BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER ORDER DENYING THREE MOTIONS TO EXCLUDE EVIDENCE OF REMEDY**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

Faith E. Bugel

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: August 10, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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

Complainants Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") hereby respond to Midwest Generation, LLC's ("MWG") July 27, 2022 Motion for Interlocutory Appeal from Hearing Officer Order Denying Three Motions to Exclude Evidence of Remedy ("MWG Mot."). The Illinois Pollution Control Board ("Board") should deny the Motion for Interlocutory Appeal because the underlying motions were an untimely and transparent attempt to collaterally attack the Board's findings of liability with respect to certain coal ash deposits at MWG's coal plants. In addition, MWG (1) profoundly mischaracterizes Illinois law and legislative history, neither of which provide support for MWG's arguments; (2) improperly attempts to shift the evidentiary burden to Complainants; and (3) makes significant factual misrepresentations.

On February 4, 2022, MWG filed three motions "to exclude [various ash areas] from consideration of a remedy." The three motions are attached to MWG's Motion in full, and are

excerpted here as Ex. A (Powerton motion), Ex. B (Will County motion) and Ex. C (Joliet 29 motion). The three motions focus on three different power plants but are otherwise substantially similar. Each motion argues that relevant evidence should be "excluded" from the remedy hearing for two reasons. First, MWG argues that the subject coal ash areas could not be conclusively linked to groundwater contamination in onsite monitoring wells. Ex. A at ¶¶ 3-6; Ex. B at ¶¶ 7-16; Ex. C at ¶¶ 7-12. Second, in a new argument that it failed to raise during the liability phase of this matter, MWG asserted that Section 21(r) of the Illinois Environmental Protection Act ("Act") allows the coal ash to remain in place, "further obviating the need for a remedy." Ex. A at page 1 and ¶¶ 7-13; Ex. B at page 2 and ¶¶ 17-23; Ex. C at page 2 and ¶¶ 13-19. Complainants responded on March 4, observing, among other things, that the Board had identified open dumping violations at each site, in part due to MWG's failure to investigate or remove the coal ash disposal areas (Ex. D at 2-3); that these violations must be remedied regardless of whether the subject coal ash areas are a proven source of contamination in any given monitoring well (*Id.* at 3); and that Section 21(r) of the Act does not excuse MWG's open dumping of coal ash. *Id.* at 5-9.

On July 13, 2022, Hearing Officer Halloran denied MWG's motions, noting that the Board found Section 21(a) (open dumping) violations at all areas identified in MWG's motions, that the areas are not exempted by Section 21(r), and that MWG waived its Section 21(r) argument by failing to raise it during the liability proceeding. Hearing Officer Order at 7.

A. MWG Improperly Challenges the Board's Liability Findings

Although MWG creatively titled its motions as motions 'to exclude evidence of remedy,' the motions in fact challenged the Board's liability findings. For example, with respect to the "former placement area" at Will County, MWG argued that "the only evidence in the record

shows that it is not a source and that there is no ash in the area, [so] the Board should exclude all evidence concerning that area." Ex. B at ¶12. This not only challenges the Board's liability finding with respect to that area (Interim Order and Opinion of the Board at 89-92 (June 20, 2019); *see also* Ex. D at 2-3), but also misstates the record, which is largely silent about the presence of coal ash constituents in the groundwater near this area (i.e., does not show that the area is "not a source"), and which strongly suggests that there is still coal ash buried in the area. *See* Ex. D at 13-14. Indeed, MWG's assertion that "there is no ash in the area" directly contradicts the Board's finding that "[b]orings taken from this area . . . show coal ash mixed with gravel as deep as three feet below surface." Interim Order at 57.

More recently, in the present appeal, MWG states that "no violations had been identified" at the three locations. Memorandum in Support of Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer Order Denying Three Motions to Exclude Evidence of Remedy ("MWG Mem.") at 4. This is false. The Board found violations at all three areas, identifying each area in its description of "historical coal ash sites" (Interim Order at 26-28, 40-43, and 55-57), then carefully explaining how these areas violate Section 21(a) of the Act before concluding that "MWG violated Section 21(a) of the Act by allowing the coal ash to be consolidated in the fill areas around ash ponds and in historical coal ash storage areas at all four Stations." Interim Order at 86-91; *see also* Ex. D at 2-3.

B. MWG misstates the effect of Section 21(r) of the Act

MWG argues that Section 21(r) of the Act renders remediation and penalties "irrelevant." MWG Mot. at ¶3. This is false. Hearing Officer Halloran correctly observed that

> under Section 21(r), the areas in question here must be exempt from the need of a permit under certain conditions or the owner has obtained a permit. Neither is present here. The Board found that none of the coal ash storage areas in question have permits. Further, no exemptions exist for the areas in question.

Hearing Officer Order at 7. To be clear, MWG's theory is wrong in multiple ways. First, Section 21(r) does not displace Section 21(a), as suggested by MWG. MWG Mem. at 5. Cases cited by MWG discussing the application of conflicting provisions of law are inapposite here because there is no conflict between Sections 21(r) and 21(a). *See* Ex. D at 6-7.

Second, even if Section 21(r) did control, it would not help MWG for the reasons given by the Hearing Officer. Section 21(r) generally prohibits coal ash storage and disposal, allowing it only where (a) the site has a permit; or (b) the site is exempt from the permit requirement under Section 21(d) of the Act. Neither condition exists here. The areas in question do not have permits. Interim Order at 90-91. And while Section 21(d)(1) waives the permit requirement for onsite storage of self-generated waste, this only applies to "minor amounts" of waste. *See, e.g.*, *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163, 175 (2003) ("[W]e construe section 21(d)(1) as providing an exemption to those on-site facilities that generate minor amounts of waste that can be disposed of without a significant threat of environmental harm") (emphasis added). *See also* Ex. D at 7-9. MWG has not argued, and could not plausibly argue, that the large historic ash disposal areas constitute "minor amounts" of waste. This means that Section 21(d) does not waive the permit requirement, and therefore Section 21(r)(1) does not exempt MWG from that section's general prohibition against the storage or disposal of coal combustion waste.

Indeed, the Board has spoken directly to this issue—in 1976, the Board was asked to decide whether Commonwealth Edison was required to have a permit for coal ash disposal at the Lincoln Stone Quarry, which happens to be located across the Des Plaines River from the Joliet 29 site. *Illinois v. Commonwealth Edison Co.*, PCB 75-368, 1976 WL 8158 (Nov. 10, 1976) ("ComEd"). ComEd argued, as MWG argues here, that its coal ash disposal area was exempt as

onsite disposal of self-generated waste. *Id.* at *2-3. The Board disagreed, "reaffirm[ing] its position . . . that the intent of Section 21(e) [as Section 21(d) was then known] was to exempt minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated" and holding that the disposal area was not exempt. *Id*. at *3 (emphasis added).

C. MWG Mischaracterizes Illinois legislative history

Because MWG cannot rely on a plain reading of the Act, it fabricates legislative history. *See, e.g.*, Mem. at 7. Specifically, MWG tries to argue that the Illinois General Assembly enacted Section 21(r)—in 1990, fourteen years after *ComEd* was decided—"to legislatively overrule the *ComEd* decision." MWG Mot. at Ex. D (MWG reply), page 4. There is simply no evidence of this being true, as explained in detail in Complainants' surreply (attached here as Exhibit E). To the extent that the legislative history of Section 21(r) says anything about legislative intent, it shows that the General Assembly was focused on the disposal of coal ash at mine sites. *See* Ex. E at 3-8; 86th Ill. Gen. Assem., Senate Proceedings, June 21, 1989, at 220; 89th Ill. Gen. Assem., House Proceedings, April 26, 1996, at 72. There is no mention of the fourteen-year-old *ComEd* case in the legislative history, and no indication that the General Assembly was not trying to overrule *ComEd*.

MWG's attempts to rewrite legislative history echo similar efforts that have, appropriately, failed. In 1976, *ComEd* argued that the legislature had implicitly overruled the Board's interpretation of Section 21(e) (the predecessor to Section 21(d)). *Illinois v. ComEd*, 1976 WL 8158, *3. The Board rejected that argument, stating that "[i]f indeed the Legislature did find the Board's interpretation incorrect, it would have been a simple matter to give us direction in the amendment." *Id.* And in 2003, the defendants in the *Dixon-Marquette Cement*

case argued that the legislature had abrogated the Board's interpretation and related court decisions through amendments to Section 21(d). The Court disagreed:

> [B]oth the *Pielet Bros.* and *Reynolds Metals* cases were decided in 1982. Since that time, the legislature has amended section 21 of the Act numerous times; however, none of those amendments reflect a reconsideration or clarification in response to the decisions. It is a fundamental principle that, "[w]here the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent.

People ex rel. Madigan v. Dixon-Marquette Cement, Inc., 343 Ill. App. 3d 163, 176 (2003) (internal citations omitted). The Board and Illinois Courts have repeatedly confirmed that Section 21(d) only waives the permit requirement for minor amounts of waste. The General Assembly has never identified this as a problem or tried to legislatively override this interpretation. Section 21(d) does not waive the permit requirement for MWG's coal ash disposal areas, so Section 21(r)(1) does not exempt MWG from that section's general prohibition against the storage or disposal of coal combustion waste.

D. MWG Attempts to Shift Its Burden to Complainants

MWG continues to argue that Complainants, not MWG, should have investigated the nature and extent of contamination at the MWG properties. MWG Mot. at ¶5; MWG Mem. at 2, 4. This is far-fetched, at best. Investigating the extent of coal ash disposal and contamination is clearly MWG's responsibility. Indeed, the Board found MWG liable in part for failing to take precautions that include investigating the extent of coal ash disposal at its sites:

> [N]o further investigation of historic areas is taking place; no additional monitoring wells are installed; and, no further inspection of ash ponds or land around the ash ponds in the locations that show persistent exceedances is taking place. The Board is, thus, not persuaded that MWG took "extensive precautions" to prevent the releases.

Interim Order at 79. Yet MWG continues to insist that it "is not required to simply investigate its property when there is no apparent reason or requirement to do so." *See, e.g.*, Ex. B at 5. The

Board has clearly indicated that there is both a "reason" and a "requirement" for MWG to investigate its property. MWG has engaged in open dumping of coal ash, the groundwater is contaminated with coal ash constituents coming from multiple disposal and/or fill areas, and remediation of each site will require a better understanding of where the coal ash is located, how much coal ash is present on the properties, and the potential groundwater impacts of the coal ash.

E. MWG's Motion Misrepresents Prior Briefing and Facts

There are two important inaccuracies in MWG's brief. First, MWG incorrectly asserts that Complainants' original complaint "did not allege any violations related to open dumping."[1] MWG Mem. at 2. In reality, the original complaint, filed in 2012 and attached here as Exhibit F, did plainly allege open dumping violations. *See, e.g.*, Ex. F at ¶¶ 33, 42-50. Open dumping was not an afterthought—Complainants have been concerned about MWG's ongoing open dumping violations for a decade.

Finally, MWG incorrectly states that "all of the coal ash [has] been removed" from "the Northeast Area" at the Joliet Station. MWG Mem. at 12. This is false in two ways. To begin with, there is no evidence in the record that any ash has been removed from the northeast area. The motion cited by MWG alleges that coal ash has been removed from the northwest area. Mot. at Ex. C, ¶5. This may be an honest mistake, but it is important. The northeast area is very large,

[1] MWG appears to be contesting its liability for open dumping violations under Section 21(a) of the Act. MWG did not object to open dumping violations in its motion for reconsideration. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Motion to Reconsider and Clarify the Interim Order (Sept. 9, 2019). This is a question of MWG's liability, which is not appropriate at this stage. *People of the State of Illinois v. Doren Poland*, PCB 98-148, 2002 WL 126132, at *3. Once the liability phase is closed, issues of liability will not be relitigated during the remedy phase. *Id.* Rather, the remedy phase is to determine the appropriate relief and remedy.

covering roughly a third of the 271-acre site,[2] while the northwest area is only about 13 acres in size. Interim Order at 28.

In any case, it is not true that "all of the coal ash" has been removed from the northwest area. MWG Mem. at 12. In reality, the record shows that only a fraction of the coal ash in the northwest area has been removed. The report of MWG expert John Seymour states that "approximately 1,062.88 tons of fill material containing historic ash was excavated and disposed off-site at a landfill," but then goes on to discuss "the historic ash in the area" that remained "[f]ollowing the excavation." Ex. C, Ex. 1, page 47. The document cited by Seymour shows an excavated area of roughly 60 feet by 60 feet, or less than a tenth of an acre. KPRG, Coal Ash and Slag Removal Summary (Dec. 6, 2005) at MWG13-15_18828 (excerpted here as Ex. H). Most of the 13-acre northwest area was left in place. It is therefore not true that "all of the coal ash [has] been removed." MWG Mem. at 12. In fact, it appears that the vast majority of coal ash has been left in place.

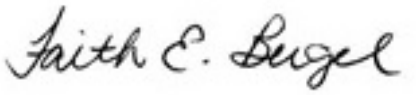
F. Conclusion

Because MWG's Motion is based on arguments that it failed to raise during the liability hearing (and therefore waived), improperly attacks the Board's liability holding, misstates the operation of Sections 21(d) and 21(r) of the Act, misrepresents the legislative history of Section 21(r), improperly attempts to shift the evidentiary burden to Complainants, and includes significant factual errors, the Board should deny the Motion.

[2] *See* Liability Hearing Exhibit 21, ENSR Phase I Environmental Site Assessment for Joliet 29 (Oct. 1998), excerpted here as Exhibit G. This document describes the "subject property" as "approximately 271 acres," *id.* at MWG13-15_25147, and shows the extent of the northeast landfill in a site map. *Id.* at MWG13-15_25149.

Dated: August 10, 2022

Respectfully submitted,



Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Peter M. Morgan
Sierra Club Environmental Law Program
1536 Wynkoop St., Ste. 200
Denver, CO 80202
(303) 454-3367
peter.morgan@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
802-662-7800 (phone)
ARuss@environmentalintegrity.org

Attorney for Prairie Rivers Network

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 E Wacker Dr, Ste 1600
Chicago, IL 606057
cjones@elpc.org
kcourtney@elpc.org
(312) 673-6500

Attorney for ELPC, Sierra Club and Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750

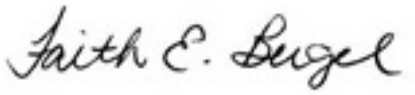
Chicago, IL 60606
312-726-2938
KHarley@kentlaw.iit.edu

Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ'S OPINIONS** before 5 p.m. Central Time on August 10, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 106 pages.

Respectfully submitted,



Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

PCB 2013-015 SERVICE LIST:

Jennifer T. Nijman
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
jn@nijmanfranzetti.com
kg@nijmanfranzetti.com

Bradley P. Halloran,
Hearing Officer
Illinois Pollution Control Board
100 West Randolph St., Suite 11-500
Chicago, IL 60601
Brad.Halloran@illinois.gov

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org

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

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 E Wacker Dr, Ste 1600
Chicago, IL 606057
cjones@elpc.org
kcourtney@elpc.org

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