

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

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

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Motion *In Limine* to Exclude the Former Ash Basin at the Powerton Station From Consideration of a Remedy with Exhibit, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By:       /s/ Jennifer T. Nijman      

Dated: February 4, 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](mailto:Brad.Halloran@illinois.gov)

Keith Harley  
Chicago Legal Clinic, Inc.  
211 West Wacker Drive, Suite 750  
Chicago, IL 60606  
[Kharley@kentlaw.edu](mailto:Kharley@kentlaw.edu)

Faith E. Bugel  
Attorney at Law  
Sierra Club  
1004 Mohawk  
Wilmette, IL 60091  
[fbugel@gmail.com](mailto:fbugel@gmail.com)

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

Abel Russ  
For Prairie Rivers Network  
Environmental Integrity Project  
1000 Vermont Avenue, Suite 1100  
Washington, DC 20005  
[aruss@environmentalintegrity.org](mailto:aruss@environmentalintegrity.org)

Greg Wannier, Associate Attorney  
Sierra Club  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
[Greg.wannier@sierraclub.org](mailto:Greg.wannier@sierraclub.org)



**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

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

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

In support of its Motion, MWG states as follows:

**A. Background**

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

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

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

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

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

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

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

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

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

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

No person shall:

\* \* \*

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

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

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

No person shall:

\* \* \*

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

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

415 ILCS 5/21(d) (emphasis added).

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

11. Section 21(r) of the Act is specific to coal combustion waste (“CCW”), which the Board concluded was at issue in the historic areas (among other areas). As such, Section 21(r) is the provision that is applicable to the historic fill areas at Powerton, not Section 21(a) of the Act. “It is...a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision...both relating to the same subject the specific provision controls and should be applied.” *Knolls Condo. Ass’n v. Harms*, 202 Ill. 2d 450, 459 (2002).

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

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

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

Respectfully submitted,  
Midwest Generation, LLC

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

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

---

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

# **EXHIBIT 1**



BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:

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

Complainants,

vs.

MIDWEST GENERATION LLC,

Respondent.

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

MR. BRADLEY P. HALLORAN,

Hearing Officer

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

1 cleaning basin. What is its purpose?

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

4 MS. FRANZETTI: And we have Stipulation 25,  
5 the metal cleaning basin was constructed in 1978  
6 with a Poz-o-Pac liner on the bottom and a  
7 Hypalon liner on the sides. Stipulation 26, in  
8 2010 Midwest Gen relined the metal cleaning  
9 basin with a 60-millimeter HDPE liner. And  
10 Stipulation 27, the ash in the metal cleaning  
11 basin is dredged approximately on an annual  
12 basis.

13 BY MS. FRANZETTI:

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

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

18 Q. Did it have any different purpose  
19 before?

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

23 Q. Is it lined?

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