPA Class I standards based on leaching from a soil-like environment (NLET method). These data were obtained during a 2004 investigation at Powerton, a 2005 investigation at Joliet #29, and a 2015 investigation at Will County, as discussed further below. Based on these data, it is reasonable to conclude that historical ash areas at all four MWG sites are not a source of groundwater impacts. Significantly, there is no evidence to conclude, as Kunkel does, that the ash areas are a source.

5.7.2.1. Joliet #29 Investigation

On behalf of Midwest Generation, in June 2005 KPRG performed an investigation of historical ash in fill materials at the Joliet #29 site. This investigation included the collection of historical ash samples from 15 soil borings at the Joliet #29 site. Historical ash samples were analyzed using a neutral leachable procedure (NLET) for metals. KPRG's report found the following conclusions:[141]

- "The ash deposits are consistent and homogenous consisting of interlayered fly ash and bottom ash/slag from the coal combustion process."

[141] KPRG, 2005a

- "The NLET metals data from sample location GP-14A displayed elevated levels of lead and copper at concentrations at least two times higher than the Class I groundwater standard." This area was later further delineated and excavated (see below).
- "The NLET metals data from the remaining 16 sample locations indicate with a high degree of statistical certainty that the criteria established in 415 ILCS 5/3.135 (formerly 415 ILCS 5/3.94) a-5(B) are met and that the material may be considered CCB relative to this criterion...."[142]

A supplemental investigation was performed in the vicinity of GP-14A in November 2005. Eight additional historical ash samples were collected from soil borings and analyzed using NLET for metals. The June 2005 and November 2005 samples were used to delineate the extent of excavation in the vicinity of GP-14A. Approximately 1,062.88 tons of fill material containing historical ash was excavated and disposed off-site at a landfill during the week of November 21, 2005. The excavation was backfilled using surficial materials near the excavation area. Following the excavation, the historic ash in the area met the CCB criteria under 415 ILCS 5/3.135.[143]

Thus, it is my opinion that leachate from historical ash in fill materials at Joliet #29 is not adversely impacting the groundwater.

5.7.2.2. Powerton Investigation

On behalf of MWG, Andrews Environmental Engineering, Inc. (AEEI) performed an investigation in May 2004 of historical ash in fill materials at Powerton[144]. A total of eight historical ash samples were collected from test pits in the Limestone Runoff Basin. Samples were analyzed for NLET metals using ASTM D3987-85. Selenium was detected in two NLET samples and chromium was detected in one NLET sample at concentrations greater than the IEPA Class I groundwater standards. All other metals in the NLET results from the eight ash samples were less than the IEPA Class I groundwater standards.

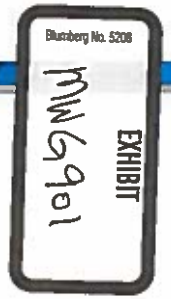
I reviewed selenium and chromium concentrations in groundwater at Powerton, and only selenium was detected at one location (MW-14) above IEPA Class I groundwater standards during the period of record.[145] Groundwater concentrations measured during the most recent full year of

[142] Of the remaining 16 sample locations, 14 sample locations were located at Joliet #29.
[143] KPRG, 2005c
[144] AEEI, 2004
[145] MWG13-15_48711-48843

EXHIBIT 2

Sierra Club Environmental, et al. v. Midwest Generation, LLC.

Respondent Expert John Seymour



Potential Leaching Characteristics of Historical Ash in Fill Materials

Generating station:	Joliet #29	Powerton	Will County
Sample Date:	July 2005 KPRG	May 2004 Andrews Engineering	June/August 2015 KPRG
Sample location:	15 soil borings from former ash placement area	8 ash samples from test pits in the Limestone Runoff Basin	20 soil borings at the Will County site
Findings:	-high degree of statistical certainty that the criteria established in 415 ILCS 5/3.135 (formerly 415 ILCS 5/3.94) a-5(B) are met and that the material may be considered CCB for engineering/ beneficial reuse	Metals were less than the IEPA Class I groundwater standards except selenium and chromium (2 wells); no impacts of selenium or chromium above groundwater standards	High degree of statistical certainty that the criteria established in 415 ILCS 5/3.135 (formerly 415 ILCS 5/3.94) a-5(B) are met and that the material may be considered CCB for engineering/ beneficial reuse
Sources:	MWG13-15_19486-668	MWG13-15_11302-492	MWG13-15_49565-649

EXHIBIT 3

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,	)	
	)	
Complainants,	)	
	)	
-vs-	)	PCB No. 2013-015
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	
	)	

REPORT OF PROCEEDINGS, at the Hearing of the above-entitled matter held at the James R. Thompson Center, 100 West Randolph Street, Suite 9-040, Chicago, Illinois, on the 29th day of January, 2018, commencing at the hour of 9:00 a.m.

HEARING OFFICER:

Mr. Bradley P. Halloran
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601
(312) 814-8917
brad.halloran@illinois.gov

Reported by: Pamela L. Cosentino, CSR
License No.: 084-003601

A. Thank you. This is much easier for my old eyes.

It says -- do you mean the area to the north and the east?

Q. Yes, the two areas that have red font.

A. Oh, okay. Alleged former ash placement area.

Q. Okay. Do you have some general familiarity with those areas at the Joliet 29 plant?

A. Yes, I do.

Q. What do those two areas refer to?

A. Well, in the ENSR surveys that were done at the time of the sale to Midwest Generation, those were the labels that were put on those two areas or something along those lines.

Q. And what do they generally refer to as having occurred in those areas, do you know?

A. Well, I know that for the northern area, the northeastern area, that there is ash placed there, and the reason I know that is because it was in the NPDS permit that we need to, as part of our storm water plan, ensure that that area stays covered.

Q. Do you know anything about the other area?

A. No, I don't.

Q. Did Midwest Gen put any ash into either of

EXHIBIT 4

Commonwealth Edison Company

Chicago, Illinois

ENSR®

Phase I Environmental Site Assessment of Commonwealth Edison Joliet #29 Generating Station 1800 Channahon Road Joliet, Illinois.

ENSR Consulting - Engineering - Remediation

October 1998

Document Number 1801-023-400

storage pile. An abandoned rail switchtrack extends onto the property from the northwest and continues east across the property immediately north of the main building. Between the switchtrack and the coal pile is the main equipment storage building and a 21,000-gallon diesel fuel aboveground storage tank (AST). Northwest of the main building are the sewage treatment building, the coal handling building, the valve house, the fuel oil unloading building, and beyond the buildings is an abandoned 950,000-gallon fuel oil AST.

On the north side of the main building are the induced draft fan units and the two main chimneys. Beyond the fan units are the central storage building and the main power switchyard. Note that for the purpose of this report, the switchyard is not considered part of the subject property. Rather, it is considered an adjacent site. Equipment and materials used on site are unloaded and stored at the storage building.

Asphalt-paved employee and visitor parking areas are located east of the main building. A small training building is located on the east side of the main building across the parking area. Further east are the ash-handling ponds, the fly ash silos, an abandoned wastewater treatment facility, and the roof and yard runoff basin.

2.3 Topography, Hydrology, and Geology

The subject property is relatively flat with a slight slope to the south. The topographic elevation is approximately 520 feet above mean sea level, according to the USGS Channahon, Illinois Quadrangle 7.5-Minute Series topographic map.

According to the USDA SCS Soil Survey for Will County, Illinois, the soils on the subject property consist mostly of silty loam. The inferred depth to groundwater is between 15 feet and 60 feet below grade surface (bgs). The regional groundwater is expected to flow toward the Des Plaines River adjacent to the south side of the subject property.

2.4 Site History

Historical information for the subject site is based on a review of building department records, tax assessors records, zoning and planning files, aerial photographs, topographic quadrangle maps, city directories, ComEd files, and interviews from site personnel and local government officials. Sanborn Fire Insurance maps were not available for the subject property vicinity. Based upon the lack of available standard historical reference sources, ENSR was unable to track the history of the subject property prior to 1965.

According to ComEd, the site was used for coal ash disposal by the Joliet # 9 station prior to the construction of Joliet # 29 in 1964-1965. Coal ash was primarily disposed in a landfill on the eastern portion of the site. A second abandoned ash disposal landfill lies on the southwest portion of the site between the coal pile and the Caterpillar, Inc. site. A topographic map dated 1954 and

EXHIBIT D

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, ENVIRONMENTALLAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	**PCB 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS MOTIONS *IN LIMINE* TO EXCLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS

MWG is not attempting to "relitigate" the Illinois Pollution Control Board's ("Board") liability opinion through its motions. Instead, MWG's motions *in limine* for certain historic areas at the Joliet 29 Station, Powerton Station, and Will County Station are based upon the fact that the Board found in its Interim Order that specific areas at these Stations were not sources of groundwater impact, or that Complainants had not demonstrated that the areas were a source. If a specific area is not established as a source, a remedy is not necessary in that area. Moreover, Complainants incorrectly assert that the Board's Interim Orders require that a remedy be imposed. Instead, the Board ordered a hearing to determine if a remedy is needed. The Board has a history of finding liability against a respondent, and yet also holding that no remedy or penalty was required.

A key purpose of this Reply, however, is to address Complainants' incorrect assertion that Section 21(r) of the Illinois Environmental Protection Act has no application in the remedy phase of this case *in combination with the fact that the Board found the areas do not constitute a source*. MWG maintains that pursuant to 21(r), when coal combustion waste ("CCW") was deposited in

certain areas in the past, it was allowed to be deposited and to remain in place. Complainants' attempt to limit Section 21(r) to small quantities is incorrect as applied to CCW. The legislative history of 21(r) and 21(d)(1) demonstrates that the General Assembly intended to allow CCW to remain in place in large quantities. MWG simply asks that the Board properly consider Section 21(r), along with its factual findings about the specified historic areas, to exclude those areas from requiring a remedy.

MWG notes that Complainants' Response fails to include page numbers, in violation of Board rules, and making citations to the Response difficult. If MWG mistakenly refers to an incorrect page of the Response, MWG asks that the Board require Complainants to refile their Response with page numbers included so there is no confusion going forward.[1]

A. A Finding of Liability Does Not Mandate a Remedy

Contrary to Complainants' claim that a remedy must be imposed, in its Interim Order, the Board does not mandate a remedy for every issue identified by the Board, but states the parties should proceed to hearing to "determine the appropriate relief *and any remedy*." (Int. Order, 6/20/19 p. 93, emph. added). The Board has, in other cases, found a party liable and yet still did not require a remedy or even a penalty. In *People of the State of Illinois v. CSX Transportation, Inc.*, PCB 07-16 (July 12, 2007), the Board found that CSX Transportation violated the Act, yet found that no penalty nor remedy was required. *Id*. at 19. Similarly, in *Union v. Caterpillar*, PCB 94-240 (Aug. 1, 1996), the Board found that Caterpillar violated the Act, and also found that no penalty or remedy was warranted. *Id*. at 30. *See also Shelton v. Crown*, PCB96-53 (Oct. 2, 1997) (Board found respondents violated the Act, but found no penalty was required). Here, simply

[1] Complainants' failure to follow the procedural rule – "All pages in the document sequentially numbered" is an additional unnecessary burden to MWG, the Hearing Officer, and the Board. 35 Ill. Adm. Code 101.302(g). Two of Complainants four Responses failed to include page numbers – this Response, and Complainants' Response to MWG's Motions to Exclude Quarles Opinion. The Hearing Officer could reject both documents on that basis alone.

because the Board found MWG liable under the Act does not automatically mean that the Board must also recommend a remedy, particularly when there is no identified source or no identified impact in certain specified areas.

B. Sections 21(r) and 21(d)(1), and their Legislative History, Shows that There was No Limitation on the Quantity of CCW Disposed

Complainants incorrectly suggest that case law limits the application of Section 21(d)(1)(i) to small quantities in all cases, including CCW, no matter the context. That is not correct, and Complainants cite to no cases that support their assertion as it relates to CCW.

The text of Section 21(d)(1)(i)[2] states that people need not have a permit to dispose of self-generated, nonhazardous wastes on the land where the wastes were generated. *See Pielet Bros. Trading, Inc. v. PCB*, 110 Ill. App. 3d 752, 755 (5th Dist. 1982) (describing this as "a literal reading of" Section 21(d), which at the time was codified as Section 21(e)). In 1975, the Board held that, if the Section 21(d)(1)(i) exception applies to *all* wastes in *any* quantity, then that exception is in such tension with the overall purposes of the Illinois Environmental Protection Act that a limit on quantity must be inserted into the law to avoid an absurd result. *EPA v. City of Pontiac*, 1975 Ill. ENV LEXIS 317, *7-*8 (PCB 1975)(concerning auto shredding waste). Under a deferential standard of review, Illinois appellate courts have affirmed the *Pontiac* holding. *E.g.*, *Pielet Bros. Trading, Inc.*, 110 Ill. App. 3d at 755. That is not the case, however, for CCW. The text of Sections 21(d)(1)(i) and 21(r)(1) *and* the General Assembly's demonstrated intentions regarding the disposal of self-generated CCW shows that there was no limitation on the volume of CCW disposed on site.[3]

[2] All citations to Section 21(r)(1), unless otherwise noted, refer to that provision as it existed in 2018. In 2019, application of the language (as to CCR surface impoundments) changed (see *Infra*, p. 7).

[3] The Board may, under 21(r), determine that it does not have subject matter jurisdiction to issue a remedy concerning the areas at issue in MWG's motions *in limine* because the CCW was disposed pursuant to 21(r), is not a source, and thus may remain in place.

1. Public Act 86-364, Codified as 21(r), Contradicts the Quantity Limitation for CCW

There was one case, *before* the enactment of 21(r)(1), that applied the *Pontiac* holding to coal ash: *People v Commonwealth Edison Company.* 1976 Ill. ENV LEXIS 273, *9 (Nov. 10, 1976). That decision predates the enactment of Section 21(r)(1) by over a decade. Indeed, by enacting 21(r)(1) *after* the *ComEd* decision, the Illinois General Assembly evidently sought to legislatively overrule the *ComEd* decision. *See Public Act* 86-0364 (eff. Jan. 1, 1990, and codified at 415 ILCS 5/21(r).[4] This is plain from the text of Section 21(r)(1) which notes that under the stated conditions, deposited CCW does not require a permit. 415 ILCS 5/21(r)(1) (stating that a person is not prohibited from "caus[ing] or allow[ing] the . . . disposal of coal combustion waste" if "such waste is . . . disposed of at a site or facility for which a permit . . . is not . . . required under subsection (d) of this Section"). It cross-references to Section 21(d), whose plain language says that a permit is not required for self-generated waste. There are no other permitting exceptions in 21(d)—either as it existed in 1989 or as it exists today—that Section 21(r)(1) could be referring to.[5]

Sections 21(r)(1) and 21(d)(1)(i) accomplish the Assembly's overarching purpose in passing Public Act 86-346, which was to allow CCW to remain in place. Section 21(r)(1) was the product of lobbying by the Illinois Coal Association and the United Mine Workers. 86th Ill. Gen. Assem.,

[4] As initially passed, this was labelled Section 21(s)—and codified at Ch. 111 ½, par. 1021(s). It was renamed to Section 21(r) in 1991. Public Act 87-752 (eff. Sept. 6 1991). The 2018 version of Section 21(r)(1) is identical to how Section 21(s) appeared in 1989. Public Act 86-364.

[5] In 1987 (when 21(r) was enacted), the language of Section 21(d) read:

> No person shall…Conduct any waste-storage, waste-treatment, or waste disposal operation… without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, *that no permit shall be required for any person conducting a waste-storage, waste-treatment, or waste disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such waste are generated*…

1989, Ch. 111 ½, par. 1021(d)(1) (emphasis added). The differences between these versions are cosmetic.

Senate Proceedings, June 21, 1989, at 220 (statements of Senator Dunn), attached as Ex. 1. It becomes clear that the purpose was to allow coal ash to remain in place, especially as coal ash was being used consistently throughout the state for a variety of construction purposes, including roadbeds, and as fill. For example, the Melvin E. Amstutz Expressway in Waukegan used 246,000 cubic yards of fly ash as fill embankment for the four-lane highway. *See* Ex. 2 excerpt of USEPA's Development of Guidelines for Procurement of Highway Construction Products Containing Recovered Material, p. I-31. Similarly, other companies touted in advertisements in the early 1990's that they "recycled" coal ash "into the building of highways like Interstate 55 and the foundation of the Sears Tower." Ex. 3, excerpt of Chicago Tribune, Oct. 28, 1991, p. 13. This suggests that the General Assembly did not think that the *ComEd* decision's quantitative limit for self-generated CCW deposits struck an appropriate balance. *Pielet Bros. Trading, Inc.*, 110 Ill. App. 3d at 755 (legislature is presumed to be aware of administrative interpretations). "An amendment that contradicts a recent interpretation of a statute is an indication that such interpretation was incorrect and that the amendment was enacted to clarify the legislature's original intent." *Collins v. Bd. of Trs. of Firemen's Annuity & Benefit Fund*, 155 Ill. 2d 103, 111 (1993). Because the Assembly's intent was to allow the disposal of CCW, the Board must follow that intent. *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶17 (Court found that when construing a statute, "[a] court's fundamental objective is to ascertain and give effect to the intent of the legislature.")[6]

The Board has never found that the General Assembly's enactment of Public Act 86-346 was intended to protect only parties that dispose of small quantities of self-generated CCW. Applying

[6] Complainants mis-interpret MWG's reliance upon this case. As is clear in MWG's original drafting, MWG's reliance on this case is solely for the basic premise that a Court, or in this case the Board, must give effect to the legislature's intent.

such a reading to a waste seldom found in small quantities is in tension with the Board's own interpretive tools. *See ComEd, 1976 Ill. ENV LEXIS 273,* at *3 (noting that in 1976 alone, the Joliet Generating Station generated 280,000 tons of combustion byproducts).

Additionally, the Board must avoid interpretations that would make any portion of Section 21(r)(1) meaningless. *People v. Tarlton*, 91 Ill. 2d 1, 5 (1982). Inserting a quantitative restriction into Section 21(d)(1)(i) for CCW would make the "is not otherwise required under subsection (d)" language in Section 21(r)(1) inoperative. *Knolls Condominium Assn. v. Harms*, 202 Ill.2d 450, 460 (2002) (statutes should not be construed in a manner whereby "portions are rendered inoperative"). Without the "not otherwise required" language, Section 21(r)(1) is essentially pointless — if CCW *must* be placed in a permitted landfill, as Complainants suggest, then Section 21(r)(1) does little more than repeat the sanitary landfill requirement in Section 21(a).

In passing Section 21(r)(1), the General Assembly determined how to regulate disposal practices for self-generated CCW. Its decision will not result in "operators disposing their waste…indiscriminately…and without accountability for the resulting pollution…" *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163, 173 (2d Dist. 2003). Elected representatives simply concluded that the risk of "serious hazards to public health and safety" (415 ILCS 5/20(2)) that might accompany CCW disposal could be effectively managed through enforcement actions under other portions of the Act, such as Section 12(a)'s prohibition on water pollution and Section 12(d)'s prohibition on water pollution hazards.[7] While the Board may prefer that enforcement be supplemented with a permitting system, the General Assembly adopted that view only recently when it changed the law in 2019 for surface impoundments, discussed below.

[7] MWG does not contend that compliance with Section 21(r) is an absolute bar to prosecuting CCW-related pollution under statutes like Section 12(a) or 12(d). Moreover, MWG is not attempting, at this time, to reargue liability. Its position is that no remedy is needed just because coal ash was historically deposited in an area, without a showing of "pollution" related thereto.

Thus it cannot be said that the text of Sections 21(d)(1)(i) and (r)(1) creates a "serious gap[]" in environmental enforcement that will cause the Illinois Environmental Protection Act to "fail[] in one of its material aspects." *R.E. Joos Excavating Co. v. PCB*, 58 Ill. App.3d 309, 312-13 (3d Dist. 1978). The Board closed the Section 21(d)(1) "gap" in the *Pontiac* decision. And though the General Assembly acquiesced to the *Pontiac* decision in most regards, it overruled the application of *Pontiac* to CCW by enacting 21(r)(1). The lawmakers were well-aware that CCW was disposed of in large quantities, and the Board must defer to the Assembly's decision on how best to address the disposal of self-generated CCW.

2. Amendments to 21(r) (Public Acts 89-93 and 89-535) Confirm No Quantity Limitation Applied to CCW

The Board must assume that the enactment of Section 21(r)(1) worked a meaningful change in Illinois law. *Maiter v. Chi. Bd. of Educ.*, 82 Ill. 2d 373, 388-89 (1980) ("[C]ourts will not assume that the legislature engaged in a meaningless act"). But here, assumptions are unnecessary: The subsequent history of Section 21(r) confirms that the General Assembly thought that Section 21(r)(1) was a key component of CCW disposal in Illinois, not just an obscure afterthought.

In 1995, the General Assembly modified Section 21(r)(1) in a way that basically repealed it. *See* Public Act 89-93 (eff. July 6, 1995) (changing Section 21(r)(1) to apply to Coal Combustion Byproducts, instead of Coal Combustion Waste). This was a drafting error. But because Section 21(r)(1) is *not* an obscure provision that applies only in rare situations, the problem was noticed almost immediately. After lobbying by the coal industry and the United Mine Workers, the statute was fixed in the same session, and the language returned to CCW. Public Act 89-535 (eff. July 19, 1996); *see also* 89th Ill. Gen. Assem., House Proceedings, Apr. 26, 1996, at 75-76 (Rep. Bost) (describing supporters) attached as Ex. 4. The bill's Senate sponsor described the restoration of Section 21(r)(1) as necessary for "the current disposal program to continue."[8] 9th Ill. Gen. Assem.,

Senate Proceedings, Mar. 22, 1996, at 27 (Sen. Luechtefeld) attached as Ex. 5. Thus Section 21(r)(1) was neither redundant nor trivial. It was "*the* current disposal program" for CCW in Illinois. *Id.* (emph. added).

3. Legislative Changes in 2019 (Public Act 101-171) Further Confirm that 21 (r) Contains No Quantity Limitation for CCW Areas

The lack of a quantitative limit in Section 21(r)(1) is further confirmed by the General Assembly specifically repealing the Section 21(d)(1)(i) exception as applied to "CCR Surface Impoundments" in 2019. Public Act 101-171 (eff. date June 30, 2019). The bill's sponsors did not want to merely eliminate a loophole in Section 21(r)(1) regarding small-scale CCW deposits. On the contrary, the change addressed environmental concerns related to CCW deposits large enough to "fill Chicago's . . . Sears Tower nearly two times." 101st Ill. Gen. Assem., House Proceedings, May 27, 2019, at 161 (statements of Rep. Ammons), attached as Ex. 6.

If the General Assembly enacted Public Act 101-171 to *prohibit* unpermitted, large-scale, self-generated, CCW deposits, then this confirms that before 2019, Section 21(r)(1) *allowed* such unpermitted, large-scale, self-generated CCW deposits. There is no evidence in the legislative history that Public Act 101-171 was intended merely to create a permitting requirement for small CCW impoundments. Nor does such a modest goal track with what the bill's advocates said. Complainant Prairie Rivers Network described the legislation as "groundbreaking" and "Landmark Legislation."[8]

[8] Prairie Rivers Network, Press Release: Illinois House and Senate Pass Landmark Legislation to Clean Up Coal Ash (May 27, 2019), https://prairierivers.org/uncategorized/2019/05/il-house-senate-pass-coal-ash-legislation/. Complainant Sierra Club called it "Landmark Legislation" that addresses "many waste pits . . . located all over the state." Sierraclub.org, Press Release: Illinois House and Senate Pass Landmark Legislation to Clean Up Coal Ash (May 28, 2019), https://www.sierraclub.org/press-releases/2019/05/illinois-house-and-senate-pass-landmark-legislation-clean-coal-ash.

C. The General-Specific Cannon of Statutory Construction Dictates that Section 21(r) Controls.

Complainants' approach to statutory interpretation contradicts Illinois caselaw. The *Knolls Condominium* decision forbids allowing a general statute to "eliminate" a remedy that "the legislature specifically provided for". 202 Ill.2d 450, 460 (2002).[9] Complainants do not "give effect to all of the provisions of" Section 21(r)(1) by saying that the protections in the "not otherwise required under subsection (d)" clause are made illusory by Section 21(a). *Cinkus v. Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 218 (2008). This is not a "harmonious" reading of the two sections, and the only solution is to recognize that the General Assembly did not intend for Section 21(a) to apply to activities regulated under Section 21(r)—"*the* current disposal program" for Illinois CCW. 89th Ill. Gen. Assem., Senate Proceedings, Mar. 22, 1996, at 27 (Sen. Luechtefeld), Ex. 5.

Complainants' final argument is complicated and tenuous. They note that Section 21(r) contains a general statement that parties complying with Section 21(r)(2), and (r)(3) are exempt "from the other provisions of . . . Title V." Comp. Resp at 7. Although the general statement does not mention Section 21(r)(1), Complainants infer that parties complying with Section 21(r)(1) are not exempt from other provisions from Title V. And because Section 21(a) is within Title V, they say, this *must* mean that parties in compliance with Section 21(r)(1) are not "exempt" from Section 21(a). Complainants are simply ignoring the canons of statutory construction. There is no logic to an argument that the General Assembly would want Section 21(a) to punish behavior that Section 21(r)(1) explicitly allows. Rather, this portion of Section 21(r) is simply trying to avoid interpretive

[9] S*ee also People ex rel. Kempiners v. Draper*, 113 Ill.2d 318, 320-21 (1986) (Mobile Home Act allows State officials to regulate any mobile home outside of the corporate limits of state municipalities, and that specific power is not limited by general provision in Municipal Code allowing municipalities to "enforce health and quarantine ordinances" outside of corporate limits).

problems that might otherwise be created by having portions of Title V − Sections 21(r)(2) and (3) − cover sites that are primarily governed by laws other than the Illinois Environmental Protection Act (*i.e.*, the Abandoned Mined Lands and Water Reclamation Act and the federal Surface Mining Control and Reclamation Act). It reflects a prudent effort by the General Assembly to create a foresighted law that operates smoothly. It does not, as Complainants suggest, make Section 21(r) internally inconsistent, or override legislative intent and ordinary canons of construction.

D. Because the CCW at the Areas At Three MWG Stations is not a Source and was Allowed Under Section 21(r), No Remedy is Required.

While the Board made a finding of open dumping at all the MWG Stations (despite no claim of open dumping for Joliet 29 in the complaint),[10] MWG's motions *in limine* argue that no remedy is required for the CCW in specified areas at three of its Stations, where those areas were not established as sources of contamination, and CCW was properly disposed in the past in accord with 21(r). When determining a remedy under Section 33 of the Act the Board must consider "the reasonableness of the…deposits involved." 415 ILCS 5/33(c). Several factors influence this "reasonableness" determination, including the character and degree of injury. *Id.* at 5/33(c)(i). Here, it is inherently reasonable to allow CCW to remain in place with no required remedy when it was deposited under 21(r)(1), and is not established as a source.[11]

[10] In this case, Complainants did not allege open dumping at Joliet 29 in its Amended Complaint, and thus it is unclear how the Board reached its finding as to Joliet 29. MWG did not defend that issue – because it was not alleged – and the Board has no jurisdiction to issue findings over claims that are not before it. *See Alton & Southern R.R. v. Ill. Commerce Comm'n*, 316 Ill. 625, 630 (1925) ("The Commerce Commission cannot enter a valid order which is broader than the written complaint filed in the case"). Subject-matter jurisdiction may be challenged at any time. *Tate v. PCB*, 188 Ill. App. 3d 994, 1018 (4th Dist. 1989).

[11] As it relates to the Former Ash Basin at Powerton, Complainants should know that the Former Ash Basin is an inactive CCR surface impoundment, subject to both 40 CFR 257 and 35 Ill. Adm. Code 845. The publicly available closure plan for the Former Ash Basin is to close it with a final cover system. See, https://midwestgenerationllc.com/illinois-ccr-rule-compliance-data-and-information/#location1. Surely, Complainants cannot be suggesting that the closure of the Former Ash Basin as a CCR surface impoundment is not a remedy.

E. Conclusion

MWG respectfully requests that the Hearing Officer exclude these areas from consideration of a remedy: the Historic Areas at the Joliet 29 Station, the Former Ash Basin at the Powerton Station, and the Former Slag and Bottom Ash Placement Area at Will County.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

EXHIBIT 1

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Senator Kustra. Any more ghosts? Senator Marovitz, to close.

SENATOR MAROVITZ:

Just solicit your Aye vote.

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Question is, shall House Bill 1620 pass. All in favor, vote Aye. All opposed, vote No. The voting is open. Have all voted who wish? Have all voted who wish? Please take the record. On this question, there are 43 Ayes, 10 Nays, 1 recorded as Present. This bill, having received the constitutional majority, is hereby declared passed. 1627. Senator Ralph Dunn. Read the bill, please.

ACTING SECRETARY: (MR. HARRY)

House Bill 1627.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR LECHOWICZ)

The Gentleman from Perry, Senator Dunn.

SENATOR R. DUNN:

Thank you, Mr. President and Members. This is a Department of Mines and Minerals bill that deals with the storage and handling of explosives. There's two amendments on it. One of them had to do with an agreement between the EPA, the Coal Association and the United Mine Workers on the disposal of flyash, and then the last amendment, Amendment No. 2, gives clear specifications for qualifications to receive license to handle explosives, and I'll be glad to answer any questions, and move for passage of...

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Any discussion?

SENATOR R. DUNN:

...House...

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Question is, shall House Bill 1627 pass. All in favor, vote

Aye. All opposed, vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Please take the record. On this question, there are 57 Ayes, no Nays, none recorded as Present. This bill, having received the constitutional majority, is hereby declared passed. 1662. Senator Schaffer. Read the bill, please.

ACTING SECRETARY: (MR. HARRY)

House Bill 1662.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR LECHOWICZ)

The Gentleman from McHenry, Senator Schaffer.

SENATOR SCHAFFER:

Mr. President, House Bill 1662 is a -- an attempt by the Department of Licensure and Registration to standardize the language of their various licensure Acts. It's a fairly lengthy bill, but it is not controversial. Provides some standard language and attempts to standardize some of the fees. I'm unaware of any opposition, although I haven't talked to the Senator from Galesburg.

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Any discussion? The Gentleman from Knox, Senator Hawkinson.

SENATOR HAWKINSON:

Will the sponsor yield for a question?

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Indicates he will.

SENATOR HAWKINSON:

Senator, my analysis indicates there'll be a hundred-dollar fee for a bad check. Does -- does this mean if a check bounces for any reason, that's an overdrawn check that can happen to people from time to time, there's going to be a hundred-dollar fee?

PRESIDING OFFICER: (SENATOR LECHOWICZ)

EXHIBIT 2

DATA COLLECTION AND ANALYSES PERTINENT TO EPA'S DEVELOPMENT OF GUIDELINES FOR PROCUREMENT OF HIGHWAY CONSTRUCTION PRODUCTS CONTAINING RECOVERED MATERIAL

Vol. II

1981

DATA COLLECTION AND ANALYSES PERTINENT TO EPA'S DEVELOPMENT OF GUIDELINES FOR PROCUREMENT OF HIGHWAY CONSTRUCTION PRODUCTS CONTAINING RECOVERED MATERIALS

Volume II
Technical Data and Appendices

This report (ms. 2096) describes work performed
for the Office of Solid Waste under contract no. 68-01-6014
and is reproduced as received from the contractor.
The findings should be attributed to the contractor
and not to the Office of Solid Waste
and Emergency Response

U.S. ENVIRONMENTAL PROTECTION AGENCY
1981

Fly ash was hauled to the site in open trucks with no dusting problems during hauling or placement. The ash was tailgated and spread in 9-inch thick lifts and compacted by a rubber-tired vibratory roller to a density of 97 percent or more of Standard Proctor (ASTM D698 or AASHTO T-99) density values. Upon completion of compaction operations, the exposed surface of the fly ash embankment was sealed with a coat of hand-sprayed road tar (Reference I-32).

Melvin E. Amstutz Expressway - Waukegan, Illinois. The Melvin E. Amstutz project (Federal Aid Route 437, Section 8) in Lake County, Illinois involved the construction of a fill embankment for a four-lane divided highway with a 42-foot wide median between Grand and Greenwood Avenues in Waukegan, Illinois, some 40 miles north of Chicago. This is probably the most outstanding example of fly ash use in highway embankment construction thus far in the United States.

A total of 246,000 cubic yards of embankment material were required for this job. Fly ash was selected as an alternate because a nearby Commonwealth Edison power plant offered an available source of material at a potential cost savings. Alternate bids indicated that construction of a fly ash embankment would result in a savings of approximately $62,000 compared to an earth embankment (Reference I-33).

Prior to placement of the fly ash, unsuitable in-place soils were removed and replaced with granular fill to a height of 2 feet above the ground water table. The average height of the fly ash embankment was 3.5 feet, although 18 to 20 foot embankments were built in ramp areas. The fly ash embankment was covered by 8 feet of earth fill on the outside slopes and by 2 feet of earth fill in the median areas.

Fly ash was trucked to the site either from stockpiles located outside the power plant or from closed storage silos and placed in 6 inch layers. Each layer was compacted by means of a 10-ton vibratory single steel drum roller to densities in excess of 85 percent of the maximum dry density at optimum moisture levels of 25 percent.

The contractor added water where necessary to obtain the desired density. Side slopes of 2 to 1 were maintained and are performing satisfactorily.

The fly ash placed in this embankment is stronger than most natural soils because of its age-hardening characteristics. The material was workable and stable with excellent compaction characteristics, provided the proper construction methods and equipment are utilized. The use of fly ash enabled work to proceed under wet conditions when it might not have been possible to work with conventional soils. Moreover, the lighter weight fly ash was found to be advantageous in bridging over weak subsoils (Reference I-33).

EXHIBIT 3

Chicago Tribune (Chicago, Illinois) · Mon, Oct 28, 1991 · Page 13

A tribal solution to family woes

William Raspberry

WASHINGTON—Kent Amos, a committed family man, wants to say a couple of words on behalf of families: Back off!

Parents—especially single mothers—are taking an undeserved rap for what is happening to our children, he believes, when an important part of the blame may lie closer at hand.

"You keep hearing about what families and parents are doing, or not doing, and how this is the reason today's children are so terrible," he was saying the other day in response to a column I had written on the importance of family.

"I agree with what you say, but take a step back and look at the process by which children have been raised historically. That process is the tribe. Even going back to biblical times, you read of the tribe of this and the tribe of that. All people on this Earth were once tribal, and it was in this context that we historically raised our children.

"The problem with today's children is that the tribe is no longer functioning."

The tribe as he sees it—villages are nothing more than stationary tribes—embodies four vital elements: the core family, the wider community, the political leadership (village elders, councils, mayors) and the religious leadership (medicine men, soothsayers, priests). The unwritten understanding has been that all four elements were responsible for bringing children to responsible adulthood.

"That covenant," he says, "has been broken—not so much by the family as by the rest of us."

Amos, a one-time Xerox executive who for 10 years has been "father" to a constantly shifting group of D.C. teenagers, evokes the image familiar to adults of his generation.

"I was just in Texas, listening to a white executive talking about growing up on a farm in the middle of Oklahoma, where if he threw a stone and hit somebody, there was always some adult to say, 'Boy, I'm gonna tell your mother what you did.' Well the same thing happened here in D.C. when I grew up, and all across America. There was always someone to tell your mother, or to admonish you directly, or to tell you: 'Now you behave yourself, you know the Amoses are not known for that.' "

But those were the days when adults disciplined (and were respected by) all the children in the community, when families stayed put for years, and where churches served the neighborhoods in which they were located.

"Now," says Amos, "adult neighbors often don't know each other, let alone one another's children. Families are dispersed. There are no neighborhoods and communities as before. The church community is scattered, parishioners often driving many miles to service and then back home, and the churches themselves may be dabbling in everything from politics to real-estate development. The government has lost its ability to serve the needs of its constituents in a covenant relationship, as opposed to a process relationship.

"Even our language suggests distance that keeps us from touching. Instead of taking care of children, we put them in programs. We call them 'youths' rather than children, and if we really want to put distance between us, we call them something like 'at-risk youth.' "

None of what Amos is talking about diminishes the importance of parents in the child-rearing enterprise. Their role was always vital, but, as Kent reminds, it was seldom exclusive. The most competent parents almost always had a hand in guiding and inspiring the neighbors' kids; the least able parents could at least exert tell-your-mother discipline.

The most competent parents almost always had a hand in guiding and inspiring the neighbors' kids; the least able parents could at least exert tell-your-mother discipline.

If we could restore some of that attitude—and Amos believes it is possible—it might be the best thing that could happen for single mothers struggling to raise decent children in a frequently harsh environment.

"Some of it still exists," says Amos. "If you go into the most drug-infested and violent neighborhood in the city, you'll find children who come through in reasonably good shape. Follow them back and you will find a covenant kind of environment, where families and neighbors work together to help bring the children up right. These kinds of environments exist all over the place. We need to hold them up, and do what we can to reinforce them."

Of course we do, and we need to do something else as well. We need to recapture not just the old arrangements but the old attitude that made the well-being of children the No. 1 priority: not to pamper them but to recognize that our children are the means through which we reproduce and preserve the best of ourselves.

Taking the Thomas-Hill story to heart

By Douglas E. Kneeland

Inside the paper

Maybe I'm wrong, but I've always thought most readers look upon those of us in the newspaper business as voyeurs with notebooks and cameras who stand aloof from and untouched by the real world we report on.

With another mega-story winding down—Clarence Thomas has been confirmed and sworn as a justice of the U.S. Supreme Court and Anita Hill is back at her law professorship at the University of Oklahoma—it might be a good time to talk about that.

Most news people are professional enough to keep their coverage even-handed. But it's a lot easier to do that when you're dealing with issues that touch you only intellectually.

Whatever special interest some reporters or editors may have in the CIA, for instance, the issue is not central to their personal lives. But the subject of sexual harassment has a reach so broad in this final decade of the 20th Century that it engages all of us.

Journalists worked hard to maintain their neutrality as they wrote and edited the news emanating from the emotional public conflict between the professor and the judge. But inside, all those I talked with acknowledged, their own feelings were churning.

I don't know how it is at all companies, or at all newspapers, but I have worked at five daily papers in my day, including this one, and I can tell you how it used to be. It's probably true of a lot of trades and professions, but over the years this newspaper business has been a rough-and-tumble one.

At least as recently as two decades ago, there weren't many women in the news departments of papers. And those who were there had to battle continuously for recognition and acceptance. A lot of them at the papers where I worked over most of the last four decades adopted about the only realistic defense they had at the time; they tried their best to be one of the guys. If that took a little cussing, listening to or telling the occasional off-color joke, enduring or exchanging a bit of sexual innuendo, they paid that price. Not always willingly, as I now know better than I knew then.

There are many more women in most newsrooms now and their numbers continue to increase, as do those in executive positions. For these reasons alone, there has been some improvement in the treatment of women in newspaper jobs. Most I know here at the Tribune agree to that, but I don't know any who would say they are dealt with as equals by every man at work in all situations.

Like a lot of other companies, the Chicago Tribune has taken steps in compliance with state and federal regulations to provide its employees "a professional work environment that is totally free of physical, psychological or verbal harassment." And in a policy statement to all employees, it defines harassment as "a pattern of behavior or language that creates or is perceived by an individual to create a hostile, offensive or intimidating work environment." The statement goes on to list such unacceptable things, among many others, as offensive jokes, unwelcome physical contact of any nature, unwelcome and unsolicited sexual advances.

Journalists worked hard to maintain their neutrality as they wrote and edited the news emanating from the conflict between the professor and the judge. But inside, their own feelings were churning.

All in all, the policy seems straightforward and about as clear as it can get. But people sometimes breach it to the point where warnings are necessary, if not action, which can include firing. And Judy Peres, the Tribune's national editor, in an article on this page the other day was moved to report that her male colleagues here were "exceedingly discomfited" by all the talk about sexual harassment that surrounded the Thomas-Hill case, wondering if "they too have been guilty—perhaps unwittingly—of sexual harassment."

Well, if they are like most of us who've been in the business awhile, they probably have been, at least at some time in the past. If they hadn't gotten the message from the rules as posted, they surely should know them by now. But it will probably take time to sort out just how much real understanding has come out of all this.

Associate editor Douglas E. Kneeland is the Tribune's public editor.

A Pandora's box of genetic bigotry

Joan Beck

Are some people genetically unfit to have children?

The question was raised in a vicious, ugly and public way recently in Los Angeles when Jane Norris spent her two-hour radio talk show on KFI-AM arguing that Bree Walker, an anchorwoman for KCBS-TV, should not be having a baby because the child might inherit Walker's finger and toe deformity.

Norris ignored the fact that Walker is beautiful, talented, healthy, intelligent, successful and happily married—and that she was already about eight months pregnant at the time of the verbal attack.

"Is it fair to bring a child into the world that you're pretty sure has a very good chance of having a disfiguring disease?" sniped Norris.

She carped on and on. "People judge you by your appearance. . . . God knows they are going to judge you by the shape of your hands and the shape of your body and the shape of your face. They just do."

The genetic abnormality at issue here is ectrodactyly, a condition in which the bones in the fingers and toes are partially fused. Walker was born with the disorder. Because it is inherited in an autosomal dominant pattern, each child she bears has a 50-50 chance of inheriting the problem. Walker and her previous husband already have a daughter with the deformity.

Several weeks after the broadcast, Walker's son with her current husband, Jim Lampley, also a TV anchor, was born—with ectrodactyly. Late in October, Walker, Lampley, other individuals and two dozen national organizations for the disabled filed a complaint with the Federal Communications Commission against KFI-AM, charging that the broadcast was inaccurate and biased.

Besides bias, however, Norris' mean-spirited broadcast does raise troubling questions about genetic and reproductive privacy, especially in the years ahead when new research will probably make all of our DNA an open book, spelling out our individual genetic makeup, our ancestry and our children's genetic potential.

"It's not just Bree," Norris snarled on the air. "It's not just her. We're all involved in this."

Already, bioethicists are expecting the time to come—perhaps in 25 or 30 years—when the human genome will be completely mapped and individual DNA blueprints for each of us will be easy to obtain.

Such personal readouts will warn about errors in genes that could mean serious problems for our offspring. (Scientists have already identified thousands of genetic disorders. Most of them are rare and caused by recessive genes, so don't occur in a child unless both parents have the same faulty gene.)

Our DNA profiles will also tell much more about us than the genetic abnormalities we carry (each of us probably has four to 20 such abnormal genes, scientists say). They will also reveal tendencies and susceptibilities, forecast whether we are likely to grow bald or fat, how resistant our bodies will be to cancer triggers, whether we will suffer from allergies or are likely to become alcoholic.

But who will have a right to such intimate information? To what use will such data be put?

Will prospective parents be given genetic profiles of their unborn children based on a few fetal cells and pressured to abort those who are less than perfect and will require extra medical care? Will "less than perfect" come to include not only the inevitably fatal Tay-Sachs disease, but hemophilia, Huntington's disease (which doesn't cause symptoms until middle age), cystic fibrosis—and ectrodactyly?

Will couples be expected to exchange DNA readouts, to ensure that genetic errors don't match up in ways that could produce a serious genetic disorder in a future offspring? Could a genetic susceptibility to alcoholism or depression be reason to reject a potential marriage partner?

Would a prospective employer have the right to insist on seeing an applicant's genetic profile before offering a job? Would he reject an otherwise qualified candidate because of a genetic tendency toward alcoholism or an illness that might run up health insurance costs? Or because of a susceptibility to certain chemicals he might be exposed to on the job?

Or, for an example posed by Robert Shapiro in his new book, "The Human Blueprint," suppose a congressional committee evaluating a Supreme Court nominee learns that two relatives suffer from manic-depression. If opponents demand he make public his DNA printout to show he has no genetic tendencies toward mental instability, dare he refuse?

In 25 to 30 years, perhaps, our DNA profiles will tell much more about us than the genetic abnormalities we carry. They will also reveal tendencies and susceptibilities. But who will have a right to such intimate information? To what use will such data be put?

As a practical matter, Shapiro notes that because most of our cells contain a full set of our DNA and very few cells are needed for testing, personal data will eventually be easy for others to obtain. It will be possible to get a DNA readout, for example, from hair in a lover's hairbrush, from skin cells rubbed off on a doorknob a job applicant has turned, even from an envelope whose flap a person has licked, he says.

The genome genie will not go back into the bottle. It shouldn't. We need the information about our essential selves that DNA can provide. Many of the most serious ills from which we suffer are caused by genetic factors. Deciphering the DNA code and its individual variations is the next, necessary step toward finding a way to cure and to prevent them.

But along with the scientific challenge comes the equally difficult task of learning to live wisely and fairly with unprecedented and enormously personal new information. It is important to stamp out genetic bigotry and to value each other for our unique selves.

EXHIBIT 4

121st Legislative Day April 26, 1996

Speaker Daniels: "The House will come to order. The Members will please be in their chairs. Those not entitled to the floor will please retire to the gallery. The Chaplain for the day is Pastor Herb Knudsen of the First Christian Church in Bloomington, Illinois. Pastor Knudsen is the guest of Representative Bill Brady. Guests in the gallery may wish to rise for the invocation. Pastor Knudsen."

Pastor Herb Knudsen: "Let us pray together. O God, our Creator and our Lord, how majestic is Thy name. We marvel at Your...which surrounds us and nurtures us and sustains us. Your blessings toward us are far more than we can count or deserve, but in these quiet moments, we recall the diversity and the presence of Your gifts in our midst. Our families and our friends, our critics and our supporters. The colleagues whose particular deaths surround each of us here, as well as those across the aisle. The constituents from the poor and beleaguered single parent to the the regular working Jane and Joe, to the wealthy corporate executive. From the little leaguer to the big leaguer. All those whom we seek to represent. From the teeming urban centers to the expansive rural farm lands which make up the millions of miles in this wondrous state we call Illinois. O Lord, our Lord, we call them into memory. We visualize them and we thank You for them. For indeed, each one of them is a child of Your creation made in Your image with whom we are called to live in community and together to build up Your Kingdom. Not our will, but Your will be done. Your will which calls for justice and mercy, love and compassion, generosity and peace. Especially this day, O Lord, we lift into Your comfort and healing presence, those of our neighbors suffering from the ravages of weather. The tornadoes and winds which swept across our

colleagues on the other side of the aisle for their favorable comments for this Bill. And I would ask for your favorable consideration."

Speaker Wojcik: "The question is, 'Shall Senate Bill 1266 pass?' All those in favor vote 'aye'; all those opposed vote 'nay'. The voting is open. This is final action. Have all voted who wish? Have all voted who wish? Have all voted who wish? Mr. Clerk, take the record. On this question, there are 90 'ayes', 14 'nays', 8 voting 'present'. And this Bill, having received a Constitutional Majority, is hereby declared passed. Mr. Clerk, what is the status of Senate Bill 1279?"

Clerk Rossi: "Senate Bill 1279 is on the Order of Senate Bills - Third Reading."

Speaker Wojcik: "Return that Bill to Second. Representative Lang, for what purpose do you rise? Mr. Clerk, please read Senate Bill 1360."

Clerk Rossi: "Senate Bill 1360. A Bill for an Act in relation to coal combustion waste. Third Reading of this Senate Bill."

Speaker Wojcik: "The Chair recognizes Representative Bost."

Bost: "Thank you, Madam Chairman, Members of the House. Senate Bill 1360 amends the Environmental Protection Act to provide that no person shall cause or allow the storage or disposal of coal combustion waste except under specific conditions. Basically, all it does, it replaces, last year we had Senate Bill 327 in which the words were put, 'coal combustible' or 'coal combustion by-products'. We want to change that and put 'coal combustible waste'. Be glad to answer any questions."

Speaker Wojcik: "Is there any discussion? The Gentleman from Kankakee, Representative Novak, is recognized."

Novak: "Thank you, Madam Speaker. Will the Sponsor yield?"

Speaker Wojcik: "He indicates he will."

Novak: "Representative Bost, could you explain for the Body the difference between 'coal combustion waste' and the other was it 'coal combustion by-products', I think you indicated. Could you explain the difference to us?"

Speaker Wojcik: "Representative Bost."

Bost: "Under the Mines and Minerals Program, the wording 'by-product' is going to require different standards than combustion waste."

Speaker Wojcik: "Representative Novak."

Novak: "Well, thank you, Madam Speaker. What do you mean by different standards, different items? I mean, will there be more things that will be included in the definition of coal combustion waste that were included in the definition of coal combustion by-products? I think that was the question I was asking."

Speaker Wojcik: "Representative Bost."

Bost: "Representative, maybe I can better answer your question of, and I'm hoping I am. I'm trying to here. By reading the word from the department, a coal mine facility wanting to dispose of coal combustion waste must submit an application obtaining approval for Illinois Environmental Protection Agency and Department of Natural Resources, offices of Mines and Minerals. The application for such a request must include a reclamation plan to demonstrate the disposal area will be covered in a manner that will support continuous vegetation. A demonstration that the facility will be adequately protected from wind and water and erosion. This demonstration shall also include a description of storage handling and placement operating and an estimate of the volume of waste to be disposed, demonstrating that the PH will be maintained so as to

prevent excessive leaching of metal ions that shall include the chemical analysis of the waste and/or waste mixture. Representative, fly ash is a product that is a coal combustible waste, and is one that would not fall under this the way it is now."

Speaker Wojcik: "Representative Novak."

Novak: "Thank you, Madam Speaker. Representative Bost, will the old railroad ties or scrap tires or other type of contaminated material be included in this?"

Speaker Wojcik: "Representative Bost."

Bost: "No, Representative. They will not."

Speaker Wojcik: "Representative Novak."

Novak: "There isn't any provision in this Bill that allows a certain percentage of scrap tires or wood or other materials to be allowed in this process? My analysis shows that."

Speaker Wojcik: "Representative Bost."

Bost: "The analysis that I have of the Bill and the word that we have from the department is it will not."

Speaker Wojcik: "Representative Novak."

Novak: "Well, so you can assure us that scrap tires, you can assure us that creosote saturated railroad ties, creosote saturated telephone poles that are no longer in use will not be used in this process? Is that correct?"

Speaker Wojcik: "Representative Bost."

Bost: "This is no change to the current program, so those are not in there now. They weren't protected under this law either."

Speaker Wojcik: "Representative Novak."

Novak: "What about fly ash?"

Speaker Wojcik: "Representative Bost."

Bost: "Fly ash is what we currently dispose of, and that is one

of the products that we're trying to make sure that we can still continue to dispose of."

Speaker Wojcik: "Representative Novak."

Novak: "I'm sorry, Representative. What did you say about fly ash? You said that product is included in this process?'

Speaker Wojcik: "Representative Bost."

Bost: "Yes it is. That's what we're trying to do, is make sure that we can still dispose of the fly ash."

Speaker Wojcik: "Representative Novak."

Novak: "I'm sure you are aware that certain fly ash products that are generated from an incineration process has been ruled as hazardous waste. Now, that type of fly ash certainly will not be included in this process. Is that correct?"

Speaker Wojcik: "Representative Bost."

Bost: "If it is not any different than the current standards. Now, if that fly ash, it is discovered that it does not meet those standards, then it will be a completely different situation."

Speaker Wojcik: "Representative Novak."

Novak: "And one last question. What is this filler material that's supposed to be involved in this?"

Speaker Wojcik: "Representative Bost."

Bost: "I don't have an answer for that."

Speaker Wojcik: "Representative Novak."

Novak: "No further questions."

Speaker Wojcik: "Are there any further discussion? The Gentleman from Washington, Representative Deering, is recognized."

Deering: "Thank you, Madam Speaker. Will the Sponsor yield?"

Speaker Wojcik: "He indicates he will."

Deering: "Representative, by changing this language, we worked on this Bill last year I know, and we do have some combustion by-products coming out of the utilities that are remnants

of a cogeneration with shredded tires and everything, some of the coal fired power plants. So we do have some of those burnt tires in the fly ash just so we can clarify the record. But by changing the wording here, we're not taking away any of the uses of the fly ash, the bottom ash or any of the other by-products could be used for structural fill to be used for filters in sanitary landfills. We can still use these products for those purposes. Is that not correct?"

Speaker Wojcik: "Representative Bost."

Bost: "That's correct, Representative. Thank you for bringing that up because that is the intent. There are times that we use these products, and we want to be able to continue to use these products. When the wording was changed, there became a problem with that. And that's why we're trying to change it back."

Speaker Wojcik: "Representative Deering."

Deering: "Thank you, Madam Speaker. Representative, I'm somewhat unfamiliar ... came about since I think we worked on some of this legislation last year, and I thought we had all the 't's' crossed and the 'i's' dotted. But this will clear up some problems that could be brought forth in the future. I know especially in our areas, the downstate areas that we represent, that a lot of these by-products are used to keep people working. They're used for fill for construction of highways, asphalt shingles, so this is good clarification language. I strongly support this Bill."

Speaker Wojcik: "Seeing no further discussion, Representative Bost to close."

Bost: "Thank you, Madam Speaker. Members of the House, this is a cleanup of some language. The Coal Association is in support of it. The United Mine Workers are in support of

this. I would ask for your 'aye' vote."

Speaker Wojcik: "The question is, 'Shall Senate Bill 1360 pass?' All those in favor vote 'aye'; all those opposed vote 'nay'. The voting is open. This is final action. Have all voted who wish? Have all voted who wish? Have all voted who wish? Mr. Clerk, take the record. On this question, there are 111 'ayes', 0 'nays', 0 voting 'present'. And this Bill, having received a Constitutional Majority, is hereby declared passed. Mr. Clerk, please read Senate Bill 1361."

Clerk McLennand: "Senate Bill 1361. A Bill for an Act concerning tax exemptions. Third Reading of this Senate Bill."

Speaker Wojcik: "The Chair recognizes Representative Bost."

Bost: "Thank you, Madam Speaker, Members of the House. Senate Bill 1361 amends the Use Tax Act and the Service Use Tax Acts, Service Occupation Tax Act and the Retailers Occupation Tax. It's identical to a Bill we moved in the House, Bill 2702, which is...basically what it does is it allows the people in the coal industry to purchase equipment less than $250 without the...makes them tax exempt, just puts them on line with farms and many other industries in the state. Be glad to answer any questions."

Speaker Wojcik: "Is there any discussion? The Gentleman from Cook, Representative Dart, is recognized."

Dart: "Thank you. Will the Sponsor yield?"

Speaker Wojcik: "He indicates he will."

Dart: "Representative, how many companies are going to be affected by this?"

Speaker Wojcik: "Representative Bost."

Bost: "We're not sure on the total number of companies that would be affected by this."

Speaker Wojcik: "Representative Dart."

EXHIBIT 5

STATE OF ILLINOIS
89TH GENERAL ASSEMBLY
REGULAR SESSION
SENATE TRANSCRIPT

86th Legislative Day March 22, 1996

PRESIDENT PHILIP:

The regular Session of the 89th General Assembly will please come to order. Will the Members please be at their desks, and will our guests in the galleries please rise. Our prayer today will be given by the Reverend Jean Martin, United Methodist Church, Oakford, Illinois. Reverend Martin.

THE REVEREND JEAN MARTIN:

(Prayer by the Reverend Jean Martin)

PRESIDENT PHILIP:

Will you please rise for the Pledge of Allegiance. Senator Sieben.

SENATOR SIEBEN:

(Pledge of Allegiance, led by Senator Sieben)

PRESIDENT PHILIP:

Reading of the Journal. Senator Butler.

SENATOR BUTLER:

Mr. President, I move that reading and approval of the Journals of Wednesday, March 20th and Thursday, March 21st, in the year 1996, be -- be postponed, pending arrival of the printed Journals.

PRESIDENT PHILIP:

Senator Butler moves to postpone the reading and the approval of the Journal, pending the arrival of the printed transcript. There being no objection, so ordered. Committee Reports.

SECRETARY HARRY:

Senator Woodyard, Chair of the Committee on Agriculture and Conservation, reports Senate Amendment 2 to Senate Bill 1633 Be Approved for Consideration; Senate Amendment 2 to Senate Bill 1749 Be Approved for Consideration; and Senate Amendment 2 to Senate Bill 1777 Be Approved for Consideration.

Senator Madigan, Chair of the Committee on Insurance, Pensions and Licensed Activities, reports Senate Amendment 2 to Senate Bill

Senate Bill 1360.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Luechtefeld.

SENATOR LUECHTEFELD:

Thank you, Madam President and Members of the Senate. Senate Bill 1360 simply clears up some language of an earlier bill. It amends the Environmental Protection Act. And this bill replaces the term "coal combustion by-product" with "coal combustion waste" in the provisions of the Environmental Protection Act regarding disposal. This will allow the current disposal program to continue. I would ask for a favorable vote on this bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Any discussion? Seeing none, the question is, shall Senate Bill 1360 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 50 Ayes, no Nays, none voting Present. Senate Bill 1360, having received the required constitutional majority, is declared passed. Senator Luechtefeld, on Senate Bill 1361. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1361.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Luechtefeld.

SENATOR LUECHTEFELD:

Thank you, Madam -- Madam President and Members of the Senate. Senate Bill 1361 would remove a -- a tax on coal equipment and spare parts of under two hundred and fifty dollars. This -- this

EXHIBIT 6

passed. Senate Bill 9, Representative Ammons. Mr. Clerk, please read the Bill."

Clerk Hollman: "Senate Bill 9, a Bill for an Act concerning coal ash. This Bill was read a second time a previous day. No Committee Amendments. No Floor Amendments have been approved for consideration. No Motions are filed."

Speaker Manley: "Third Reading. Representative Ammons, Senate Bill 9. Mr. Clerk, please read the Bill."

Clerk Hollman: "Senate Bill 9, a Bill for an Act concerning coal ash. Third Reading of this Senate Bill."

Speaker Manley: "Representative Ammons."

Ammons: "Thank you, Madam Speaker. Senate Bill 9 is a Coal Ash Pollution Prevention Act. Coal ash is a by-product that is produced when burning coal. It contains toxic metals that cause serious health problems, including cancer. For over seven years, we've been working to try to address the issue of coal ash. For over 55 years, power plant operators at the Vermilion Power Station dumped over 3.3 million cubic yards of toxic ash in the floodplains of the Middle Fork. This is enough to fill Chicago's Willis or Sears Tower nearly two times. Protecting our communities and our environment is our number one option. This Bill will set the parameters of how coal ash will be handled in the State of Illinois. It is a good piece of legislation negotiated with many, many partners. And we look forward to passing coal ash this evening for the taxpayers of Illinois but, specifically for those who are impacted by the coal ash that is in their backward. We highly urge a 'yes' vote for this Bill, Senate Bill 9. And I'll take any questions."