ILLINOIS POLLUTION CONTROL BOARD
December 15, 2022

SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, AND CITIZENS AGAINST RUINING THE ENVIRONMENT,	)	
Complainants,	)	
v.	)	PCB 13-15
	)	(Enforcement – Water, Land)
MIDWEST GENERATION, LLC,	)	
Respondent.	)	

ORDER OF THE BOARD (by B.F. Currie):

On June 20, 2019, the Board found that Midwest Generation, LLC (MWG or Midwest) violated the Environmental Protection Act and Board regulations based on a complaint filed by Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, Environmental Groups). The matter has been split into a liability and remedy phase. The liability phase is concluded and the matter is currently in the remedy phase.

At issue are two motions filed by the parties as well as five interlocutory appeals of a hearing officer order. MWG moves to stay the proceedings in light of pending permit applications submitted to the Illinois Environmental Protection Agency (IEPA or Illinois EPA). Separately, the Environmental Groups filed a motion asking the Board to sanction MWG for requesting a third stay in this proceeding. Additionally, MWG and the Environmental Groups have each filed interlocutory appeals of a hearing officer order that ruled on motions *in limine* prior to the second hearing in this matter. Today, the Board denies MWG's motion to stay the proceedings, denies the Environmental Groups' request for sanctions, and denies the five interlocutory appeals.

In this order, the Board first provides a brief procedural history relevant to the motions. Next, the Board summarizes the filings regarding the motions, after which the Board analyzes and provides the reasons for denying the motions and interlocutory appeals.

PROCEDURAL BACKGROUND

Procedural History

The majority of the procedural history in this case is described in detail in the June 20, 2019, Board order. *See* Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 4 (June 20, 2019) (Interim Order). Within that Interim Order, the Board held that MWG violated

Sections 12(a), 12(d), and 21(a) of the Act (415 ILCS 5/12(a), 12(d), 21(a) (2020)), as well as Sections 620.115, 620.301(a), and 620.405 of the Board groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301(a), 620.405). Following a MWG motion to reconsider and clarify the Interim Order, on February 6, 2020, the Board issued an order granting in part and denying in part MWG's motion. The Board did not alter the substance of the previous Interim Order ruling which found MWG violated the above-mentioned sections of the Act and regulations. However, the Board found that groundwater management zones (GMZs) at three of the Stations are still in operation and therefore violations of 35 Ill. Adm. Code Sections 620.115, 620.301(a) and 620.405 were stayed since the creation of the GMZs in 2013.

The parties have been engaged in discovery as to the liability phase and a multi-day hearing is scheduled to begin in late January 2023. On January 21, 2022, MWG filed a motion to stay the proceedings (Mot. to Stay) and a memorandum in support of that motion (Memo to Stay). On February 18, 2022, the Environmental Groups filed a memorandum in opposition of the request to stay (Resp. Mot. to Stay). On March 4, 2022, MWG filed a motion for leave to file, instanter, its reply in support of the motion to stay (Reply Mot. to Stay). Though the motion within this filing addresses the motion to stay, the attached reply appears to be related to the Environmental Groups' motion for sanctions. On March 18, 2022, the Environmental Groups filed a motion for leave to file, instanter, its reply to the motion to stay, or in the alternative, motion for leave to file a sur-reply (Sur-reply Mot. to Stay).

On February 18, 2022, the Environmental Groups filed a motion for sanctions (Mot. for Sanctions). Along with the motion for sanctions, the Environmental Groups filed a memorandum in support of their motion for sanctions. (Memo for Sanctions). On March 4, 2022, MWG filed a response in opposition to the motion for sanctions (Resp. Mot. for Sanctions). On March 18, 2022, the Environmental Groups filed a motion for leave to file, instanter, their reply to the motion for sanctions (Reply Mot. for Sanctions). On April 5, 2022, MWG filed an objection to the Environmental Groups' request for leave to file a reply (MWG Reply Mot. for Sanctions).

On July 13, 2022, the hearing officer issued an order deciding various motions, responses, replies and sur-replies regarding evidentiary issues (July 13 HO. Ord.). On July 27, 2022, MWG filed a motion for expedited review of its motions for interlocutory appeal of two of the hearing officer's decisions (MWG Appeal). Additionally, on July 27, 2022, MWG filed three separate appeals. The first was an appeal of the hearing officer's order ruling denying MWG's motion *in limine* to exclude Jonathan Shefftz's opinions without non-disclosable exhibits (MWG Shefftz Mot. and MWG Shefftz Memo). The second filing was an appeal of the hearing officer's ruling allowing Mr. Quarles's opinions and redacting Mr. Quarles's notes (MWG Quarles Mot., MWG Quarles Memo). The third filing was a motion for interlocutory appeal from the hearing officer order denying three motions to exclude evidence of remedy and a memorandum in support (MWG Mot. Three Locations, MWG Memo Three Locations).

On July 27, 2022, the Environmental Groups filed two objections to and appeals from the hearing officer's order. First, the Environmental Groups filed an objection to and appeal of the hearing officer's ruling on MWG's motion *in limine* to preclude evidence regarding NRG Energy, Inc. (NRG Appeal Mot., NRG Appeal Memo). Second, the Environmental Groups filed

an objection to and appeal of the hearing officer's ruling on their motion *in limine* to exclude portions of MWG's expert report, or in the alternative to reinstate portions of their expert report (Koch Appeal Mot., Koch Appeal Memo).

On August 10, 2022, MWG filed a combined response to the Environmental Groups' interlocutory appeal of the NRG Energy evidence and related portions of the Koch report (MWG Combined Resp.) Also on August 10, 2022, the Environmental Groups filed three separate responses: the first was a response to MWG's appeal of Mr. Quarles's opinion (Quarles Resp.), the second was a response to MWG's appeal of Shefftz's opinion (Shefftz Resp.), and the third was a response to the Three Locations appeal (Three Locations Resp.)

Procedural Motions

MWG's motion for leave to file, instanter, its reply to the motion to stay is denied as the reply filed with the Board appears to be addressing to a separate issue. The Environmental Groups' motion for leave to file, instanter, its sur-reply to the motion to stay is granted.

MWG's objection to the Environmental Groups' request for leave to file a reply to the motion for sanctions is denied. The Environmental Groups' motion for leave to file, instanter, their reply to the motion for sanctions is granted.

MOTION TO STAY

Legal Background

The Board's rules regarding a motion to stay are found at 35 Ill. Adm. Code Section 101.514(a) and are as follows:

Section 101.514 Motions to Stay Proceedings

a) Motions to stay a proceeding must be directed to the Board and must be accompanied by sufficient information detailing why a stay is needed, and in decision deadline proceedings, by a waiver of any decision deadline. A status report detailing the progress of the proceeding must be included in the motion.

b) If the motion to stay is granted, at the close of the stay, the parties must file a status report in compliance with Subpart C. Additional requests for stay of the proceedings must be directed to the hearing officer.

The decision to grant or deny a motion for stay is "vested in the sound discretion of the Board." *See* People v. State Oil Co., PCB 97-103 (May 15, 2004). When exercising its discretion to determine whether an arguably related matter pending elsewhere warrants staying a Board proceeding, the Board may consider the following factors: (1) comity; (2) prevention of multiplicity, vexation, and harassment; (3) likelihood of obtaining complete relief in the foreign jurisdiction; and (4) the *res judicata* effect of a foreign judgment in the local forum, *i.e.*, in the

Board proceeding. Sierra Club, et. al v. Midwest Generation, LLC, PCB 13-15, slip op at 11 (April 17, 2014). The Board may also weigh the prejudice a stay would cause the nonmovant against the policy of avoiding duplicative litigation. *Id.* at 11, *citing* Village of Mapleton v. Cathy's Tap, Inc., 313 Ill. App. 3d 264, 267, 729 N.E.2d 854, 857 (3d Dist. 2000). Additionally, the Board must consider any ongoing environmental harm should the stay be granted. *Id.* at 16.

Discussion

MWG asks the Board to stay the case at hand in order to defer to any specific actions that will arise from the IEPA 35 Ill. Adm. Code Part 845 permit review of the four facilities at issue in this case. Mot. to Stay at 1. Additionally, MWG asks for a stay to "avoid multiplicity of remedies and conflicts with remedies permitted by Illinois EPA and the evolving regulatory landscape for CCR." *Id*. MWG explains that it has submitted operating permit applications and is preparing construction permit applications to submit to IEPA for the four facilities. Memo to Stay at 2. MWG argues a stay would, "allow MWG to continue its regulatory requirements, potentially making all or part of a Board hearing on remedy moot." *Id*. MWG asks the Board for a stay and if granted, require MWG to submit to the Board a status one year from the date the stay is granted. *Id*. at 24. MWG does not request a specific length of time for the stay.

MWG argues that a stay is appropriate in this case because there is not a risk of ongoing environmental harm. Memo to Stay at 2. In support of this argument, MWG says, "[i]t is undisputed that there are no potable wells downgradient of the MWG Stations, and there are ELUCs [Environmental Land Use Controls] established at the Waukegan Station, Powerton Station, and Will County Station preventing any potable use of the groundwater." Memo to Stay at 15-16. MWG points to the existence of groundwater management zones at three of the four facilities as evidence of a lack of continuing environmental harm. Memo to Stay at 2. Additionally, MWG claims that one of the previous Board decisions denying an MWG motion to stay failed to take into account the establishment of GMZs at three of its four stations. *Id*.

As MWG is engaged in the permitting process with IEPA for its facilities, it argues that the Board should defer to the IEPA's decision making in the permit applications. "It is unreasonable to push forward while the Illinois EPA is proceeding with its regulatory review." Memo to Stay at 12. MWG's memorandum contains detailed information of its proposed plans for each of the surface impoundments at issue in this matter. Memo to stay at 10-11. "Because MWG is fully complying with the Illinois CCR Rule pursuant to the schedules in the Rule, the Board should stay this matter to prevent a multiplicity of actions and vexation to MWG in facing a remedy that could conflict with the remedy approved in the future." Memo to Stay at 14.

The Environmental Groups oppose MWG's motion to stay, arguing the permitting and enforcement proceedings are distinct and can take place without any fear of multiplicity, vexation or harassment. Resp. to Mot. to Stay at 3. Further, the Environmental Groups dispute MWG's assertion that there is no risk of environmental harm should a stay be granted. Resp. to Mot. to Stay at 7-10.

Board Findings

This is MWG's third motion to stay this matter. The Board previously denied MWG's motions to stay on April 17, 2014, and April 16, 2020. The primary question that arises from these filings is whether the Board can simultaneously consider an enforcement action, ongoing rulemaking issues, and pending permit decisions that deal with overlapping issues.

This is an enforcement action, currently in the remedy phase. In fashioning a remedy in this case, the Board will take into consideration the need to ensure that the relief does not conflict with any permit that may be issued by IEPA pursuant to Part 845. The Board finds that it can exercise its technical expertise and consider these issues simultaneously. Further, the ongoing environmental harm at the Stations weighs heavily in favor denying the motion to stay. The Board also notes that the issuance of a permit is not a defense to violations of the Act or Board regulations; therefore, the Board is unconvinced that staying this enforcement action is advisable. Additionally, should civil penalties become a remedy issue in this matter, that issue would be separate from the permitting process.

As has been the case through much of the timeline of this matter, the promulgation, adoption, and implementation of new CCR regulations has overlapped with the issues at hand. The Board is able to consider, at the same time, an enforcement matter and changes in regulations dealing with similar issues as the enforcement matter. The Board finds no issues of comity, multiplicity or vexation in this matter.

In its two previous rulings on MWG's motions to stay, the Board found a risk of ongoing environmental harm in this matter. In the 2014 denial of MWG's motion for a stay, the Board found, "that if the violations alleged in the complaint are proved, the risk of environmental harm would be serious. Thus, the Board believes that consideration of the risk of environmental harm weighs strongly against a stay." Sierra Club, et. al v. Midwest Generation, LLC, PCB 13-15, slip op at 16 (April 17, 2014). In the 2020 denial of a motion to stay, the Board found, "that the recent groundwater monitoring results support the Environmental Groups' claim that groundwater contamination continues at all four stations." Sierra Club, et. al v. Midwest Generation, LLC, PCB 13-15, slip op at 5 (April 16, 2020).

The Board reiterates its finding that the potential for environmental harm exists at this juncture. The Board found MWG in violation of the Act and Board regulations in the Board's Interim Order. While the violations related to GMZs are stayed from 2013-onward, MWG has been found to have ongoing violations of Sections 12(a), 12(d) and 21(a) of the Act and Section 620.405 of the Board's regulations. 415 ILCS 5/12(a), 12(d), 21(a) (2020); 35 Ill. Adm. Code 620.405. The Board is aware of the GMZs that exist at Joliet 29, Powerton and Will County as well as the ELUCs at the stations. However, the existence of GMZs or ELUCs at the MWG's facilities do not eliminate the risk of environmental harm.

Under Section 620.250, a GMZ may be established where groundwater is being managed to mitigate impairment caused by release of contaminants. Further, the rules provide a shield from groundwater standards specified in Sections 620.410, 620.420, 620.430, and 620.440 to released chemical constituents within the GMZ if the initiated corrective action is implemented

in a timely and appropriate manner. *See* Section 620.450(a)(3). The GMZs at three MWG stations cover only the area of the ash ponds and are located within the property boundaries. Mot. at 96-99. Thus, the GMZs at MWG stations apply on-site for timely restoration of groundwater quality. However, as noted by the Environmental Groups, merely establishing a GMZ does not mean that environmental harm or threat to public health is eliminated. EG's Resp. at 7-8. In this regard, no new evidence has been placed before the Board to show that groundwater remediation at the affected sites has been completed in compliance with Part 620 to eliminate the risk of environmental harm.

Regarding MWG's contention that the ELUCs at Waukegan, Powerton, and Will County Stations prevent any potable use of the groundwater, the Board's Interim Order explained why the establishment of ELUCs is not "corrective action". *See* Interim Order at 83. The Board noted that an ELUC establishes limitations that are designed to protect "against exposure to contaminated groundwater," rather than to remedy the contamination. *Id.* While ELUCs include measures to protect against exposure to contaminated soil and groundwater at the MWG stations, they do not include measures to prevent contamination and migration of coal ash constituents from MWG sites. *Id.* at 27. Like the GMZs, ELUCs at MWG facilities do not extend beyond the property boundaries. Mot. at 96-99.

MWG's argument regarding the nonexistence of continuing environmental harm or threat to public health is hinged upon the risk to downgradient receptors. Memo to Stay at 2, 7, 17, 19. The lack of current receptors is not the equivalent of absence of environmental harm. As the Environmental Groups correctly point out, Waukegan is not covered by a GMZ. Further, a lack of current receptors at the four sites does not equate to an absence of environmental harm. The focus of this enforcement action, the adopted regulations in Part 845, and the rulemaking sub-docket in R20-19A is the preservation of the water, land and air of the State for future use. The Board holds that simply because there are no current receptors, does not mean there exists no risk of current or future contamination from the facilities. Therefore, the Board finds that a stay is inappropriate at this point in the proceedings and denies MWG's third motion for stay. In order to keep the Board abreast of the status of MWG's permit applications with IEPA, the Board will require MWG to provide a written update prior to the January 2023 hearings.

MOTION FOR SANCTIONS

Legal Background

Section 101.202 Definitions for Board's Procedural Rules

> "Sanction" means a penalty or other mechanism used by the Board to provide incentives for compliance with the Board's procedural rules, Board orders or hearing officer orders. 35 Ill. Adm. Code 101.202

The Board's rules on sanctions are found at 35 Ill. Adm. Code Section 101.800.

Sanctions for Failure to Comply with Procedural Rules, Board Orders, or Hearing Officer Orders

a) If any person unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or any order entered by the Board or the hearing officer, including any subpoena issued by the Board, the Board may order sanctions. The Board may order sanctions on its own motion, or in response to a motion by a party.

b) Sanctions include the following:

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2) The offending person may be barred from filing any other pleading or other document relating to any issue to which the refusal or failure relates;

3) The offending person may be barred from maintaining any claim, counterclaim, third-party complaint, or defense relating to that issue;

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5) Any portion of the offending person's pleadings or other documents relating to that issue may be stricken and, if appropriate, judgment may be entered as to that issue; and

6) The witness may be barred from testifying concerning that issue.

c) In deciding what sanction to impose, the Board will consider factors including: the relative severity of the refusal or failure to comply; the history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith by the offending party or person.

35 Ill. Adm. Code 101.800

Discussion

The Environmental Groups ask the Board to sanction MWG for repeatedly filing motions to stay for functionally the same issue. "MWG has unreasonably disregarded this Board's prior two orders denying MWG's prior Motions to Stay by filing duplicative motions that attempt to relitigate issues that the Board has already decided." Memo for Sanctions at 2. The Environmental Groups argue that MWG has failed to comply with the Board's two previous denials of motions to stay and that, "[r]epeated failure to comply with Board or hearing officer orders warrants sanctions." *Id*. at 10. The Environmental Groups request that the Board strike MWG's motion to stay, bar MWG from filing further motions to stay, bar MWG from repeating any of the arguments or claims in the previous motions to stay, and bar MWG from making any future arguments that the proceedings should be delayed due to developments in Part 845 or 40

C.F.R. Part 247. Mot. for Sanctions at 5-6. The Environmental Groups ask for two additional sanctions as they relate to motions *in limine*. These are addressed in a following section of this order.

The Environmental Groups argue that sanctions are appropriate in this matter because MWG has filed "duplicative motions that attempt to relitigate issues that the Board has already decided." Memo for Sanctions at 1. Further, the Environmental Groups argue that, "MWG is filing duplicative motions that waste the Board's time and resources as well as Complainants' time and resources, and prolong the long-standing and ongoing environmental harm occurring as a result of MWG's violations." Memo for Sanctions at 7.

MWG argues that the Board has not issued any order barring further motions to stay in this matter. Resp. Mot. for Sanctions at 2. "The Board's prior denials of MWG's motions to stay do not forbid any future motions and the Board rules have no preclusion against multiple motions to stay." *Id*. MWG distinguishes this motion to stay from previous motions by basing the request on the implementation of the new CCR rules as well as MWG's current and future permit applications pursuant to those rules. *Id*. at 2. Arguing that this motion to stay is "objectively reasonable", MWG points to the significant recent changes in the laws and regulations surrounding CCR. *Id*. at 9.

Board Findings

The Board's procedural rules allow it to issue sanctions in cases where parties have unreasonably failed to comply with a Board order, a hearing officer order, or the Board's procedural rules. *See* 35 Ill. Adm. Code 101.800. Sanctions may include dismissing a proceeding with prejudice, or barring a party from maintaining a claim or defense. The Board has on rare occasions issued sanctions. For repeated failure to timely file an initial brief, the Board granted an IEPA motion for sanctions that requested to dismiss the proceeding with prejudice. Modine Manufacturing Company v. IEPA, PCB 87-124, slip op at 3 (November 17, 1988) aff'd, 192 Ill. App. 3d 511. On remand from the Fourth District Appellate Court, the Court directed the Board to issue sanctions in the form of awarding attorney fees in an air permit appeal. The Grigoleit Company v. IEPA, PCB 89-184, slip op at 4 (March 17, 1994).

The Board has broad discretion in determining the imposition of sanctions. *See* IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 597 (3d Dist. 1988); Modine Manufacturing Co. v. PCB, 192 Ill. App. 3d 511, 519 (2d Dist. 1989). In exercising this discretion, the Board considers such factors as "the relative severity of the refusal or failure to comply; the past history of the proceeding; the degree to which the proceeding has been delayed or prejudiced; and the existence or absence of bad faith on the part of the offending party or person." 35 Ill. Adm. Code 101.800(c).

The last several years have included changes and developments in the way CCR is handled and stored both at a national and state level. The Board is understanding that a changing landscape of rules puts the issue of remedies in flux. However, as it has done throughout this matter, and indeed in other matters, the Board is able to proceed with enforcement actions and rulemaking on parallel tracks. MWG asks the Board to stay this proceeding because at its four

stations it has applied for, or is in the process of applying for, construction permits per the requirements of Part 845. MWG has previously requested stays to avoid potential conflicts with the USEPA coal ash rulemaking and to await the promulgation of the Illinois coal ash rulemaking.

The Board does not find this latest motion for stay as part of a pattern of bad faith or deliberate noncompliance with its rules or orders. The Board has not issued an order barring future motions to stay, nor has it cautioned participants in this matter regarding multiple motions to stay. As such, the Board denies the Environmental Groups' motion for sanctions and directs the hearing officer to proceed expeditiously to a hearing on remedy.

INTERLOCUTORY APPEALS

Environmental Groups Appeals

Following the hearing officer's July 13, 2022, order deciding various motions *in limine*, the Environmental Groups filed two appeals to the Board. The first is their objection to and appeal of the ruling on MWG's motion *in limine* to preclude evidence regarding NRG Energy, Inc. The second is their objection to and appeal of the ruling on the Environmental Groups' motion *in limine* to exclude portions of MWG's expert report, or in the alternative to reinstate portions of complainants' expert report. The Environmental Groups ask that the two appeals be considered jointly by the Board. MWG filed a combined response to both appeals.

NRG Energy Evidence

In a September 9, 2021 order, the Board decided a nearly identical issue. During the discovery process, the Environmental Groups submitted an expert opinion of its witness, Jonathan S. Shefftz (Shefftz Opinion). MWG then filed a motion *in limine* to exclude sections of the Shefftz Opinion as they related to NRG Energy, MWG's indirect parent company. An April 13, 2021, hearing officer order granted MWG's motion *in limine* and excluded those portions of the expert report. The Environmental Groups appealed the hearing officer's decision and on September 9, 2021 (NRG Order), Board order upheld the hearing officer's decision, holding, "NRG information is barred from the expert report but will be allowed to be introduced if Midwest makes an inability to pay argument." Sierra Club v. Midwest Generation, LLC, PCB 13-15, slip op. at 8 (Sept. 9, 2021).

Presently, the Environmental Groups argue that "MWG has now sought to introduce evidence in support of an inability to pay argument, in the form of portions of the Expert Report of Gayle S. Koch." NRG Appeal Mot. at 3. The hearing officer denied the Environmental Groups' motion *in limine* to exclude portions of Ms. Koch's report and found that the Environmental Groups failed to establish that NRG was responsible for any of the violations found by the Board in this case, and therefore found that NRG's financial information was not relevant to the penalty determination. July 13 HO. Ord. at 14. The hearing officer granted MWG's motion *in limine* to exclude portions of the Shefftz Opinion that discuss NRG. *Id*.

The Environmental Groups filed an interlocutory appeal of the hearing officer order, arguing that MWG's expert testimony made an inability to pay argument. The Environmental Groups argue that MWG's expert testimony, including portions of the expert report of Ms. Koch, make inability to pay arguments. NRG Appeal Mot. at 3. "The Hearing Officer erred in granting a blanket exclusion contrary to the Board's September 9, 2021 Order, in failing to address the facts that have changed, and in failing to adhere to the Board's decision to treat MWG's arguments as opening the door to financial information about NRG." *Id*. at 2-3.

"More broadly, Ms. Koch's reports and deposition testimony make clear that MWG intends to argue that MWG's small size and poor economic outlook will make the company unable to reasonably afford the remedies and penalties Complainants believe are appropriate for their confirmed violations of the [Act]." Koch Appeal Mot. at 3.

The expert report of Ms. Koch contains non-disclosable information. The Environmental Groups contend that the following pages of the Koch expert report contain evidence of inability to pay arguments: 1-2, 6, 19, 24-25, 27-29. NRG Appeal Mot. at 3.

Motion *in limine* to Exclude Portions of MWG's Expert Report, or in the Alternative Reinstate Portions of Complainant's Expert Report

The Environmental Groups had previously filed a motion *in limine* to exclude portions of MWG's expert witness, Ms. Koch's opinion. The hearing officer denied the motion, ruling that Ms. Koch's report did not introduce an inability to pay argument, but "was merely rebutting Mr. Shefftz's report regarding MWG's ability to pay." July 13 HO. Ord at 13. The Environmental Groups now appeal that determination and ask the Board to exclude portions of Ms. Koch's report, or in the alternative, reinstate portions of Mr. Shefftz's report as they relate to MWG's relationship to its indirect parent company, NRG. The Environmental Groups ask the Board to consider this appeal as interrelated to its appeal on the admission of NRG evidence. Koch Appeal Memo at 4.

Pointing to portions of Ms. Koch's expert opinion, the Environmental Groups claim that these sections allude to constraints on MWG's financial situation, triggering the situation set forth in the hearing officer's directive – that if MWG makes an inability to pay argument, NRG-related evidence may be introduced. Koch Appeal Memo at 5. "In making this argument, Ms. Koch and MWG are asking the Board to consider MWG's ability to afford (or pay for) the joint remedy and penalty costs." *Id*. at 6. Due to the purported inability to pay argument, the Environmental Groups ask the Board to reinstate the portions of Mr. Shefftz's opinion that discuss the financial relationship between MWG and NRG. Koch Appeal Memo at 8.

MWG denies that it has made an inability to pay argument in any of its filings or reports. MWG Combined Resp. at 2. "No one, not MWG nor Ms. Koch, has stated that MWG has an inability to pay for a remedy or penalty. In fact, Ms. Koch specifically states she was *not* making an ability to pay determination and was not asked to do so." *Id*. at 2, emphasis in original.

Board Discussion and Findings

The Board has previously decided the issue of evidence regarding the finances of MWG's indirect parent company, NRG Energy. NRG Order. In that order, the Board looked to two previous Board decisions involving the assets of parent companies when reviewing the statutory factors and determining remedies. NRG Order at 7. Those cases were People v. Panhandle Eastern Pipeline, PCB 99-191, slip op. at 29-30 (Nov. 15, 2001) and Charter Hall Homeowner's Association v. Overland Transportation System, Inc., PCB 98-81, slip op. at 13 (May 6, 1999). The Board found that while it is clear the Board may consider parent company finances when determining the appropriate civil penalty, in this case, "NRG is not a party to the case, nor has it been alleged to have violated the Act or Board regulations in this matter." *Id*. The Board looked to Charter Hall for the proposition that the Board can, "decline to consider a parent company's financial information because complainants 'have not established that [the parent company] is responsible for these violations or adequately demonstrated that this information is relevant to the penalty to be imposed." *Id*. at 8.

In looking to Panhandle, the Board found it distinct from the facts at hand in that the subsidiary did not object to introducing the parent company's financial information to analyze the economic benefit incurred. *Id*. at 8. The Board found that MWG had not at that time put forth an inability to pay argument so it was, "inappropriate to consider NRG's financials when evaluating Midwest's economic benefit under Section 42(h) of the Act, as NRG is not named party in this matter." *Id*. However, the Board held that should MWG make "an inability to pay argument in the future, or should the facts being considered change, the Board will consider it at that time and the Environmental Groups may then renew their request for admission of NRG's financial information." *Id*. at 8-9.

The Board has carefully reviewed the information of Ms. Koch's expert report and has found that it supports MWG's argument that no inability to pay argument has been made therein. On the pages cited by the Environmental Groups, Ms. Koch addresses the economic benefit calculations made in the Shefftz Opinion and argues that Mr. Shefftz incorrectly uses NRG economic information when NRG is not a party to the case. Koch Opinion at 25. Additionally, Ms. Koch makes an economic reasonableness argument. *Id*. at 27-28.

The Board finds that MWG has not made an inability to pay argument in its recent filings or expert testimony. The portions of the Koch Expert Report cited by the Environmental Groups do not make an inability to pay argument. The Board finds no explicit inability to pay argument made yet by MWG. Should one be made in the future, the Board will determine at that time how best to proceed. The Board denies the Environmental Groups' appeal on the MWG motion *in limine* to preclude evidence regarding NRG. Additionally, the Board denies the Environmental groups appeal to strike portions of the Koch report.

Midwest Generation Appeals

Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's notes

A detailed procedural history of this contested issue can be found in the Hearing Officer's September 14, 2020 order. Sept. 14, 2020 HO. Ord. at 1-3. In short, during the liability hearing, the Environmental Groups' expert witness was James Kunkle. On April 1, 2020, the Environmental Groups requested leave to designate a substitute expert witness. The Hearing Officer granted the request, over the objections of MWG, on September 14, 2020. *Id*. "The parties may call additional witnesses to provide more information to the Board for the second hearing in this matter… Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." *Id*.

The Environmental Groups subsequently designated Mark Quarles, P.E., as their expert witness on the issue of groundwater. On February 4, 2022, MWG filed a motion *in limine* to exclude the Quarles opinion, arguing that Mr. Quarles has not relied upon the previous expert's opinion, as directed by the hearing officer (MWG Mot. to Exclude). The July 13, 2022, Hearing Officer Order denied MWG's motion, saying that MWG's argument regarding the Quarles opinion is, "premature and better left to objections at the hearing on remedy. It may be that the Board, as a technical body, can parse through any objections that may arise as to Mr. Quarles testimony." July 13 HO. Ord. at 12.

Broadly, MWG objects to Mr. Quarles's testimony as a whole. Additionally, MWG objects to two related issues: the first is handwritten notes included in Mr. Quarles's opinion and the second is Mr. Quarles's opinions of MWG's witnesses. On February 4, 2022, the Environmental Groups filed a motion to exclude certain documents (EG Mot. to Exclude). The motion asked the hearing officer to strike one line of Mr. Quarles's handwritten notes as they related to MWG's witnesses. EG Mot. to Exclude at 5. Separately, MWG asked the hearing officer to redact Mr. Quarles's opinions on MWG's expert witness qualifications. MWG Mot. to Exclude at 6-9.

MWG asks the Board to reverse the hearing officer's July 13, 2022, order that denied MWG's request to exclude Quarles's expert opinion. Quarles Memo at 1. MWG argues that as a substitute opinion, Mr. Quarles's expert opinion did not adhere to the hearing officer's directive that any substitute witness must elaborate and amplify the information in Mr. Kunkle's opinion. MWG Quarles Memo at 4. "The Hearing Officer's decision should be reversed because MWG is materially prejudiced by the admission of Mr. Quarles's opinions that are inconsistent with and wholly unrelated to Complainants' first expert opinion, in violation of the Hearing Officer's September 14, 2020 Order and Illinois law, and do not aid the Board." Quarles Memo at 6.

MWG claims it will be materially prejudiced should Mr. Quarles's opinion be admitted. "Though the Hearing Officer claimed that MWG could simply cross-examine Mr. Quarles at the hearing, MWG was unable to do so during his deposition because Mr. Quarles had no basis to

testify as to the prior opinions by Mr. Kunkel, having not reviewed or relied upon them." Quarles Memo at 10. MWG argues that Mr. Quarles's opinion did not offer a remedy. "He does not recommend a specific investigation, admits he has not determined the type of nature and extent investigation that should be conducted, and states he has no plans to do so." Quarles Memo at 12. However, the Environmental Groups say that Mr. Quarles has indeed offered a remedy in his opinion. "After a nature and extent investigation, Mr. Quarles recommended a process for selecting a remedy—an alternatives analysis… This all aids the Board because it is impossible to consider the economic reasonability and technical feasibility of any remedy without first knowing the nature and extent of the contamination." Quarles Resp. at 12.

Separately, MWG argues that the Board should reverse the hearing officer's ruling on the issue of Mr. Quarles's opinions of MWG's witnesses and the exclusion of a remark in Mr. Quarles's notes. Quarles Memo at 1. In his rebuttal opinion, Mr. Quarles provided his opinion as to the qualifications of MWG's experts, Douglas Dorgan and Michael Maxwell of Weaver Consultants Group (Weaver Experts). "If Mr. Quarles is allowed to speak to MWG's experts' qualifications in his opinions, pertinent statements in his notes should be available in the record for impeachment purposes to show his bias or other motives towards those experts." *Id*. at 1. MWG asks the Board to either disallow the Quarles opinions of other expert qualifications or allow it and allow the Quarles notes for impeachment purposes. *Id*.

In their response to MWG's appeal, the Environmental Groups argue that Mr. Quarles "uses the Interim Board Order as the foundation of and basis for his remedy phase reports." Quarles Resp. at 5. As to Mr. Quarles's opinions on the Weaver Experts, the Environmental Groups say that, "Mr. Quarles's testimony is helpful to the Board because it is informative on the experts' qualifications. Even where a witness may not qualify as an expert to opine on an issue, their testimony can still have 'probative value.' Under such circumstances, the Board can weigh the expert's testimony accordingly." *Id*. at 13 (citations omitted).

Board Discussion and Finding

In determining whether to admit expert testimony, "district courts employ a three-part framework that inquires whether: (1) the expert is qualified by knowledge, skill, experience, training, or education; (2) the reasoning or methodology underlying the expert's testimony is reliable; and (3) the expert's testimony will assist the trier of fact in understanding the evidence or determining a factual issue." Bielskis v. Louisville Ladder, Inc., 663 F.3d 887, 893-94 (7th Cir. 2011).

The Board as a technical body is able to make determinations based on contradictory expert testimony. The Board has already made use of Mr. Kunkle's opinions in its interim order. At the liability hearing, MWG cross-examined Mr. Kunkle. Tr. 1 at 71, Tr. 2 at 10-146.[1] The Board finds that the hearing officer's directive - that any testimony already entered into the record by Mr. Kunkle stands - to be determinative in this dispute. Mr. Kunkle is no longer available as a witness to the Environmental Groups. Mr. Kunkle is no longer able to participate,

[1] The Board cites the transcript of separate hearing days as "Tr.1" for October 27, 2017; and "Tr. 2" as January 29, 2018.

nor is he able to be cross-examined. An analogous situation would be where an expert witness has passed away or become incapable of participating further in a proceeding. This is not a novel situation, and has been accommodated in various ways by Illinois courts, such as in Plost v. Weiss Memorial Hospital, 62 Ill. App. 3d (1st Dist. 1978) and Sullivan v. Eichmann, 213 Ill. Ed. 82 (2004). In Plost, one of the plaintiff's identified expert witnesses died prior to trial. *Id*. at 256. The plaintiff requested a continuance to identify new expert witnesses, which the trial court denied. *Id*. The appellate court reversed, holding that the trial court had abused its discretion in denying the continuance. *Id*. at 258. In Sullivan, the plaintiff's expert witness withdrew and the plaintiff's counsel requested that the court allow additional time to seek a new expert. *Id*. at 86. The court granted the request. *Id*.

The Board finds that based on his pre-filed testimony, Mr. Quarles satisfies the three expert testimony rules set forth in Bielskis. Mr. Quarles appears to be qualified to give his opinion on the facts in this case, his reasoning appears to be reliable and as Mr. Kunkle is no longer available, and Mr. Quarles's testimony will assist the Board in understanding the groundwater issues in this case.

When presented at hearing, the Board will determine whether Mr. Quarles's opinion sufficiently relies upon Mr. Kunkle's previous opinions. Similarly, the Board will be able to weigh Mr. Quarles's opinions on MWG's Weaver Experts based on its technical ability. MWG will be able to cross-examine Mr. Quarles at hearing. If MWG finds Mr. Quarles's responses during cross-examination insufficient, that can be addressed by the hearing officer at hearing or MWG can explain to the Board in post-hearing briefs why Mr. Quarles's responses are insufficient.

MWG cites La Playita for the holding that an expert is not permitted to opine on the credibility of another witness. MWG Mot. to exclude Quarles at 9, *citing* La Playita Cicero, Inc. v. Town of Cicero, 2017 U.S. Dist. LEXIS 44868, (N.D. Ill. March 28, 2017). MWG argues that Mr. Quarles's opinions on the Weaver Experts are general criticisms of credibility and such unproven statements are inadmissible. MWG Mot. to Exclude Quarles at 9. The Board finds La Playita distinguishable from this case. In La Playita, an expert witness said he questioned the validity of another expert witness' character. La Playita Cicero, Inc. v. Town of Cicero, 2017 U.S. Dist. LEXIS 44868, at 26. The Court found, "[n]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Citing,* Gen. Elec., 522 U.S. at 146. *Id*. The Court further found that the statements in question, "are more likely to confuse the trier of fact. The jury might misunderstand Jaffe to be opining not merely on Meza's credibility in answering questions during the psychological evaluations, but rather on Meza's credibility in giving testimony during the trial itself." *Id*. at 27.

In this case, Mr. Quarles's rebuttal opinion cites the expert credentials of the Weaver Experts. Those opinions are found on pages 4 through 6 of Mr. Quarles's July 2021 rebuttal opinion, Sections 2.1.1 and 2.1.2. Mr. Quarles offers his opinions as to why the two experts may lack CCR-related experience. Mr. Quarles does not, as in La Playita, attack the characters of the Weaver Experts in his rebuttal opinion. The Board, after hearing all witnesses testify, may properly accord weight to each witness.

The one sentence in Mr. Quarles's handwritten notes relating to the Weaver experts shall remain redacted. The Board finds that the handwritten note was correctly excluded by the hearing officer due to its prejudicial effect outweighing its probative value. Further, the Board finds that Mr. Quarles does offer a proposed remedy process in recommending a source identification and site investigation of the four facilities. Should MWG find Mr. Quarles's remedy recommendation insufficient, those insufficiencies can be raised during cross-examination at hearing and in post-hearing briefs.

The Board denies MWG's appeal of the hearing officer's three determinations regarding the Quarles Opinion – Mr. Quarles's opinion as a whole shall be allowed, his rebuttal opinion shall not be redacted as to the Weaver Experts' credentials, and the one line of his handwritten notes shall remain redacted.

Appeal of the Hearing Officer's Ruling Denying MWG's Motion *in limine* to Exclude Jonathan Shefftz's Opinions

MWG had filed a motion *in limine* to exclude the Environmental Groups' expert witness, Jonathan Shefftz, which was denied by the hearing officer on July 13, 2022. MWG now appeals the hearing officer's decision and asks the Board to reverse and exclude Mr. Shefftz from testifying at the hearing to, "any opinions that are not based on evidence." MWG Shefftz Mot. at 2.

In its appeal of the hearing officer's order allowing Mr. Shefftz's economic benefit expert opinion, MWG argues that Mr. Shefftz based his opinion on data inputs from Mr. Kunkle's opinion and information provided by counsel for the Environmental Groups. MWG Shefftz Mot. at 6 and 7. MWG moves to exclude Mr. Shefftz's opinion, "in part because the opinions rely on cost estimates for a removal remedy that Complainants have withdrawn and rely upon assumptions fed to him by Complainants' counsel that are not based on direct or circumstantial evidence." MWG Shefftz Memo at 8.

The Environmental Groups argue that not only is MWG's exclusion request overbroad it fundamentally misunderstands the primary purpose of Mr. Shefftz's testimony. Shefftz Resp. at 3. "To the extent MWG has raised any legitimate issues with any of the inputs utilized by Mr. Shefftz in his reports (and Complainants do not concede that MWG has), those concerns would go only to the weight the Board may choose to place on those suggested inputs, not to Mr. Shefftz's economic expertise or the validity of the economic model he has devised." *Id*. at 4. "Such a rule, if adopted by the Board, would require every economic expert providing testimony to assist the Board to possess not only economic expertise, but expertise in additional areas such as engineering, chemistry, and environmental remediation. Such an absurd policy would have the effect of depriving the Board of testimony from qualified economists." *Id*. at 10-11.

Board Discussion and Findings

The Board may turn to the Illinois Rules of Evidence in instances where its own rules do not fully address the issues. The Illinois rule regarding expert opinion testimony is as follows:

Rule 703 – Bases of an Opinion Testimony by Experts

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.
> Ill. R. Evid. 703.

In allowing the Environmental Groups to substitute their expert witness, the hearing officer directed them to have new witness testimony build upon the testimony given by Mr. Kunkle at the liability hearing. Sept. 14 HO. Ord. at 3. Though MWG argued that Mr. Quarles's testimony should be excluded because it did not hew close enough to Mr. Kunkle's testimony, MWG argues here that Mr. Shefftz's testimony should be excluded because it relies *too* heavily on Mr. Kunkle's testimony. MWG Shefftz Mot. at 4. MWG does not challenge Mr. Shefftz's qualifications as an expert witness in the field of economics.

The Board is persuaded by the Environmental Groups' argument that Mr. Shefftz's opinion relies upon reasonable assumptions arising from the factual evidence. "As long as the hypothetical assumptions are within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible . . . . Moreover, the facts suggested in hypothetical questions need not be undisputed but only supported by the record." Carter v. Johnson, 247 Ill. App. 3d 291, 297 (1993) (internal citations omitted). Any specific issue MWG wishes to raise regarding the basis of Mr. Shefftz's testimony can be raised at hearing. MWG will be able to cross-examine Mr. Shefftz at hearing.

The Illinois Supreme Court has held that, "the weight to be, assigned to an expert opinion is for the jury to determine in light of the expert's credentials and the factual basis of his opinion." Noakes v. AMTRAK, 363 Ill. App. 3d 851, 858-859 (1st Dis. 2006), *citing* Snelson, 204 Ill. 2d at 27. Courts have held that expert witnesses are allowed to rely upon data "presented to him 'outside of court and other than by his perception,' so long as it is of a type ordinarily relied upon by experts in the field in forming their opinions." Rock v. Pickleman, 214 Ill. App. 3d 368, 374 (1st Dist. 1991), *citing* Fed. R. Evid. 703. Further, the courts have held that cross-examination at trial is the remedy for such an issue. Additionally, "[t]he Illinois Supreme Court has explained the basis for a witness's opinion generally goes only to the weight of the evidence, not its sufficiency. Noakes, *citing* Snelson v. Kamm, 204 Ill. 2d 1, 26-27 (2003).

MWG's concerns regarding the basis for the input values Mr. Shefftz used in his economic model can be raised during cross-examination. Deficiencies, faults, inconsistencies can also be raised at that time or elaborated on in post-hearing briefs. Again, the Board is a technical body – it has been able to and is currently able to evaluate expert testimony including arguments regarding the scientific or mathematical basis for the expert testimony.

MWG argues that it is at a disadvantage because it is not able to cross examine Mr. Kunkle during the upcoming hearing. "Even though Mr. Shefftz developed his economic opinions based on the disavowed Kunkle Remedy Report, Complainants will not present Mr.

Kunkel to testify. Because Mr. Kunkel does not live in Illinois, MWG cannot subpoena him to appear at the hearing." MWG Shefftz Mot. at 6. The Board does not find this argument persuasive for two reasons. MWG cross-examined Mr. Kunkle at length during the liability hearing on October 27, 2017 and January 29, 2018. Tr. 1 at 71, Tr. 2 at 10-146. Mr. Kunkel was on the witness stand for two days during the liability hearing. Second, Mr. Kunkel's expert reports have not been disavowed. The hearing officer made clear that the Environmental Groups' substitute witnesses were to build upon Mr. Kunkle's report. Further, the Environmental Groups correctly point out that remedy was not a part of the testimony or evidence at the liability hearing. Quarles Resp. at 6. Therefore, Mr. Kunkle's remedy report is not part of the record of that first hearing. *Id*. Contrary to MWG's argument, the Board finds no disavowal of the Kunkle opinion in either Mr. Quarles's or Mr. Shefftz's expert opinions. The Board also finds no reason why MWG cannot cross-examine Mr. Quarles or Mr. Shefftz at hearing regarding the basis of their testimony.

The Board denies MWG's appeal of the hearing officer order allowing Mr. Shefftz's expert opinion.

Motion for Interlocutory Appeal from Hearing Officer Order Denying MWG's Three Motions to Exclude Evidence of Remedy

MWG appeals the hearing officer's denial of three motions *in limine* related to remedies. MWG Remedy Mot. at 3. MWG's motions argued that evidence should be excluded relating to specific areas at three of the facilities at issue in this case. The sites are 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 (Three Locations). *Id*. at 2. MWG argues that its actions at these locations, "conformed to an exception contained in Section 21(r) of the Act." *Id*. Further, "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." MWG Memo Three Locations at 8.

MWG argues that its conduct at the Three Locations adhered to an exception contained in Section 21(r) that deemed coal combustion waste (CCW) deposited by former operators was "reasonable". MWG Mot. Three Locations at 2. "As such, any evidence related to advocating particular removal or remediation projects, or the imposition of monetary penalties would be irrelevant." *Id*. MWG interprets Section 21(r) as treating 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 Three Locations] 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.'" MWG Memo Three Locations at 6.

The Environmental Groups disagree with MWG's assertion that Section 21(r) allows for coal ash to remain in place at the three sites at issue. Three Locations Resp. at 2. The Environmental Groups cite the Board's Interim Order that found open dumping violations at the three sites and they argue that the open dumping violations have not yet been remedied. *Id*.

The hearing officer's order denying MWG's three motions identified Section 21(a) violations at the three areas and found that Section 21(r) does not exempt the areas from cleanup. July 13 HO. Ord. at 7. "Generally, 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." *Id*., *citing* Interim Order at 90-91. The hearing officer also held that MWG had waived its argument regarding Section 21(r) as it did not raise it during the liability hearing. July 13 HO. Ord. at 7. MWG also appeals that decision.

As referenced above, the Environmental Groups' motion for sanctions includes a request to sanction MWG for raising the issue of excluding the Three Locations from the remedy hearing. "These three motions attempt to relitigate issues already decided during the liability phase of this case and show a disregard of the Board's Interim Order… Delaying a remedy will of course prolong the ongoing contamination at the heart of this case, which in turn prolongs and aggravates the environmental harm caused by that contamination. Because of MWG's disregard of Board orders and intent to delay this matter, MWG should be sanctioned." Mot. for Sanctions at 5. The Environmental Groups propose that the Board sanction MWG by barring it from repeating any of the arguments of claims related to the issue of excluding evidence of the Three Locations at the remedy hearing. *Id*. at 6.

Board Discussion and Findings

Sections 21(d) and (r) of the Act, in relevant part, are as follows:

Sec. 21. Prohibited acts. 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….

(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; or …

The Board's Interim Order found violations of Section 21(a) of the Act at the Three Locations. Interim Order at 26-28, 40-43, and 55-57. "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 91.

Prior cases have held that Section 21(d) of the Act waives the permit requirement for onsite storage of self-generated waste, only when there are "minor amounts" of waste. For example, in People ex rel. Madigan v. Dixon-Marquette Cement, Inc., 343 Ill. App. 3d 163 (2003), the court held, "we 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". *Id*. at 175. In Illinois v. Commonwealth Edison Co., PCB 75-368 (Nov. 10, 1976), the Board issued a holding as to the meaning of Section 21(e) [currently 21(d)],

> "[t]he intent of Section 21(e) was to exempt minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated… To interpret the exemption as allowing the municipality to dispose of any refuse it owns without a permit will ean that large quantities of varied materials could be indiscriminately deposited at a waste-disposal site. This obviously circumvents both the permit system and the purpose of the Act." *Id*. at 4, *citing* EPA v. City of Pontiac, PCB 74-396, slip op at 306 (Aug. 7, 1975).

MWG argues that it does not intend to 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." MWG Memo Three Locations at 8. MWG cites to three prior Board cases, all of which are fundamentally distinct, factually, from the issues at hand: People v. CSX Transportation, Inc., PCB 07-16 (July 12, 2007); Union v. Caterpillar, PCB 94-240 at 30 (Aug. 1, 1996); and Shelton v. Crown, PCB 96-53 (Oct. 2, 1997). Each case can easily be distinguished from this case because in each, the violations were already remedied by the time the Board decided the case.

In CSX, the People filed a complaint alleging CSX violated three sections of the Act by releasing 400 to 500 gallons of diesel fuel in 2004. People v. CSX Transportation, Inc., PCB 07-16, slip op at 2 (July 12, 2007). Immediately following the release, CSX responded by removing and disposing of the affected soil, placing absorbent pads and booms, installing a drainage channel, and application of a bioremediation process. *Id*. Subsequent soil sampling in the following months found contaminants in amounts that exceeded the background carcinogenic concentrations. *Id*. at 16. A further sample a year after the spill indicated no additional exceedances. *Id*. The Board found CSX had violated the Act and that "subsequent compliance is not a defense" and that the Board, "may impose penalties to deter future violations." *Id*. at 19.

In Union, a citizens' enforcement action alleged Caterpillar's on-site dry cleaning facility, which discontinued operation in 1976, discharged dry cleaning related chemicals causing soil and groundwater contamination. Union v. Caterpillar, PCB 94-240, slip op. at 30 (Aug. 1, 1996). During a renovation project in 1990, workers were made ill from fumes in an

uncovered brick catch basin under the subflooring of one of the buildings under renovation. *Id*. at 8. Caterpillar shut down the renovation activities and sampled the site which revealed the presence of volatile organic compounds. *Id*. Subsequently, Caterpillar entered into a program that provided Illinois EPA review and evaluation of its cleanup activity. *Id*. at 9. The Board found that Caterpillar had undertaken remedial activities one year prior to the filing of the citizen complaint. *Id*. at 37. The Board declined to impose a civil penalty. *Id*.

In Shelton, neighbors filed a citizen's enforcement action regarding the noise levels of an air conditioning unit at a neighboring house. Shelton v. Crown, PCB 96-53, slip op. at 1 (Oct. 2, 1997). The Sheltons alleged violations of the Board's noise regulations. *Id*. Following the filing of the complaint with the Board, the Crowns constructed several acoustic shields that resulted in dampening the noise levels of the air conditioning unit. *Id*. at 7. The Board found that the mitigations had achieved compliance with the Board's noise regulations, however, found the Crowns violated the noise regulations for a three year period from the installation of the unit to the construction of the noise shields. *Id*. at 14.

In each of the three cases cited by MWG, the parties had remediated the alleged violations either prior to the filing of the complaint, or prior to the Board's final decision. The Board finds that the case at hand is presently distinct from CSX, Union and Shelton. Should MWG remediate all four of its facilities prior to the issuance of the Board's final order in this case, the holdings in those three cases would be relevant. At present, the Board finds the holdings of the three cases distinct from the facts in this case.

The Board finds that MWG is allowed to raise the argument regarding Section 21(r) at this time. However, the Board is not persuaded by MWG's argument that Section 21(r) exempts the Three Locations from remedies. The Board found, "that historic ash landfills at all four Stations contain ash, as evidenced by testing for CCB [coal combustion byproducts] compliance, boring results, MWG admissions and testimony, and groundwater monitoring results." Interim Order at 90. The Board therefore denies MWG's interlocutory appeal of the hearing officer's order as related to the Three Locations.

Though the Board's Interim Order found violations at the Three Locations, the Board has not issued any order barring MWG from making arguments related to 21(r) of the Act. As to the sanctions requested by the Environmental Groups, the Board does not find MWG's interlocutory appeal is a part of a pattern of bad faith or deliberate noncompliance with its rules and orders. Therefore, the Board denies the Environmental Groups' motion for sanctions as related to this MWG appeal.

CONCLUSION

The Board denies MWG's motion to stay the proceedings, finding that the Board is able to simultaneously consider an enforcement action and a permitting decision. Additionally, the Board finds there exists a risk of environmental harm, which weighs heavily in its decision to deny requested stay. The Board also denies the Environmental Groups' request for sanctions, finding no deliberate non-compliance with a previous Board order or hearing officer order. The

Board denies the Environmental Groups' two interlocutory appeals as well as MWG's three interlocutory appeals.

ORDER

1. MWG's motion to stay the proceedings is denied.

2. The Environmental Groups' motion for sanctions is denied.

3. The Environmental Groups' appeal of the hearing officer's ruling on MWG's motion *in limine* to preclude evidence regarding NRG Energy, Inc. is denied.

4. The Environmental Groups' appeal of the hearing officer's ruling on Complainants' motion *in limine* to exclude portions of MWG's expert report is denied.

5. MWG's appeal from the hearing officer's ruling allowing Quarles's opinions and redacting Quarles's notes is denied.

6. MWG's appeal from the hearing officer's ruling denying its motion *in limine* to exclude Shefftz's opinions is denied.

7. MWG's appeal from the hearing officer's ruling denying three motions to exclude evidence of remedy is denied.

8. MWG is to provide a written update to the Board on the status of all Part 845 permit applications filed with IEPA by January 15, 2022.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on December 15, 2022, by a vote of 4-0.

Don A. Brown

Don A. Brown, Clerk
Illinois Pollution Control Board