

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

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

**NOTICE OF FILING**

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ MOTION FOR SANCTIONS** and **MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

/s/ Gregory E. Wannier

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Dated: February 18, 2022

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Complainants,	)	(Enforcement – Water)
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v.	)	
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MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

**COMPLAINANTS’ MOTION FOR SANCTIONS**

Pursuant to 35 Ill. Admin. Code § 101.800, Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) hereby request that the Illinois Pollution Control Board (“Board”) enter an Order granting their Motion for Sanctions. Sanctions are proper because Respondent Midwest Generation, LLC (“MWG”) has established a pattern of disregarding Board Orders in this proceeding, and relitigating issues, time and time again, after the Board decided those issues. Most recently, MWG has disregarded previous Board and Hearing Officer Orders (1) denying MWG’s previous motions to stay proceedings, by asking again for a stay on nearly identical grounds; and (2) establishing liability in this proceeding, by filing multiple motions *in limine* that attempt to relitigate the Board’s liability holdings. The volume and duplicative nature of MWG’s recent motions collectively show an intention to bog down these proceedings and delay an ultimate remedy.

In support of this Motion, Complainants submit the attached Memorandum and also state as follows:

**A. MWG Motions to Stay**

1. Complainants initiated this case over nine years ago. *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Complaint (Oct. 3, 2012). The Board has identified numerous violations, including ongoing groundwater contamination and open dumping (*Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Interim Opinion and Order of the Board (June 20, 2019)), that have gone unresolved for nearly ten years.

2. MWG filed a Motion to Stay Proceedings on February 19, 2014. *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Respondent's Motion to Stay Proceedings (Feb. 19, 2014).

2. On April 17, 2014, the Board denied that first motion to stay. The Board decided that state coal ash rules do not supplant this enforcement action. "The Board notes that according to the Agency, the proposed state coal ash rule would not displace an enforcement action based on exceedances of groundwater standards." *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Order of the Board at 13 (Apr. 17, 2014). The Board also concluded that "consideration of the risk of environmental harm weighs strongly against a stay." *Id.* at 16.

3. On June 20, 2019, the Board entered an Interim Order and Opinion, holding that MWG violated 12(a), 12(d) and 21(a) of the Illinois Environmental Protection Act (415 ILCS 5/12(d)) and Sections 620.115, 620.301(a) and 620.405 of the Board regulations, 35 Ill. Admin. Code 620.115, 620.301(a), 620.405. *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Interim Order, at 92-93 (June 20, 2019).

4. On February 6, 2020, the Board reconsidered certain findings in its Interim Order but

affirmed its conclusions as to MWG's violations. "The Board therefore affirms its June 20, 2019 decision, in which the Board: (1) found MWG violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2016); found MWG violated Section 12(d) of the Act, 415 ILCS 5/12(d) (2016); (3) found that MWG violated Section 21(a) of the Act, 415 ILCS 5/21(a) (2016); (4) found MWG violated Sections 620.115, 620.301(a) and 620.405 of the Board regulations, 35 Ill. Admin. Code 620.115, 620.301(a), 620.405." *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Board Order, at 16 (Feb. 6, 2020).

5. On February 21, 2020, MWG again attempted to stay this proceeding. *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Midwest Generation, LLC's Motion to Stay Proceedings (Feb. 21, 2020).

6. On April 16, 2020, the Board denied MWG's second motion to stay and rejected MWG's argument that this enforcement case should be stayed due to the then-pending state rulemaking on coal ash impoundments, *Coal Combustion Waste Ash Ponds*, R14-10. See *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, at 4-6 (April 16, 2020). In deciding that motion to stay, the Board again found proceedings related to the coal ash rules to be distinct from this enforcement proceeding. "While the final adoption by the Board of the proposed rules for [coal ash fill] and the future remedy ordered in this matter have overlapping issues, the two matters are distinct from each other." See *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Order of the Board at 5 (April 16, 2020). As to environmental harm and prejudice to the nonmoving party, the Board found that these factors weighed "in favor of not granting a stay in this matter." *Id.* at 6. Finally, in that order "[t]he Board direct[ed] the parties and the hearing officer to *proceed expeditiously* to hearing on remedy." *Id.* (emphasis added).

7. Instead of proceeding expeditiously to a hearing on remedy, MWG, on January, 21, 2022,

filed a third motion to stay these proceedings. *See Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, MWG's Motion to Stay Proceedings (Jan. 21, 2022) ("Motion to Stay"). In this most recent Motion to Stay, MWG argues issues that the Board has already decided. In particular, MWG argues, again, that proceedings under Illinois EPA's administration of the Illinois CCR Rule could be at odds with "the Board's potential actions." MWG's Memorandum in Support of Its Motion to Stay Proceedings, at 13 (Jan. 21, 2022). MWG also argues that "the Board could order a corrective action contrary to the Illinois EPA's permit requirement." *Id.*

8. MWG further argues, again, that a stay would not cause environmental harm or prejudice complainants even though the Board has already decided, twice, that a stay would cause environmental harm and would prejudice the Complainants. *See Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Order of the Board, at 16 (Apr. 17, 2014). *See Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Order of the Board, at 6 (April 16, 2020).

9. On January 23, 2022 at 3:00 pm, Counsel for Complainants conferred by phone with Counsel for MWG. Counsel for Complainants communicated their concerns with MWG's Motion for a Stay and gave MWG an opportunity to withdraw the motion prior to Complainants taking any action. To date, upon information and belief, MWG has not withdrawn their Motion to Stay, forcing Complainants to expend additional costs to respond.

10. MWG is filing frivolous and duplicative motions that waste the Board's time and resources as well as Complainants' time and resources. MWG's motives for repeatedly filing the same motion can only be explained by an intent to bog down proceedings in this case and delay a decision on remedy. Because of MWG's disregard of Board orders and intent to delay this matter, MWG should be sanctioned.

**B. MWG Motions in Limine**

11. On February 4, 2022, MWG filed three Motions in Limine seeking to “exclude [certain coal ash disposal areas] from consideration of a remedy.” MWG Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29 (“Joliet Motion”); MWG Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy (“Powerton Motion”); Motion in Limine to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station (“Will County Motion”).

12. On February 16, 2022, Counsel for Complainants conferred by phone with Counsel for MWG. Counsel for Complainants communicated their concerns with MWG’s Joliet, Powerton, and Will County Motions, and gave MWG an opportunity to withdraw the motions prior to Complainants taking any action. To date, upon information and belief, MWG has not withdrawn the Joliet, Powerton, and Will County Motions, forcing Complainants to expend additional costs to respond.

13. 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. Again, MWG’s attempts to relitigate decided issues show an intent to unjustly delay a decision on remedy. 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.

**C. Proposed Sanctions**

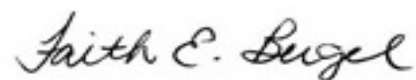
14. Pursuant to Section 101.800(b), Complainants request that the Board sanction MWG by:

- a. Striking MWG’s Motion to Stay Proceedings filed on January 21, 2022;
- b. Barring MWG from any filing further Motions to Stay Proceedings;
- c. Barring MWG from repeating any of the arguments or claims in their three Motions to Stay;

- d. Barring MWG from making any further arguments that the proceedings in this case should be delayed or deferred based on actions or proceedings related to the Illinois coal ash rules found at 35. Ill. Admin. Code Part 845 or the federal coal ash rules found at 40 C.F.R. Part 257;
- e. Striking MWG's MWG Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29; MWG's Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy; and MWG's Motion in Limine to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station; all filed on February 4, 2022;
- f. Barring MWG from repeating any of the arguments or claims in their Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29; MWG Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy; and Motion in Limine to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station.

WHEREFORE, for the reasons stated above, Complainants requests that the Board grant Complainants motion for sanctions and issue an order with the aforementioned relief.

Respectfully submitted,



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*Attorney for Sierra Club*

Dated: February 18, 2022

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v.	)	
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MIDWEST GENERATION, LLC,	)	
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**COMPLAINANTS’ MEMORANDUM IN SUPPORT OF  
THEIR MOTION FOR SANCTIONS**

Complainants request that the Illinois Pollution Control Board (“Board”) enter an order for sanctions barring Midwest Generation, LLC (“MWG”) from (a) filing any further Motions to Stay; (b) repeating any of the arguments or claims in their three Motions to Stay; and (c) making any further arguments that the proceedings in this case should be delayed or deferred based on actions or proceedings (included by not limited to permitting, impoundment closures, or corrective action) pursuant to the Illinois coal ash rules found at 35. Ill. Admin. Code Part 845 845 or the federal coal ash rules found at 40 C.F.R. Part 257. 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. MWG’s duplicative motions to stay have wasted the Board’s time and resources as well as Complainants’ time and resources, and they will continue to waste these resources if the current Motion to Stay is allowed to proceed. As the following sections demonstrate, there is ample precedent for Complainants’ requests in this case.



**I. Statement of Facts**

Complainants initiated this case over nine years ago. *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Complaint (Oct. 3, 2012). The Board has identified numerous violations, including ongoing groundwater contamination and open dumping (*Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Interim Opinion and Order of the Board (June 20, 2019)), that have gone unresolved for nearly ten years.

MWG filed its first motion to stay this proceeding on February 19, 2014. *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Respondent's Motion to Stay Proceedings (Feb. 19, 2014). On April 17, 2014, the Board denied that motion to stay. The Board decided that state coal ash rules do not supplant this enforcement action. "The Board notes that according to the Agency, the proposed state coal ash rule would not displace an enforcement action based on exceedances of groundwater standards." *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Order of the Board at 13 (Apr. 17, 2014). The Board also concluded that "consideration of the risk of environmental harm weighs strongly against a stay." *Id.* at 16.

On February 21, 2020, MWG filed a second motion to stay this proceeding. *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Midwest Generation, LLC's Motion to Stay Proceedings (Feb. 21, 2020). On April 16, 2020, the Board denied MWG's second motion to stay and rejected MWG's argument that this enforcement case should be stayed due to the then-pending state rulemaking on coal ash impoundments, *Coal Combustion Waste Ash Ponds*, R14-10. See *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, at 4-6 (April 16, 2020). In deciding that Motion for Stay, the Board again found proceedings related to the coal ash rules to be distinct from this enforcement proceeding. "While the final adoption by the Board of the proposed rules for [coal ash fill] and the future remedy ordered in this matter have overlapping issues, the two matters are distinct from each other." See *Sierra Club et al. v. Midwest*

*Generation, LLC*, PCB 13-15, Order of the Board at 5 (April 16, 2020). As to environmental harm and prejudice to the nonmoving party, the Board found that these factors weighed “in favor of not granting a stay in this matter.” *Id.* at 6. Finally, in that order “[t]he Board direct[ed] the parties and the hearing officer to proceed expeditiously to hearing on remedy.” *Id.* (emphasis added).

On January 21, 2022, MWG filed its third Motion to Stay. In that Motion, MWG argues that proceedings under Illinois EPA’s administration of the Illinois CCR Rule could be at odds with “the Board’s potential actions.” MWG’s Memorandum in Support of Its Motion to Stay Proceedings, at 13 (Jan. 21, 2022). MWG also argues that “the Board could order a corrective action contrary to the Illinois EPA’s permit requirement.” MWG’s Memorandum in Support of Its Motion to Stay Proceedings, at 13 (Jan. 21, 2022). MWG also argues, again, that a stay would not cause environmental harm or prejudice complainants based on the presence of groundwater monitoring zones. *Id.* at 15-16.

On January 23, 2022 at 3:00 pm, Counsel for Complainants conferred by phone with Counsel for MWG. Counsel for Complainants communicated their concerns with MWG’s Motion for a Stay and gave MWG an opportunity to withdraw the motion prior to Complainants taking any action. To date, upon information and belief, MWG has not withdrawn their Motion to Stay, forcing Complainants to expend additional costs to respond.

On February 4, 2022, MWG filed three Motions in Limine seeking to “exclude [certain coal ash disposal areas] from consideration of a remedy.” MWG Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29 (“Joliet Motion”); MWG Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy (“Powerton Motion”); Motion in Limine to Exclude Evidence of the

Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station (“Will County Motion”).

On February 16, 2022, Counsel for Complainants conferred by phone with Counsel for MWG. Counsel for Complainants communicated their concerns with MWG’s Joliet, Powerton, and Will County Motions, and gave MWG an opportunity to withdraw the motions prior to Complainants taking any action. To date, upon information and belief, MWG has not withdrawn the Joliet, Powerton, and Will County Motions, forcing Complainants to expend additional costs to respond.

**II. Legal Standard**

Section 101.800 of the Board's procedural rules provides that

a) If any person unreasonably fails to comply with any provision of 35 Ill. Admin. 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:

1) Further proceedings may be stayed until the order or rules are complied with, except in proceedings with a statutory decision deadline. Proceedings with a statutory decision deadline may be dismissed prior to the date on which decision is due;

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 particular claim, counterclaim, third-party complaint, or defense relating to that issue;

4) As to claims or defenses asserted in any pleading or other document to which that issue is material, a judgment by default may be entered against the offending person or the proceeding may be dismissed with or without prejudice;

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 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. Admin. Code 101.800.

“The Board has broad discretion in deciding whether to impose sanctions.” *Grigoleit Co. v. Pollution Control Bd.*, 184 Ill. Dec. 344, 350, 613 N.E.2d 371, 377 (4th Dist. 1993). The Board has granted sanctions against a party when that party fails to follow Board or hearing officer orders. *See Modine Mfg. v. Pollution Control Bd.*, 192 Ill. App. 3d 511, 548 N.E. 2d 1145 (2nd Dist. 1989) (Board sanctioned party for failing to comply with hearing officer order and Board order setting briefing schedule); *Grigoleit Co. v. Pollution Control Bd.*, 245 Ill. App. 3d 337, 613 N.E.2d 371 (4th Dist. 1993) (Agency sanctioned for failing to issue permit as required by Board order); *Dorothy v. Flex-N-Gate*, PCB 05-49, 2006 WL 3265962, at 8\* (Nov. 2, 2006) (“[F]ailure to timely respond to discovery requests, failure to meet deadlines, and repeated failure to comply with Board procedural rules and hearing officer orders constitutes sanctionable behavior.”); “of November 11, 1985.” *Illinois E.P.A. v. Celotex Corp.*, 168 Ill. App. 3d 592, 594, 522 N.E.2d 888, 890 (3d Dist. 1988) (sanctions were appropriate where the Agency repeatedly failed to comply with a hearing officer order). Sanctions are appropriate when a party shows a deliberate and pronounced disregard for the Board’s rules and orders. *See Modine Mfg. v. Pollution Control Bd.*, 192 Ill. App. 3d 511, 548 N.E. 2d 1145 (2nd Dist. 1989); *Dorothy v. Flex-N-Gate*, PCB 05-49, 2006 WL 3265962, at 8\* (Nov. 2, 2006) (finding “repeated infringements of Board procedures amounts to a general disregard for the Board's authority”); *compare Valdivia v. Chicago and North Western Transp.*, 87 Ill. App. 3d 1123, 409 N.E. 2d 457 (1st Dist. 1980) (party’s failure to appear for deposition due to language barrier was not such a “deliberate or contumacious act” so as to warrant dismissal of his suit).

A pattern of disregard that shows a design to delay proceedings or decisions in a matter is grounds for sanctions. *Modine Mfg. Co. v. Pollution Control Bd.*, 192 Ill. App. 3d 511, 519, 548 N.E.2d 1145, 1150 (2nd Dist. 1989) (sanctions appropriate where party “repeatedly violated the hearing officer and Board orders, and was able to delay a decision in the proceedings”); *Freedom Oil v. IEPA*, PCB 03-54, 2006 WL 391850, \*9 (Feb. 2, 2006) (sanctions appropriate where a party showed a “dilatory pattern or scheme designed to stall these proceedings”). When an attempt to stall proceedings has been shown, a sanction is “appropriate and should be unhesitatingly applied.” *Illinois E.P.A. v. Celotex Corp.*, 168 Ill. App. 3d 592, 597, 522 N.E.2d 888, 891-92 (3d Dist. 1988). In such situations of a party’s disregard designed to delay proceedings, the Board may use sanctions to expeditiously move proceedings along. “The Board will not tolerate any further delays in this proceeding. If necessary in the future, the Board will use its sanctioning authority to ensure that this matter proceeds in an expeditious manner.” *People v. Wiemann*, PCB 93-191, 1997 WL 670516, at \*4 (Oct. 16, 1997).

### **III. MWG’s Relitigation of the Same Issues Disregards Board Orders**

#### **A. Repeated Motions to Stay**

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. MWG is attempting to relitigate issues that the Board has already decided and delay decisions on a remedy. The Board can look to its previous ruling on MWG’s first Motion to Stay to see that MWG’s motions to stay are duplicative and disregard the Board’s prior Orders. The first time the Board rejected MWG’s request to stay this enforcement proceeding, the Board provided reasoning that applies squarely to the arguments iterated in MWG’s pending Motion to Stay:

The Board is not persuaded that the federal and state coal ash rulemakings provide a reason to stay this case. The Board notes that rulemakings and enforcement actions are entirely distinct proceedings with different aims. Rulemakings are forward-looking and impose future obligations, while enforcement actions concern alleged past or ongoing violations and the proper remedies to redress proven violations.

*Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Order at 13 (Apr. 17, 2014); compare *Midwest Generation EME, LLC v. IEPA*, PCB 04- 216, at 8 (Apr. 6, 2006) (finding the two proceedings at issue to be “substantially similar”). The Board’s language in its first denial of MWG’s first motion to stay is equally applicable to MWG’s second and third motions to stay, demonstrating MWG’s disregard for the Board’s Order denying the first motion.

There is nothing in either rulemaking proposal that would prevent the Board from ordering tailored remedial measures if complainants establish the violations alleged in this action. Thus, regardless of the end result of the federal and state rulemakings, neither can be expected to obviate this proceeding or render any aspect of it moot.

*Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Order at 14 (Apr. 17, 2014).

In addition, the second time the Board rejected MWG’s motion to stay, the Board again used language that is squarely applicable to MWG’s current motion. “While the final adoption by the Board of the proposed rules for [coal ash fill] and the future remedy ordered in this matter have overlapping issues, the two matters are distinct from each other.” *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Board Order, at 5 (Apr. 16, 2020).

MWG again attempts argue that there is no environmental harm, but the Board has addressed the question of MWG causing environmental harm and prejudice to Complainants time and again during the past 10 years: not once, not twice, but at least three times. In the Board’s first Order denying MWG’s first motion to 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 v. Midwest Generation, LLC*, PCB 13-15, Order at 16 (Apr. 17, 2014). The Board also found that the violations in the complaint were proven, so the risk of environmental harm is serious. In concluding that MWG violated the Illinois Environmental Protection Act, the Board found the MWG discharged contaminants that are likely to make groundwater harmful to public health. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Interim Board Order, at 77 (June 20, 2019). Finally, in April of 2020, the Board found again that MWG is causing environmental harm and that environmental harm constitutes prejudice to Complainants. “The Board finds that prejudice to the nonmoving party, which includes ongoing environmental harm at the four Stations, weighs in favor of not granting a stay in this matter. Accordingly, the Board finds that a stay is not warranted and denies the motion for a stay.” *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Board Order, at 6 (April 16, 2020). MWG argues that somehow the presence of the GMZs means there is no environmental harm. The Groundwater Management Zones, however, do not cover Waukegan and have been in effect for both MWG’s second motion to stay and for the Board’s decision on liability. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Board Order, at 24, 38, 53, 65 (June 20, 2019). Thus, despite the existence of the CCA’s, Environmental Land Use Controls, and GMZs, the Board has consistently concluded that there has been ongoing environmental harm and that there would be prejudice to Complainants if the case were stayed. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Board Order, at 6 (Apr. 16, 2020).

In sum, MWG’s Motion to Stay repeatedly raises issues that the Board has already decided and, as such, disregard the Board’s previous orders. Like the *Grigoleit* and *Modine* cases, MWG has failed to comply with two Board orders, in this case both of the Board’s previous rulings denying its Motion to Stay. *Grigoleit Company v. Pollution Control Bd.*, 245 Ill.

App. 3d 337, 613 N.E. 2d 371 (4th Dist. 1993); *Modine Mfg. Co. v. Pollution Control Bd.*, 192 Ill. App. 3d 511, 519, 548 N.E.2d 1145, 1150 (2nd Dist. 1989). Repeated failure to comply with Board or hearing officer orders warrants sanctions. Because MWG's behavior shows a repeated disregard for Board orders, sanctions are appropriate.

**B. Motions in Limine Relitigating Liability-Phase Decisions**

Akin to filing the three repeated Motions to Stay, MWG also filed three Motions in Limine that improperly seek to challenge the Board's liability holdings. Specifically, MWG argues that the hearing officer should exclude evidence related to a remedy for certain historic fill areas at Joliet 29, Powerton (the Former Ash Basin), and Will County. Joliet Motion at 1-3; Powerton Motion at 1-2; Will County Motion at 1-2. This fundamentally misconstrues the procedural posture of this case. MWG cannot now avoid the responsibility for a remedy by second-guessing the Board's liability findings. Regardless of whether the historic fill areas are a source of the contamination identified in a given groundwater monitoring well,<sup>1</sup> they are violating Section 21(a) of the Act for all of the reasons set forth by the Board (and summarized above). This alone constitutes "the need for a remedy."

It has been established through multiple lines of evidence, including MWG admissions, that these areas contain coal ash, as described by the Board:

[T]he instant record shows that historic ash landfills at all four Stations contain ash, as evidenced by testing for CCB compliance, boring results, MWG admissions and testimony, and groundwater monitoring results. At Joliet 29, MWG admitted that all three historic coal ash sites (Northwest, Northeast, and Southeast areas) contain historic ash. Interim Order at 90.

This is simply not a fact that requires further review by the Board.

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<sup>1</sup> See Interim Order at 79 ("It is immaterial whether any specific ash pond or any specific historic ash fill area can be pinpointed as a source to find MWG liable").



Similarly, it is frivolous and vexatious for MWG to argue that Complainants must re-establish liability after the Board has already made a liability determination. *See* Joliet Motion at 3, 3 – 5 (“It is the Complainants’ duty and responsibility to prove their case”). Complainants have already “proved their case” by demonstrating to the Board’s satisfaction that MWG engaged in open dumping at the historic ash fill areas at all four sites in violation of Section 21(a). It is now MWG’s responsibility to remedy these violations.

To provide one more example of MWG attempting to re-litigate an issue that the Board has already dealt with, we note that MWG is once again arguing that its voluntary actions in response to a separate enforcement action somehow constitute an adequate investigation of the sites. *See, e.g.*, Joliet Motion at 4-5. The Board addressed this argument directly in 2019:

MWG knew that contaminants that include coal ash constituents are leaking from its property but did not fully investigate specific source or prevent further release, claiming that IEPA did not ask it to do so. MWG, however, cannot use IEPA’s actions to excuse for MWG’s violations of the Act or the Board rules.” *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Interim Order, at 79 (June 20, 2019).

For years, MWG has failed to adequately investigate the sites, and has been faulted by the Board for failing to do so, yet now makes the outrageous claim that it is somehow Complainants’ obligation to do so. This is simply not a valid or reasonable line of argument.

MWG also distorts the language and operation of Section 21 of the Illinois Environmental Protection Act (“Act”). MWG argues that because Section 21(r) and 21(d) of the Act allow unpermitted disposal of coal combustion waste that was generated by the site owner and disposed at the site. Joliet Motion at 5–7; Powerton Motion at 2-4; Will County Motion at 6-8. As described below, this is simply not true, but it also amounts to an attempt to relitigate the liability determinations at these locations.

MWG provides no serious justification for its claim that the Act's open dumping prohibition in Section 21(a) is somehow waived by Section 21(r). Instead, MWG misstates a common canon of construction. It is generally understood that if there is a conflict between statutes or statutory provisions, then the specific provision should control over the general provision. However, MWG cites *Knolls Condominium Ass'n v. Harms* for a very different proposition, which is that specific provisions always control over general provisions regardless of whether there is a conflict. MWG has badly missed the mark. A fair reading of the *Knolls Condominium* case reveals that it simply echoes the familiar canon of construction regarding conflicting language. It does not help MWG for the simple reason that there is no conflict between Sections 21(a) and 21(r) of the Act. It is possible to read both provisions harmoniously, as required by *Knolls Condo Ass'n*, to mean that “the storage or disposal of coal combustion waste” must meet both the specific requirements of 21(r) and the general open dumping prohibition in Section 21(a). Indeed, Section 21(r) explicitly exempts coal ash used in mine reclamation (pursuant to Sections 21(r)(2) and (r)(3))<sup>2</sup> from “the other provisions of this Title V,” but does not provide this exemption for Section 21(r)(1), the provision cited by MWG. *See, e.g.,* Joliet Motion at 6. This confirms that both Sections 21(a) and 21(r) apply to the historic ash at the MWG plants.

Furthermore, Section 21(r)(1) only provides an exemption from that Section's general prohibition against coal ash storage or disposal for two circumstances—either the facility has a permit, or a permit is not required pursuant to Section 21(d)—and neither of these circumstances apply here. First, the Board has already determined that these historic ash areas lack permits. Interim Order at 90 – 91. Second, section 21(d)(1), which MWG cites as support (*See, e.g.,* Joliet

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<sup>2</sup> No party has alleged that Sections 21(r)(2) or (r)(3) apply here.

Motion at 6; Powerton Motion at 3), generally requires a permit for waste storage, treatment, or disposal, but waives the permit requirement for “wastes generated by such person’s own activities which are stored, treated, or disposed within the site where such wastes are generated.” However, this permit waiver is not nearly as broad as MWG would like it to be. Indeed, such a broad waiver would make no sense at all, as it would incentivize widespread, unpermitted onsite waste disposal. MWG fails to acknowledge abundant precedent that dramatically narrows the scope of this permit waiver to “minor amount” of waste. *See, e.g., People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill.App.3d 163, 175 (2003) (“[W]e construe section 21(d)(1) as providing an exemption to those on-site facilities that generate minor amounts of waste that can be disposed of without a significant threat of environmental harm”); *Pielet Bros. Trading v. Pollution Control Bd.*, 110 Ill. App. 3d 752, 756–57 (1982) (“[T]he Board has at least twice interpreted the section 21(e) [as Section 21(d) was then known] exemption as applicable only to minor amounts of refuse which could be disposed of without environmental harm on the site where generated. . . [I]n light of the exemptive language used and the evils the act is directed to remedy, such construction is reasonable”). MWG has not argued, and cannot plausibly argue, that the large historic ash disposal areas at the sites constitute “minor amount” of waste. This means that MWG is not eligible for Section 21(d)’s permit waiver, and therefore MWG is not excused from Section 21(r)’s general prohibition against unpermitted coal ash storage and disposal.

MWG’s arguments are unavailing, but they also arrive too late – MWG could have raised these arguments during the liability phase of these proceedings. It is plainly inappropriate to raise liability issues that the Board has already decided just before a remedy hearing. To the extent

that MWG believes its claims under Section 21(r) are novel, it waived those claims when it declined to raise them in its briefing on liability.

**IV. MWG's Relitigation of the Same Issues Appears to Be an Attempt to Delay Remedy in This Matter**

MWG's three motions to stay, which attempt to relitigate issues already decided twice by the Board, and three motions in limine, which attempt to relitigate the Board's liability findings, taken together demonstrate a pattern of behavior designed to delay these proceedings. In addition, by bogging this proceeding down with repeated stay motions and duplicative motions in limine, MWG is disregarding the Board's order on the second stay motion. In that order "[t]he Board direct[ed] the parties and the hearing officer to proceed expeditiously to hearing on remedy." *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Board Order, at 6 (Feb. 6, 2020) (emphasis added). Similar to the *Modine* case, this record of motions shows that MWG's disregard of the Board's authority and previous Board orders. *Modine Mfg. v. Pollution Control Bd.*, 192 Ill. App. 3d 511, 516-17, 548 N.E. 2d 1145, 1149 (2nd Dist. 1989). The present situation is also analogous to *Freedom Oil*, where a party was sanctioned because it showed a "dilatory pattern or scheme designed to stall these proceedings." *Freedom Oil v. IEPA*, PCB 03-54, 2006 WL 391850, \*9 (Feb. 2, 2006). When an attempt to stall proceedings has been shown, a sanction is "appropriate and should be unhesitatingly applied." *Illinois E.P.A. v. Celotex Corp.*, 168 Ill. App. 3d 592, 597, 522 N.E.2d 888, 891-92 (3d Dist. 1988). Because MWG appears to be deliberately attempting to delay these proceedings by filing duplicate motions and by attempting to tie Complainants and the Hearing Officer up in six Motions in Limine, three of which relitigate the Board's liability findings, MWG should be sanctioned and prohibited from further delaying remedy proceedings. "The Board will not tolerate any further delays in this proceeding. If necessary in the future, the Board will use its sanctioning authority to ensure that

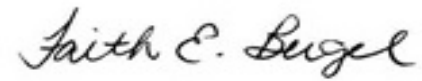
this matter proceeds in an expeditious manner.” *People v. Wiemann*, PCB 93-191, 1997 WL 670516, at \*4 (Oct. 16, 1997). In sum, because of MWG’s evident repeated attempts to delay this case, the Board should use its sanctioning authority to ensure that this matter moves forward quickly and efficiently.

**V. Conclusion**

For the foregoing reasons, Complainants respectfully request that the Board grant Complainants’ motion for sanctions and issue an order with the following relief and such other relief as the Board deems appropriate:

- a. Striking MWG’s Motion to Stay Proceedings filed on January 21, 2022;
- b. Barring MWG from any filing further Motions to Stay Proceedings;
- c. Barring MWG from repeating any of the arguments or claims in their three Motions to Stay;
- d. Barring MWG from making any further arguments that the proceedings in this case should be delayed or deferred based on actions or proceedings related to the Illinois coal ash rules found at 35. Ill. Admin. Code Part 845 or the federal coal ash rules found at 40 C.F.R. Part 257;
- e. Striking MWG’s Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29; MWG’s Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy; and MWG’s Motion in Limine to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station; all filed on February 4, 2022;
- f. Barring MWG from repeating any of the arguments or claims in their Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29; Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy; and Motion in Limine to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station.

Respectfully submitted,

A handwritten signature in cursive script that reads "Faith E. Bugel".

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*Attorney for Sierra Club*

Dated: February 18, 2022

**CERTIFICATE OF SERVICE**

The undersigned, Greg Wannier, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' MOTION FOR SANCTIONS** and **MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS** before 5 p.m. Central Time on February 18, 2022 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 23 pages.

Respectfully submitted,

/s/ Gregory E. Wannier

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