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
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Objection to Complainants' Request for Leave to File Sur-Reply (*Instanter)* to Respondent's Motion in Limine to Exclude Evidence of the Need for a Remedy at Certain Areas at Three Stations, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: April 12, 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
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
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 Objection to Complainants' Request for Leave to File Sur-Reply (*Instanter)* to Respondent's Motion in Limine to Exclude Evidence of the Need for a Remedy at Certain Areas at Three Stations, a copy of which is hereby served upon you was filed on April 12, 2022 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies of the Notice of Filing, Certificate of Service and Midwest Generation, LLC's Objection to Complainants' Request for Leave to File Sur-Reply (*Instanter)* to Respondent's Motion in Limine to Exclude Evidence of the Need for a Remedy at Certain Areas at Three Stations were emailed on April 12, 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 OBJECTION TO COMPLAINANTS' REQUEST FOR LEAVE TO FILE SUR-REPLY (INSTANTER) TO RESPONDENT'S MOTIONS IN LIMINE TO EXCLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS

While Midwest Generation LLC's ("MWG") reply brief in support of its Motions *in Limine* to Exclude Evidence of the Need for a Remedy at MWG's Joliet 29, Will County and Powerton Stations ("Motions *in Limine*") was necessary to avoid material prejudice, Complainants' sur-reply does not aid the Board and can be rejected without causing any prejudice.

In their response to MWG's Motions *in Limine*, Complainants raised an argument asking that the Board adopt an entirely new interpretation of Section 21(r)(1) that is inconsistent with the text of that section and inconsistent with a "literal reading" of its incorporation of Section 21(d)(1)(i). When MWG filed its initial Motions *in Limine*, it could not have anticipated such a novel response. As such, MWG's reply was necessary and appropriate. Now, Complainants seek to file a sur-reply simply because they want to reargue the position that Complainants originally raised in their response brief. Under those circumstances, it would be materially prejudicial—both to MWG and to the Board—for Complainants to get the first, last, and only word on the subject.

Although Complainants imply that they, too, would face prejudice unless they can present a sur-reply containing "a substantial discussion of legislative history," they fail to point out that they already had that opportunity. (Compls.' Mot. at ¶9.) The legislative history of Section 21 was available when Complainants filed their response brief seeking to convince the Board to deviate from the plain text of the law. When presenting that type of argument, an inquiry into legislative history is arguably obligatory. It would not be unfair to assume that the Complainants *did* do this research, but failed to find anything supporting their implausible interpretation of the legislation creating and revising Section 21(r).

The proposed sur-reply itself shows that is does not aid the Board. It is internally inconsistent, and seeks to blur the issues at hand rather than bring them into focus. Evidentiary burdens are shifted. Questions are dodged. Stories are changed. Complainants are simply demanding that they get the last word because getting the last word is preferable. If rejecting that rationale constituted "material prejudice," then briefing would never end.

A. MWG Did Not "Misrepresent" Evidence.

In the two paragraphs that Complainants devote to justifying the need for a sur-reply, they claim that doing so is required to "rebut MWG's misrepresentation of Section 21's legislative history." (Compls.' Mot. at ¶9.) That is a serious accusation that not a *single sentence* of the proposed sur-reply attempts to substantiate. The word "misrepresent" or its variants, do not even appear in Complainants' proposed brief.

In truth, the sur-reply does little more than quibble with MWG's accurate recounting and reproduction of relevant legislative materials. The materials MWG cited were attached and presented for the Board's review. MWG did not "misrepresent" the record simply because Complainants disagree. Complainants seek to file a sur-reply that does not fulfill the allegations made in their motion for leave to file. There is no material prejudice in denying that request.

B. The Proposed Sur-reply is Unhelpful.

1. The sur-reply fails to explain how the Complainants can meet their burden to show that a "literal reading" of Section 21(r)(1)'s incorporation of Section 21(d)(1)(i) must be rejected.

The chief problem with the proposed sur-reply is that it is unhelpful. Instead of bringing issues into focus it distracts the Board from the question at hand and improperly shifts evidentiary burdens from the Complainants to MWG. Generally speaking, sur-replies may be reviewed under the same standards as replies. See *City of Quincy v. IEPA*, 2010 Ill. ENV LEXIS 282, *6 (June 17, 2010). The Board has made it clear that when the issues are fully briefed, no reply is necessary. *Roger and Romana Young v. Gilster-Mary Lee Corp*. 2001 Ill. ENV LEXIS 290, *2, (June 21, 2001). When the reply offers no assistance and the movant would suffer no material prejudice, a motion for leave to file a reply should be denied. *Commonwealth Edison v. IEPA*, 2007 WL 1266937, PCB04-215, slip op. at 2 (Apr. 26, 2007) (B. Halloran).

The issue here is not as complex as Complainants make it out to be in their 11-page proposed sur-reply. In interpreting how Section 21(r)(1) interacts with Section 21(d)(1)(i), the Board's "fundamental objective is to ascertain and give effect to the intent of the legislature." *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶17. "Legislative intent is to be derived primarily from a consideration of the legislative language itself." *People ex rel. Scott v. Schwulst Building Center, Inc.*, 89 Ill.2d 365, 371 (1982). A "literal reading" of Section 21(d)(1)(i), as incorporated in Section 21(r)(1)'s "not otherwise required" clause, establishes a clear presumption that the permitting exception for CCW is not subject to a quantitative limit. *See Pielet Bros. Trading, Inc. v. PCB*, 110 Ill. App. 3d 752, 755 (5th Dist. 1982). That presumption can only be rebutted if failing to do so would "obviously circumvent[] . . . the purposes of the Act." *EPA v. Pontiac*, 1975 Ill. ENV LEXIS 317, at *8 (Aug. 7, 1975).

In their proposed sur-reply to this argument, Complainants fail to identify a single case where the Board found that the permitting exception in Section 21(r)(1) contains a quantitative limit on the permitting exemption for self-generated CCW. They thus take the extraordinary step of asking the Board to fulfill what Complainants believe was the "intent" of the General Assembly by inserting words that are not found in in Section 21(d)(1)(i) or Section 21(r)(1).

Such a step would be justified only if required to avoid the absurd result of allowing the Illinois environment to be despoiled by "indiscriminate[e]" pollution by actors that will face no "accountability for the resulting pollution." *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163, 173 (2d Dist. 2003). But despite briefing the issue *three times already,*[1] Complainants never attempt to overcome the "normal assum[ption] that whenever the legislature intended a limitation, it expressed that limitation; [and] if the limitation is absent from the text, the legislature presumably did not intend the limitation." *Ill. Bell Tel. Co. v. Ill. Commerce Comm'n*, 362 Ill. App. 3d 652, 660 (1st Dist. 2005). Not a single sentence of the proposed sur-reply seeks to prove why Complainants think it is somehow incorrect to accept Section 21(r)(1)'s incorporation of Section 21(d)(1)(i) as written.[2] Complainants fail to explain how MWG would not face "accountability" for any proven violation of law or regulation prohibiting pollution.

Despite purporting to enforce the unspoken will of the General Assembly, the Complainants did not present a single fact about the complex history of Section 21(r)(1) in their

[1] Complainants' Response to Respondent Midwest Generation, LLC's Motion In Limine to Exclude Evidence of the Need for a Remedy (Etc.), pp. 1-15 filed Mar. 4, 2022; Complainants' Memorandum in Support of their Motion for Sanctions, pp. 10-14, filed Feb. 18, 2022); Complainants' Motion for Leave to File, Instanter, Reply to Respondent's Response to Complainants' Motion for Sanctions, pp. 10-16, filed Mar. 18, 2022.

[2] A possible exception is Complainants' slippery-slope contention that if the Board concluded that Section 21(r)(1) does not have a quantity limit, then it would also have to conclude that *all* self-generated wastes can be dumped without a permit in any quantity. (Proposed Sur-Reply at 2.) But, because the Assembly chose to regulate the dumping of CCW in isolation from other wastes, the environmental consequences of applying the rule as written must be considered in isolation as well. Complainants' proposed sur-reply fails to conduct that analysis.

first, second, or third responsive briefs. They have no excuse for failing to advise the Board on this issue when it was their turn to speak.[3] The legislative history materials MWG filed in reply are public documents, and most are available on the General Assembly's website. The Board would not work "material prejudice" on the Complainants by holding them to their obligation to present their best case, using the opportunity guaranteed to them by 35 IAC §101.500(d).

Moreover, the proposed sur-reply's discussion of the legislative history fails to significantly help the Complainants' case. Complainants' response brief first raised the argument that Section 21(r)(1) should be read to contain a quantitative limit for CCW. As such, it is the Complainants' burden to convince the Board that the Assembly's intentions went beyond what it committed to text. It is the *Complainants* that need to mine legislative history for evidence that the Assembly intended to enact a pointless permitting exclusion that Complainants agree would have applied only to (nonexistent) *de minimis* CCW deposits. And Complainants do not explain the legislature's second enactment in 1996 or why the legislature would go to the trouble of rescinding this provision in 2019, when concerns about CCW deposits large enough to "fill Chicago's . . . Sears Tower nearly two times" peaked. 101st Ill. Gen. Assem., House Proceedings, May 27, 2019, at 161 (statements of Rep. Ammons).[4]

Suffice it to say, not one shred of legislative history supports Complainants' reading. There is no material prejudice in setting aside the Complainants' backup plan, which is simply to

[3] Complainants' Motion for Leave makes the disingenuous claim that the proposed sur-reply would merely "reproduce" arguments already made in past filings. (Compls.' Mot. at ¶8.) The sur-reply is plainly greater in scope than any of the Complainants' prior filings. In any event, there is no "material prejudice" in denying the Complainants an opportunity to "reproduce" arguments that they admit they have already presented in triplicate.

[4] And, it must be noted that during those decades where unpermitted deposits of self-generated CCW were supposedly (according to Complainants' reading) not allowed under the Act, there does not seem to have been a *single* enforcement action or citizens suit under that law between the *ComEd* complaint in 1975, and Complainants' amended complaint in 2015. How could it be the case that there was an enormous, "obvious[]," "gap" in the Illinois permitting system that went unnoticed for *forty years*? *Pontiac*, 1975 Ill. ENV LEXIS 317, at *8.

complain that some portions of the floor debate are, in Complainants' view, potentially ambiguous and, if divorced from context, might be read as referring to other components of the bill. That is not a "helpful" observation to the Board. Nor is it helpful to the Complainants, who cannot meet their burden of proof merely by muddying waters.

2. The sur-reply is unhelpful because it dodges the most important questions.

Like any brief that seeks to muddy waters, the topics that determine the outcome are difficult to find, or sometimes entirely absent. For example, Complainants fail to provide any consistent explanation for why the 2019 revisions to Section 21(d)(1)(i), which specifically excluded CCR surface impoundments from the permitting exception, happened. On one page, they claim that "this comprehensive legislation . . . clarified that coal ash impoundments can *never* be exempted from Section 21(d)." (Proposed Sur-reply, at 7, emphasis added.) But, on the very next page they claim that (apparently in reference to the pre-2019 version) Section 21(r) "clearly does allow for some amount of coal ash to be stored or disposed of onsite . . . " (Id. at 8.) A bill that changes "clearly . . . allow[s] for some amount" to "never" allows in any amount, is not a "clarification" as Complainants suggest. But they *have* to take that position, because the only alternative is to tell an improbable story about state legislators going out of their way to tighten regulations on a fictitious class of *de minimis* deposits. A sur-reply brief that changes its story from paragraph-to-paragraph is not "helpful."

That is not the only topic the sur-reply fails to engage seriously. It is important here to establish whether a party could be pursued under Section 21(a) and 21(r) simultaneously for the same activities. For the purposes of MWG's Motions *in Limine*, it is key to determining whether recognized deposits of CCW (as CCW was found by the Board in its Interim Order) should be subject to a remedy. MWG pointed out that such a reading of Section 21 is contrary to principles of statutory construction, and that the correct interpretation is that Section 21(r) has exclusive

control over alleged CCW violations and consideration in determining whether a remedy is required.[5]

Complainants' proposed sur-reply refuses to give an answer on the issue of simultaneous application of Sections 21(a) and (r). It vaguely says that: "Whether this is true depends on the facts." (Proposed Sur-reply, at 8.) But then, after musing that one can "imagine unpermitted coal ash management practices that comport with" both sections, it never bothers to give a bottom line on which "facts," if any, would allow for simultaneous prosecution under both statutes for the same acts or omissions. (Id. at 9.) Nor does it spend one word explaining how this double-jeopardy interpretation of the law squares with standards of construction. The proposed sur-reply, which merely distracts from the questions Complainants cannot answer, is not "helpful."

The proposed sur-reply also argues, for the first time, and without citation to authority, that the general-specific rule of statutory interpretation does not apply unless the two rules in question are "coextensive." (Proposed Sur-reply, at 8.) This is nonsensical: By their nature, "general" rules and "specific" rules, are *never* coextensive. But this interpretive rule does not serve Complainants' purposes and so, now, at the eleventh hour, they advise the Board to interpret it out of existence. This is not "helpful." Nor is this newly raised question of how to interpret statutory text meaningfully relevant to Complainants' demand to engage in a "substantial discussion of legislative history." (Compls.' Mot. at ¶9.)

CONCLUSION

Complainants have not justified their request to file a lengthy sur-reply brief. Every point made in MWG's reply brief was one that the Complainants should have addressed when drafting

[5]This is critical, because even if MWG's practices *were* prohibited by Section 21(r), the Board is not in possession of a complaint making such a charge, because Section 21(a) does not regulate CCW. *See Lloyd A. Fry Roofing Co. v. Pollution Control Board*, 20 Ill. App. 3d 301, 305 (1st Dist. 1974).

their response. Even though Complainants bore the burden of showing that the law meant something other than its plain text, which they should have presented in their response brief, their response provided little more than the assertion that Section 21(r) should somehow be much more restrictive than written. Their arguments made no mention of the Assembly's stated intentions and relied entirely on Board precedents that did not involve Section 21(r). Their new efforts to re-interpret Assembly transcripts and re-frame Section 21(r)'s evolution are untimely and not helpful to the Board. Sur-replies are not a remedy for parties that failed to present their best case in the first instance.

Nor is the sur-reply justified by Complainants' tossed-off allegation that MWG "misrepresented" historical evidence—no support for that serious accusation is provided in the proposed sur-reply, because it is simply not the case. (Id.) A sur-reply is not warranted just because Complainants seek the last word.

Complainants' "Motion for Leave to File, *Instanter*, Its Sur-reply to Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motions *In Limine* to Exclude Evidence of the Need for a Remedy at Certain Areas at Three Stations" should be denied.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: April 12, 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