BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion to Stay, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 4, 2022

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service and Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion to Stay, a copy of which is hereby served upon you was filed on March 4, 2022 with the following:

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

and that true copies of the Notice of Filing, Certificate of Service and Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion to Stay were emailed on March 4, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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RESPONDENT'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTION FOR STAY

Respondent, Midwest Generation, LLC ("MWG"), submits this Motion for Leave to File, *Instanter*, its brief filed in response to complainants' motion for sanctions, as MWG's Reply in Support of its Motion to Stay. 35 Ill. Adm. Code 101.500(e), 101.514. MWG's Reply is warranted because Complainants' Response to MWG's Motion to Stay goes beyond MWG's motion. Complainants claim (without basis) a ploy to delay or relitigate issues, Complainants suggest potential actions that the Board cannot take to avoid inconsistent remedies, Complainants incorrectly state that the Board can work around permits that have yet to be issued, and Complainants wrongly equate elevated concentrations in the groundwater to environmental harm or risk during the pendency of a stay. In support of its motion, MWG submits its Response to Complainants' Motion for Sanctions as its Reply and states:

1. On February 18, 2022, Complainants filed their Response to MWG's Motion to Stay ("Complainants' Response") presenting arguments that go beyond the request for a stay, and include new arguments about how the Board might avoid multiplicity.

2. Complainants' Response asserts, without any description, facts, or analysis, that MWG is attempting to delay these proceedings and relitigate issues by filing the Motion to Stay. Comp. Response, p. 1, 7. While they do not explain their reasoning in the Response, Complainants expand on these assertions in their Motion for Sanctions against MWG, filed at the same time as they filed Complainants' Response. MWG requests that the Board consider MWG's response to the sanctions motion as its Reply in Support of Stay because the issues raised are overlapping and MWG's arguments apply to both .

3. Complainants' Response also raises new arguments in objection to a stay that warrant correction. First, Complainants wrongly claim that the Board could avoid duplicity between the final permits and this enforcement by stating that the Board could coordinate with the Agency concerning the work to be implemented by MWG under the CCR Rules. Comp. Resp. p. 4. Complainants fail to note the Board's may not be involved in such Agency decisions. The Board is the adjudicatory body that will review the permits issued by the Illinois EPA if they are appealed and the Board may not be a part of the decision making process for the permit. 415 ILCS 5/40(g), 35 Ill. Adm. Code 845.270(e).

4. Second, Complainants wrongly draw analogies to the Compliance Commitment Agreements MWG entered into before this lawsuit was filed. But here, there is no way for the Board to account for the decisions being made by Illinois EPA under the CCR Rules until MWG's permits are issued.

5. Third, Complainants' Response misinterprets MWG's argument that *a stay* will not cause harm, and instead focuses on elevated concentrations of constituents in the groundwater as harm. In addition, Complainants confuse concept of "harm" with the process of risk evaluation under the Act. Under the Act, evaluation of risk to the environment, and the subsequent need for

a remedy, is not based solely on an exceedance of a standard. Rather, the Act states that determining remediation objectives is risk based, and the Illinois legislature ordered the Board to prepare regulations establishing remediation objectives. 415 ILCS 5/58.5. As MWG points out, Complainants own public statements appear to support this. Complainants' counsel has stated publicly that there is no immediate risk to drinking water and that MWG's ponds are *probably less likely to be contaminating groundwater than at many other coal ash sites*. See Kari Lydersen, Historic coal ash raises concerns at iconic Illinois coal plant site, Energy News Network (Dec. 21, 2021) https://energynews.us/2021/12/21/historic-coal-ash-raises-concerns-at-iconic-illinois-coal-plant-site/ ("Article"), attached as Ex.4 to MWG's Response (emphasis added).

6. MWG will suffer material prejudice if it is not permitted to reply to these new and unfounded arguments. MWG addresses each of these issues in Section IIIs and IV.a. of its Response to Complainants' Motion for Sanctions (pp. 3-14, attached), which MWG now seeks to incorporate as its Reply in Support of its Motion to Stay. The issues raised by Complainants go beyond MWG's initial motion.

7. This Motion is timely filed on March 4, 2022, within fourteen (14) days after service of Complainants' Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, MWG respectfully requests that the Board grant Respondent's Motion for Leave to File Instanter, its Response to Complainants' Motion for Sanction as its Reply in Support of MWG's Motion to Stay, and accept the attached brief as its Reply as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

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

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MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' MOTION FOR SANCTIONS

Complainants have no basis to claim that MWG's motions are for any other reason than meritorious argument. Instead, Complainants grossly misstate the facts and blatantly and knowingly misstate Board precedent in violation of Illinois's Rules of Professional Conduct. MWG has not failed to comply with any Illinois Pollution Control Board ("Board") rule or any order by the Board or Hearing Officer. Even if MWG had somehow failed to follow a Board order or rule, which it has not, MWG's motions and arguments were objectively reasonable. MWG moved to stay this proceeding because the law and facts are significantly different, requiring a stay. The process of implementing the now final CCR rules, both in time and scope, was not previously known and newly conflict with whether or how a remedy might be identified. Similarly, MWG's motions *in limine* are solely related to consideration of a remedy, and do not attempt to reargue liability.[1] The motions *in limine* were timely because they were based on findings by the

[1] As the Interim Order is not final, it is not yet permissible to appeal liability findings at this time.

Board made in its Interim Order − that the unconsolidated coal ash was "coal combustion waste" ("CCW") even though MWG argued it was "coal combustion byproduct" ("CCB").

While the Complainants purport to raise a concern about delay, since the Board's Interim Order in 2020, the only delays are due to Complainants requests for extensions of Hearing Officer schedules.

Because MWG has not failed to comply with an order or rule, let alone ***unreasonably***, no sanctions are warranted. Further, because of Complainants' knowing misrepresentations of both a prior Board order and Hearing Officer Order in violation of Illinois Professional Code of Conduct, Complainants' motion should be summarily denied.

I. Applicable Law

The Board may order sanctions if a person "unreasonably" fails to comply with the Board's procedural rules or an order by the Board or hearing officer. 35 Ill. Adm. 101.800(a). Even if there is a violation of a Board order or rule, the Board rarely imposes sanctions in the absence of a pattern of bad faith or a finding of unreasonable noncompliance of a Board order or procedural rule. Instead, in determining whether sanctions are warranted, the Board considers whether the complained-of actions demonstrate a deliberate and pronounced disregard for our jurisdiction's rules. *People v. Lloyd Wiemann*, 1997 Ill. ENV LEXIS 584, *7-8 PCB, 93-191 (October 16, 1997), 35 Ill. Adm. Code 101.800(c).

II. Complainants Cannot Establish Any Failure to Comply with a Board Order or Rule by MWG

There is no Board rule or order barring MWG from filing a motion to stay or motions *in limine*, and Complainants' effort to claim "disregard" of an order is specious at best. 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. *See Sierra* Club *et al. v. Midwest Generation, LLC,*

PCB13-15, April 17, 2014 Board Order and April 20, 2020 Board Order; 35 Ill. Adm. Code 101.514. In fact, Complainants fail to point out that the Board has already granted two of MWG's requests for stays of this proceeding based on the circumstances at the time. *See Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Feb. 7, 2013 Order and July 8, 2021 Order. MWG expressly identifies in its current Motion for Stay the new circumstances that warrant a stay. Specifically, that implementation of the new CCR Rules by Illinois EPA, a separate technical agency with control over the process, as well as MWG's permit applications pursuant to the CCR Rules, create new conditions and circumstances that warrant a stay to avoid conflicts in any remedy. MWG's Motion for Stay, Jan. 21, 2022.

Similarly, the Board's July 2019 Interim Order, and its February 2020 Interim Order reversing its decision in part, do not preclude motions *in limine* relating to findings made in those orders. Where the Board found certain areas were not a source or not shown to be a source, MWG is entitled to assert that those areas should not be subject to a remedy. Where the Board found that the coal ash at the MWG Stations was "waste" (CCW) over MWG's objections, MWG is entitled to assert that the "waste" may remain in place under applicable laws for CCW. There is no disregard for the orders and no effort to relitigate the Board's general findings of liability for groundwater. *See Sierra Club et al. v. Midwest Generation, LLC*, PCB13-15, July 19, 2019 Board Order and Feb. 6, 2020 Board Order, 35 Ill. Adm. Code Part 101. Because there is no Board order or rule precluding the motions, the Board should deny Complainants' motion.

III. MWG's Motions Are Not Designed to Delay

Complainants' attempt to twist MWG's legitimate motions into a ploy to delay and "tie Complainants and the Hearing Officer up in six Motions *in Limine*" is meritless and offensive, especially because three of those motions are essentially the same (divided only to identify the

distinct Stations) and because Complainants filed four (4) of its own motions, along with this motion for sanctions. Complainants' Motion, p. 14. Casting baseless aspersions on the motives behind legitimate motions violates the spirit of an attorney's duty of fairness to opposing counsel, and contributes to the hostility between the parties. *See* IL R. Prof. Conduct 3.4; Cir. Ct. Cook Cty. Rule 13.11.[2] Complainants have no basis to assert that MWG's motions are part of some plot to delay, without any facts in support. MWG has proceeded expeditiously towards the next hearing and has not caused any extension or delay since the Board's February 2020 Interim Order. The same cannot be said for Complainants. While MWG's Motion to Stay is pending, MWG has continued to comply with the Hearing Officer's Pre-hearing schedule, including exchanging proposed joint agreed stipulations (for which Complainants sought an extension), and filing pre-hearing motions.

Throughout this proceeding both parties have requested extensions from time to time. But since the Board's February 2020 Interim Order, all of the extensions and delays have been caused by the Complainants. On May 5, 2021, Complainants requested an eight week extension of the expert discovery schedule. On January 26, 2022, Complainants requested a two week extension to respond to the motion to stay. On February 3, 2022, Complainants requested a one week extension to review the Joint Agreed Stipulations. *See* email by F. Bugel to B. Halloran, dated Feb. 3, 2022 attached as Ex. 1. Although the Board granted MWG's request for a stay of discovery of MWG's economic expert − to allow time for an opinion on MWG's Motion to Exclude Complainant's

[2] Complainants' claim of a conference regarding the motions *in limine* is misleading at best. Complainants' counsel called MWG counsel at 4 pm on Feb. 16, 2021 with a veiled request that MWG withdraw its motions without any details. There was no discussion of a motion for sanctions and it was not a substantive meet and confer.

expert opinion (relating to its indirect parent, NRG) – the stay did not impact remaining discovery, which continued. Moreover, the Hearing Officer granted MWG's Motion to Exclude opinions of Complainants' expert, and any potential for delay was due to Complainants' request for reconsideration of the Hearing Officer's decision, coupled with a motion for an interlocutory appeal to the Board. Ultimately, the Board issued its opinion upholding the Hearing Officer's decision on September 9, 2021. Order, Sept. 9, 2021.

Similarly, MWG's motions *in limine* will cause no additional delay. Complainants appear to object to the total number of motions *in limine* filed by MWG. MWG could have combined the three motions at issue here it into one, because the motions have almost identical arguments and were separated only to distinguish amongst the three different MWG Stations involved. In effect, MWG filed four motions *in limine* in total – the same number of motions as Complainants. Complainants claims of delay and burden on the Hearing Officer are equally directed at Complainants' own four motions *in limine*, along with this motion for sanctions. Moreover, at least one of Complainants' motions *in limine* was filed on highly questionable grounds, in complete disregard for the Hearing Officer's prior Order in this case holding to the contrary.[3] Even more disingenuous is Complainants' claim of delay due to alleged "relitigating" when, as discussed more fully below, Complainants' motion *in limine* now attempts to relitigate the Hearing Officer's decision on MWG's indirect parent company for a fourth time.

The only evidence of delay has been in Complainants' own actions. To accuse MWG is simply without merit, and certainly not a basis for sanctions.

[3] See MWG's Response to Complainants' Motion *in Limine* to Exclude New or Revised Expert Opinions, pp. 8-9, attached as Ex. 11. Complainants flagrantly misrepresented the Hearing Officer's July 18, 2017 Order. Complainants suggest in their motion that the Hearing Officer's 2017 Order supported their claim that MWG's experts should be precluded from issuing new opinions based upon documents exchanged after the expert depositions. The Hearing Officer came to the opposite conclusion in 2017 and held that experts were allowed to testify about documents produced after the deposition "in order to elaborate previously disclosed opinions."

IV. Complainants' Motion for Sanctions Fails to Breach the High Standard of Showing Bad Faith or Unreasonableness

Even if MWG's motions somehow failed to comply with some unknown Board order or rule (which they did not), there is still no basis for sanctions because Complainants cannot demonstrate any bad faith or unreasonable conduct. Generally, the Board does not impose sanctions without also a showing of bad faith or a finding of unreasonable noncompliance. For example, in *People v. Lloyd Weinmann*, the Board denied a party's unopposed request for sanctions because the offending party's noncompliance was not in bad faith despite multiple violations of Hearing Officer orders, including failing to timely file an objection to the motion for sanctions. *Weinmann*, 1997 Ill. ENV LEXIS 584, *9. See also, *Zervos Three, Inc. v. Illinois EPA*, 2010 Ill. ENV LEXIS 137, *12 PCB10-54 (April 15, 2010) (Board denied request for sanctions because there was no evidence of bad faith); *People v. Jersey Sanitation Corp.*, 2005 Ill. ENV LEXIS 91, *24 PCB No. 97-2 (February 3, 2005). (Board denied People's motion for sanctions because both parties caused delay and respondents' delay in filing its brief was not in bad faith).

The Board's limitation of sanctions to unreasonable failures of compliance with Board orders and bad faith is grounded in Illinois case law that states sanctions may not be imposed on a party who presents objectively reasonable arguments. See, e.g., *Gambino v. Blvd. Mrtg. Corp*., 398 Ill. App. 3d 21, 73 (2009) (Court upheld denial of sanctions because the party presented objectively reasonable arguments for their view, even though it was incorrect); *Ambrose v. Thornton Township School Trustees*, 274 Ill.App.3d 676, 685 (1995) (Court upheld denial of sanctions because the defendant's motion was objectively reasonable, and not in bad faith); *Shea, Rogal & Associates, Ltd. V. Leslie Volkswagen, Inc*., 250 Ill. App. 3d 149, 154 (1993) (Court's disagreement with party's application of the law to the facts did not mean that the party's claim was sanctionable).

A key Board decision on the issue of sanctions and unreasonable conduct is *Freedom Oil Co. v. Illinois EPA*, a case specifically cited and discussed by Complainants. Comp. Response, pp. 7, 14. The case, however, explicitly supports the *denial* of Complainants' motion. In *Freedom Oil* the Board denied a request for sanctions because, even though the respondent filed numerous late responses in discovery, the failures did not amount to "bad faith, deliberate noncompliance with rules or orders, or a dilatory pattern or scheme designed to stall these proceedings." *Freedom Oil Co. v. Illinois EPA* , PCB 03-54 and consolidated appeals, , *9-10 (Feb. 2, 2006), relevant excerpt attached as Ex. 2. As discussed in detail in Section V below, in a significant and shocking breach of attorney conduct, in their motion for sanctions Complainants falsely claim that the Board *granted* sanctions in *Freedom Oil*. Comp. Response, p. 14. There is no question that the Board clearly and obviously denied the request for sanctions in that case. Complainants were fully aware of the Board's denial of sanctions in *Freedom Oil* because Complainants themselves previously cited to it in their own brief in response to a previous motion in this case. See discussion at Section V below, and Ex. 3, excerpt of Comp. April 3, 2018 Response. Complainants' false representation to the Board is a violation of Rule 3.3 Illinois Rules of Professional Conduct that merits immediate denial of this motion and such other remedy as the Board may deem appropriate.

In this case, both MWG's Motion to Stay, and its Motions *in Limine*, are based on sound arguments and are objectively reasonable.

a. MWG's Motion to Stay is Objectively Reasonable

In its Motion for Stay, MWG properly distinguishes the Board's prior orders denying a stay based on the proposed CCR Rules. MWG fully acknowledges those past orders in its Motion, and explains that Illinois EPA's implementation of the final CCR Rules during the past two years, and MWG's submittal of permits and applications to Illinois EPA in compliance with the CCR Rules,

requires deference to the Illinois EPA process. Because the facts and law have significantly changed and continue to change, and the Illinois EPA (as the authority over CCR surface impoundments), has implemented a complex process for permitting and closure, a stay is necessary to defer to the agency and to avoid conflicting orders and permits. While Complainants quickly dismiss MWG's concern about conflicting remedies, it is MWG that installed new Illinois-EPA required and approved liners in its CCR impoundments, at a cost of many millions, only to be subject to the new CCR Rules requiring it to remove the liners, again at significant cost.

Complainants' assertions that there is still harm to the environment due to the groundwater exceedances also misses the point. MWG's position in its request for stay is that a stay of this proceeding will not alter (or harm) the existing status. Complainants fail to provide any example of some event that would occur in the next year (during a stay) that will change the current status. In fact, Complainants have publicly stated the opposite. Recently, counsel for Sierra Club is reported saying that, "*Environmentalists' expert witnesses have also not found an immediate risk to drinking water,...*" *See* Kari Lydersen, *Historic coal ash raises concerns at iconic Illinois coal plant site*, Energy News Network (Dec. 21, 2021) https://energynews.us/2021/12/21/historic-coal-ash-raises-concerns-at-iconic-illinois-coal-plant-site/ ("Article"), attached as Ex._ (emphasis added). Counsel further explained that "*…most of the coal ash repositories at Midwest Generation's coal plants are lined, and unlike many other companies, Midwest Generation frequently emptied the ash and sold it for "beneficial reuse" as construction materials and other uses. That means Midwest Generation's active coal ash ponds subject to the state and federal rules were probably less likely to be contaminating groundwater than at many other coal ash sites.*" *Id.* (emphasis added). Complainants cannot claim some unspoken harm caused by a stay of these proceedings when, to the public, they suggest there is little concern. MWG is not seeking a

dismissal, and is not arguing whether groundwater exceedances exist pursuant to the Board's Interim Orders. Instead, MWG reasonably raised the issue of conflict between a remedy in this case and Illinois EPA's requirements under the CCR Rules – a process that is new, and the scope and timing of which was previously not known.

i. Because the Facts and Law Regarding CCR Have Changed and Continue to Change, MWG's Motion to Stay is Objectively Reasonable

As MWG stated in its Motion to Stay, the facts and the law related to the matters at issue here significantly changed, most significantly that the Illinois EPA is in process of implementing the CCR Rules, MWG has submitted extensive and detailed permit applications for all its impoundments in compliance with the Rules, and Illinois EPA has expressed that it will take a significant amount of time to review and comment on the applications. *Midwest Generation, LLC v. Illinois EPA*, PCB21-108 (Variance-Land), Tr., pp. 117:10-11; 119:6-15 (July 27, 2021). Any Board action to impose a remedy in this matter could radically conflict with the Agency's decision-making process, resulting in MWG being in the untenable position of attempting to comply with two opposite orders. The Board also issued an order in its Sub docket on March 3, 2022, showing that it is moving forward with consideration of rules regulating areas of unconsolidated CCR. The prospect that the areas of unconsolidated CCR will be regulated is even more certain now, further supporting MWG's argument that a stay now is necessary.

Complainants' response to MWG's motion to stay confirms that MWG's arguments in support are objectively reasonable and a stay is necessary. Though recognizing the Illinois EPA's extensive permitting process, Complainants waive it away by theorizing in their Response that the Board can consider the future permits that will be issued by the Illinois EPA by either (i) consulting with the Illinois EPA; (ii) taking into consideration any closure actions at the surface impoundments and/or tailoring its remedy to be consistent with those actions and/or separate and distinct from

those actions. Comp' Res. to Mot to Stay, p 4-5. Complainants' suggestion that the Board and Illinois EPA may consult with each other over the correct remedy in this private party quasi-judicial matter demonstrates a lack of understanding of Illinois permitting law or implementation of remedies in Illinois. The Board is the forum that will hear any appeal of a permit and is statutorily barred from being part of the decision making process for the permit. 415 ILCS 5/40(g), 35 Ill. Adm. Code 845.270(e).

Complainants' cursory statement that the Board can take into account the Illinois EPA permits just as it could with the prior Compliance Commitment Agreements is inapplicable at this stage. Comp. Res. to Mot. to Stay, pp. 4-5. The obvious flaw in their argument is that the Illinois EPA permitting process is underway – there is no way for the Board to account for the decisions being made by Illinois EPA under the CCR Rules until MWG's permits are issued. And just because MWG has requested a certain type of closure in its permit applications does not mean the permit will be ultimately granted. Complainants do not explain how a remedy can be "tailored" when Illinois EPA's decisions are unknown at this time. Complainants further argue that because areas of ash beyond the surface impoundments are not addressed by the existing CCR Rules, that the Board can proceed with a hearing as to those areas. But this is also fraught with potential conflict. For instance, if an impoundment is to be removed under the CCR Rules and Illinois EPA permit, certainly ash areas around the impoundment are impacted. As to other fill areas, are Complainants suggesting a further bifurcation of this case to avoid conflict? A stay is a reasonable compromise under the circumstances.

Complainants conveniently ignore the fact that the only remedy they have ever presented to this Board, and the remedy their economic expert relies upon, calls for a *complete* removal of the CCR surface impoundments – which is not the closure option for all of the CCR surface

impoundments under the CCR Rules and MWG's permit applications. Are Complainants now suggesting that they no longer believe complete removal is the correct remedy? If so, then Complainants must withdraw their economic expert opinion because they no longer are claiming that complete removal is necessary for compliance. As Complainants appear to be insisting that closure by removal is their proposed remedy, (based on the reliance of their economic expert), then the Board should stay the proceeding in deference to the Illinois EPA's decision making process.

Complainants cannot have their cake and eat it too. Complainants cannot on one hand state that the only remedy is complete removal, hence the economic benefit penalty must be significant based upon the economic benefit of failing to do a complete removal. And then state on the other hand that the Board may defer to the Illinois EPA's decision-making process, including potentially closing in place, while allowing this matter to move forward. Because Complainants are proposing inconsistent remedies that could conflict with Illinois EPA permits, MWG's motion to stay the proceeding to allow Illinois EPA to conduct its regulatorily designated work is objectively reasonably, and no sanctions are warranted.

Complainants' contention that MWG's Motion to Stay, which is based upon new facts and law, is sanctionable because the Board has denied two prior motions is ironic given Complainants' request that the Hearing Officer consider, again, the issue of MWG's indirect parent entity. See Complainants' Motion *in Limine* to Exclude Portions of Respondent's Expert Report, or In The Alternative to Reinstate Portions of Complainants' Expert Report. In their motion, Complainants attempt to relitigate, for the fourth time, the decision that information about MWG's indirect parent company is not relevant. Complainants contend in their motion that because they claim information and facts have changed, the Hearing Officer should reverse his earlier decisions and

reverse the Board's decision on interlocutory appeal.[4] That is the same argument MWG is making in its Motion to Stay – that the facts and law about the CCR surface impoundments and other areas and have changed, requiring a stay. If MWG's motion to stay based upon new information is sanctionable action, then Complainants' request to revisit the three orders excluding consideration of MWG's indirect parent company is equally sanctionable. There is no basis for sanctions under such circumstances.

ii. Granting a Stay Will Not Cause Risk to Human Health or the Environment During Pendency

MWG's statement in its motion concerning a lack of harm is directed to *the pendency of a stay*. Complainants miss the by point by arguing that exceedances in the groundwater at the MWG Stations are proof of harm. Complainants fail to explain how those exceedances would be impacted by a stay; in other words, how the current conditions at the Stations, arguably present for 30-50 years, would result in harm *during a temporary stay*. MWG's position is objectively reasonable because MWG is not attempting to dismiss this proceeding, or argue that it is moot. MWG is simply taking the position that a separate state agency with authority over how CCR impoundments should be remedied has begun its review of permitting for the exact same impoundments at issue in this case, and should be given the deference to continue its work. To do so will result in state-wide consistency and allow the entity with the most knowledge and knowhow to make the decisions.

In the process of looking at harm generally, rather than harm during the pendency of a stay, Complainants also conflate the concept of "harm" with the process of risk evaluation under the

[4] In contrast with the fundamental impacts due to the implementation of the CCR Rules by a separate agency, nothing has changed regarding MWG's financial condition. Complainants' Motion *in Limine* to Exclude Portions of Respondent's Expert Report, or In The Alternative to Reinstate Portions of Complainants' Expert Report, is premised on the baseless assumption that MWG will make an inability to pay claim. Complainants' Motion, ¶9. No facts or evidence support that assumption.

Act. Evaluation of risk to the environment, and the subsequent need for a remedy, is not based solely on an exceedance of a standard. Rather, the Act states that determining remediation objectives is risk based, and the Illinois legislature ordered the Board to prepare regulations establishing remediation objectives, stating:

> "the regulations shall provide for the adoption of a three-tiered process for a [Remedial Applicant] to establish remediation objectives protective of human health and the environment *based on identified risks and specific site characteristics at and around the site*."
> 415 ILCS 5/58.5(c)(1) (emphasis added)

The implementing regulation, the Tiered Approach to Corrective Action Objectives ("TACO"), is clear that the determination of a remedy under the Act is risk-based. 35 Ill. Adm. Code Part 742. The intent and purpose of applying TACO in development of a remedy is to set "forth procedures for evaluating the risk to human health posed by environmental conditions and developing remediation objectives that achieve acceptable risk levels." 35 Ill. Adm. Code 742.100(a). Its purpose is also to "provide for the adequate protection of human health and the environment based on the risks to human health posed by environmental conditions *while incorporating site related information.*" 35 Ill. Adm. Code 742.100(b) (emphasis added). Part 742 even envisions that "contaminants of concern may exceed the groundwater quality standards…" 35 Ill. Adm. Code 742.105(f). The approach in TACO is to develop remediation objectives that identifies the exposure routes, exclude pathways for exposure, and the present and post-remediation uses of the sites. 35 Ill. Adm. Code 115.

Here, as MWG stated in its Motion to Stay, because there are limited pathways for exposure and historic conditions, *a stay* will not cause any harm. There is no exposure pathway for ingestion of the groundwater because, as the Board found, there are no potable wells downgradient of the ponds, and three of the Stations have Environmental Land Use Controls preventing any use of the

groundwater for drinking water.[5] There is also no risk of exposure to the surface waters. MWG's expert conducted a risk analysis and concluded that the constituents in the groundwater are not causing harm to the downgradient surface waters. Because the exceedances in the groundwater are contained and the exposure routes are eliminated, a temporary stay will not adversely impact the public health or the environment. As stated above, it is especially ironic for Complainants to suggest there is some impending issue that must be remedied immediately in this case (without any stay) when counsel for Sierra Club publicly announces only a few months ago that their own experts have not found an immediate risk to drinking water and that MWG's lined coal ash ponds, subject to the state and federal rules, were probably less likely to be contaminating groundwater than at many other coal ash sites..." *See* Kari Lydersen, *Historic coal ash raises concerns at iconic Illinois coal plant site*, Energy News Network (Dec. 21, 2021) https://energynews.us/2021/12/21/historic-coal-ash-raises-concerns-at-iconic-illinois-coal-plant-site/ ("Article"), attached as Ex. 4 (emphasis added). Complainants own statements support that a stay in this proceeding is appropriate.

b. MWG's Motions *in Limine* are Objectively Reasonable and not Sanctionable

Similarly, Complaints have not, and cannot, argue that three of MWG motions *in limine* are somehow unreasonable. In making an argument that MWG is attempting to relitigate its liability, Complainants again miss the point. MWG is not arguing about its liability for the groundwater contamination found by the Board. MWG's motions are based upon the fact that the Board found in its Interim Order that either certain areas were not sources of groundwater impact, or that

[5] *Sierra Club v. Midwest Generation LLC*, PCB13-15, Order, pp. 29, 43, 69 (June 19, 2020). For the Will County Station, the Board relied heavily on Exhibit 15C, the Hydrogeologic Assessment Report for the Will County Station, in support of its opinion. *Id.*, p. 57-58. Exhibit 15C shows that the only identified potable wells within 2,500 feet of the Site's ash ponds are drilled more than 1,500 feet below the ground surface and below the Maquoketa shale, a significant aquitard separating the shallower aquifers. Ex. 15C, p. 4. Complainants' expert, Dr. Kunkel, also stated that the MWG Stations, including Will County, do not impact offsite drinking water. 10/27/18 Tr. p. 182:3-7.

Complainants had not demonstrated that the areas were a source. MWG submitted the reasonable argument that, if an area is not established as a source, a remedy should not be necessary. That argument does alter the Board's findings concerning the groundwater at the Stations, nor has MWG made that argument. In other words, there can be no remedy required in an area just because ash is "there". This is especially true for the Powerton Station, where the Board specifically held that the area subject to MWG's Motion *in limine*, the Former Ash Basin, is not a source. *Sierra Club*, PCB13-15, June 19, 2019 Order, p. 41. In any case, the Former Ash Basin is covered by the Illinois CCR Rule, so the remedy for that area will be dictated by Illinois EPA pursuant to the CCR Rule and a stay is warranted. *See* Joint Agreed Stipulation No. 16 filed on Feb. 14, 2022 (MWG submitted an operating permit application to the Illinois EPA for the Former Ash Basin at Powerton.)

MWG timely added an argument to these three motions that Section 21(r) of the Act, applicable to CCW, allows the Board to find that the ash in these areas may remain in place. This argument is in response to the Board's finding that the CCR in these areas (and others) is "waste". MWG's discussion of how Section 21(d)(1) interacts with Section 21(r) is a reasonable and accurate description of the law. The legislative history of the two Sections demonstrates the General Assembly previously allowed coal ash to remain in place in large quantities without limitation. In MWG's motions *in limine*, MWG is simply asking that the Board properly consider Section 21(r) and exclude the areas from requiring a remedy. Because the arguments are reasonable and in good faith, sanctions are not warranted.

i. MWG's Discussion of How Sections 21(d)(1) and Section 21(r) Interact is Not Sanctionable Because it is an Accurate Description of Law

Complainants incorrectly suggest that case law limits the application of Section 21(d)(1)(i) to small quantities in all cases, no matter the context. That is not correct, and Complainants cite to

no cases that support their assertion as it relates to CCW. MWG's CCW argument is newly available at this time because the Board determined that CC*R* at the MWG Stations was CC*W*. MWG is entitled to raise the argument that there is no applicable quantity limitation for CCW, and Complainants' misdirected request for sanctions on this point has no support.

The text of Section 21(d)(1)(i)[6] states that people do not need to have a permit to dispose of self-generated, nonhazardous wastes on the land where the wastes were generated. *See Pielet Bros. Trading, Inc. v. PCB*, 110 Ill. App. 3d 752, 755 (5th Dist. 1982) (describing this as "a literal reading of" Section 21(d), which at the time was codified as Section 21(e)). In 1975, the Board held that, if the Section 21(d)(1)(i) exception applies to *all* wastes in *any* quantity, then that exception is in such tension with the overall purposes of the Illinois Environmental Protection Act that a limit on quantity must be inserted into the law to avoid an absurd result. *EPA v. City of Pontiac*, 1975 Ill. ENV LEXIS 317, *7-*8 (PCB 1975)(concerning auto shredding waste). Under a deferential standard of review, Illinois appellate courts have affirmed the *Pontiac* holding. *E.g.*, *Pielet Bros. Trading, Inc.*, 110 Ill. App. 3d at 755.

What is not established, however, is whether the quantity limitation in *Pontiac* applies to CCW given the express language subsequently enacted in 21(r)(1). Complainants fail to cite any Board decision (or court decision) applying the *Pontiac* holding in a case involving CCW. For that reason alone, MWG's argument that its CCW complied with Section 21(r)(1) is not frivolous and therefore not sanctionable.[7] *Enbridge Energy (Ill.), L.L.C. v. Kuerth*, 2018 Ill. App (4th) 150519-

[6] All citations to Section 21(r)(1), unless otherwise noted, refer to that provision as it existed in 2018. In 2019, the language was materially changed in a way that limits the relevance of the Section 21(d)(1)(i) exception to this case. The relevance of that change is discussed below in Section IV.b.i.3.

[7] The *Pontiac* holding has not been universally endorsed. *See Pielet Bros. Trading, Inc.*, 110 Ill. App. 3d at 758 (Harrison, J., dissenting) (*Pontiac* conflicts with "unambiguous" text of Section 21(d)); *Reynolds Metals Co. v. IEPA*, 1981 Ill. ENV LEXIS 353, *4 (PCB, Nov. 19, 1981) (Member Harrison, dissenting) (arguing that *Pontiac* was legislatively overruled by Public Act 82-380).

B, ¶73, 421 Ill. Dec. 210, 221-222 (4th Dist. 2018) (argument not frivolous where law was unclear or unsettled at time of argument).

But, MWG's argument is more than just non-frivolous. It is supported both by the text of Sections 21(d)(1)(i) and 21(r)(1) *and* the General Assembly's demonstrated intentions with regard to the disposal of self-generated CCW.

1. Public Act 86-364, Codified as 21(r), Contradicts the Quantity Limitation for CCW

Though Complainants fail to mention it, there was, *prior* to the enactment of 21(r)(1), one case applying the *Pontiac* holding to coal ash: *People v Commonwealth Edison Company*. 1976 Ill. ENV LEXIS 273, *9 (Nov. 10, 1976). That decision predates the enactment of Section 21(r)(1) by over a decade. Indeed, the Illinois General Assembly appears to have enacted Section 21(r)(1) to legislatively overrule the *ComEd* decision. *See Public Act* 86-0364 (eff. Jan. 1, 1990, and codified at 415 ILCS 5/21(r)[8]). This is plain from the text of Section 21(r)(1) which notes that under the stated conditions, deposited CCW does not require a permit. 415 ILCS 5/21(r)(1) (stating that a person is not prohibited from "caus[ing] or allow[ing] the . . . disposal of coal combustion waste" if "such waste is . . . disposed of at a site or facility for which a permit . . . is not . . . required under subsection (d) of this Section"). It cross-references to Section 21(d), whose plain language says that a permit is not required for self-generated waste. There are no other permitting exceptions in 21(d)—either as it existed in 1989 or as it exists today—that Section 21(r)(1) could be referring to.[9]

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[8] As initially passed, this was labelled Section 21(s)—and codified at Ch. 111 ½, par. 1021(s). It was renamed to Section 21(r) in 1991. Public Act 87-752 (eff. Sept. 6 1991). The 2018 version of Section 21(r)(1) is identical to how Section 21(s) appeared in 1989. Public Act 86-364.

[9] In 1987 (when 21(r) was enacted), the language of Section 21(d) read:

> No person shall…Conduct any waste-storage, waste-treatment, or waste disposal operation… 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

As written, Sections 21(r)(1) and 21(d)(1)(i) accomplish the Assembly's overarching purpose in passing Public Act 86-346. *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."). Section 21(r)(1) was the product of lobbying by the Illinois Coal Association and the United Mine Workers. 86th Ill. Gen. Assem., Senate Proceedings, June 21, 1989, at 220 (statements of Senator Dunn), attached as Ex. 5. It is safe to assume that purpose, at that time, was to allow coal ash to remain in place, especially as coal ash was being used consistently throughout the state for a variety of construction purposes, including roadbeds, and as fill. For example, the Melvin E. Amstutz Expressway in Waukegan used 246,000 cubic yards of fly ash as fill embankment for the four-lane highway. *See* Ex. 6 excerpt of USEPA's Development of Guidelines for Procurement of Highway Construction Products Containing Recovered Material, p. I-31. Similarly, Commonwealth Edison touted in advertisements in the early 1990's that it "recycled" its coal ash "into the building of highways like Interstate 55 and the foundation of the Sears Tower." Ex. 7 , expert of Chicago Tribune, Oct. 28, 1991, p. 13. This suggests that the General Assembly did not think that the *ComEd* decision's creation of a quantitative limit for self-generated CCW deposits struck an appropriate balance. *Pielet Bros. Trading, Inc.*, 110 Ill. App. 3d at 755 (legislature is presumed to be aware of administrative interpretations). "An amendment that contradicts a recent interpretation of a statute is an indication that such interpretation was incorrect and that the amendment was enacted to clarify the legislature's original intent." *Collins v. Bd. of Trs. of Firemen's Annuity & Benefit Fund*, 155 Ill. 2d 103, 111 (1993).

> be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, *that no permit shall be required for 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 waste are generated*…

1989, Ch. 111 ½, par. 1021(d)(1) (emphasis added). The differences between these versions are cosmetic.

The Board has never found that the General Assembly's enactment of Public Act 86-346 was intended to protect only parties that dispose of small quantities of self-generated CCW. Indeed, applying such a reading to a waste that is seldom found in small quantities is in tension with the Board's own interpretive tools. *See ComEd, 1976 Ill. ENV LEXIS 273,* at *3 (noting that in 1976 alone, the Joliet Generating Station generated 280,000 tons of combustion byproducts).

Additionally, the Board is required to avoid interpretations that would make any portion of Section 21(r)(1) meaningless. *People v. Tarlton*, 91 Ill. 2d 1, 5 (1982). Inserting a quantitative restriction into Section 21(d)(1)(i) for CCW would make the "is not otherwise required under subsection (d)" language in Section 21(r)(1) inoperative. *Knolls Condominium Assn. v. Harms*, 202 Ill.2d 450, 460 (2002) (statutes should not be construed in a manner whereby "portions are rendered inoperative"). Without the "not otherwise required" language, Section 21(r)(1) is essentially pointless — if CCW *must* be placed in a permitted landfill, as Complainants suggest, then Section 21(r)(1) does little more than repeat the sanitary landfill requirement in Section 21(a).

In passing Section 21(r)(1), the General Assembly made a determination of how to regulate disposal practices for self-generated CCW. Its decision will not result in "operators disposing their waste…indiscriminately…and without accountability for the resulting pollution…" *People ex rel. Madigan v. Dixon-Marquette Cement, Inc*., 343 Ill. App. 3d 163, 173 (2d Dist. 2003). Elected representatives simply concluded that the risk of "serious hazards to public health and safety" (415 ILCS 5/20(2)) that might accompany CCW disposal could be effectively managed through enforcement actions under other portions of the Act, such as Section 12(a)'s prohibition on water pollution and Section 12(d)'s prohibition on water pollution hazards.[10] While the Board may prefer

[10] MWG does not contend that compliance with Section 21(r) is an absolute bar to prosecuting CCW-related pollution under statutes like Section 12(a) or 12(d). That is the sort of interpretation of Section 21(r) that *would* create a serious gap in environmental enforcement and produce results contrary to the legislature's intentions. See *Dixon-Marquette Cement, Inc*., 343 Ill. App. 3d at 173 (resisting interpretation of Section 21(d)(1)(i) that would permit dumping

that enforcement be supplemented with a permitting system, the General Assembly adopted that view only recently when it changed the law in 2019, discussed below.

Thus it cannot be said that the text of Sections 21(d)(1)(i) and (r)(1) creates a "serious gap[]" in environmental enforcement that will cause the Illinois Environmental Protection Act to "fail[] in one of its material aspects." *R.E. Joos Excavating Co. v. PCB*, 58 Ill. App.3d 309, 312-13 (3d Dist. 1978). The Board closed the Section 21(d)(1) "gap" in the *Pontiac* decision. And though the General Assembly acquiesced to the *Pontiac* decision in most regards, it overruled the application of *Pontiac* to CCW by enacting 21(r)(1). The lawmakers were well-aware that CCW was disposed of in large quantities, and the Board is required to defer to the Assembly's decision on how best to regulate the disposal of self-generated CCW. MWG's arguments on this issue are valid, reasonable, and certainly do not provide any basis for sanctions.

2. Amendments to 21 (r) (Public Acts 89-93 and 89-535) Confirm No Quantity Limitation Applied to CCW

The Board must assume that the enactment of Section 21(r)(1) worked a meaningful change in Illinois law. *Maiter v. Chi. Bd. of Educ.*, 82 Ill. 2d 373, 388-89 (1980) ("[C]ourts will not assume that the legislature engaged in a meaningless act"). But here, assumptions are unnecessary: The subsequent history of Section 21(r) confirms that the General Assembly thought that Section 21(r)(1) was a key component of CCW disposal in Illinois, not just an obscure afterthought.

In 1995, the General Assembly modified Section 21(r)(1) in a way that basically repealed it. *See* Public Act 89-93 (eff. July 6, 1995) (changing Section 21(r)(1) to apply to Coal Combustion Byproducts, instead of Coal Combustion Waste). This was a drafting error. But because Section 21(r)(1) is *not* an obscure provision that applies only in rare situations, the problem was noticed

"without accountability for . . . resulting pollution"). Moreover, MWG is not attempting, at this time, to reargue liability. Its position is that no remedy is needed just because coal ash was historically deposited in an area, without a showing of "pollution".

almost immediately. After lobbying by the coal industry and the United Mine Workers, the statute was fixed in the same session. Public Act 89-535 (eff. July 19, 1996); *see also* 89th Ill. Gen. Assem., House Proceedings, Apr. 26, 1996, at 75-76 (Rep. Bost) (describing supporters) attached as Ex. 8. The bill's Senate sponsor described the restoration of Section 21(r)(1) as necessary for "the current disposal program to continue." [8] 9th Ill. Gen. Assem., Senate Proceedings, Mar. 22, 1996, at 27 (Sen. Luechtefeld) attached as Ex. 9. Thus Section 21(r)(1) was neither redundant nor trivial. Until 2019, it was "*the* current disposal program" for CCW in Illinois. *Id.* (emph. added).

3. Legislative Changes in 2019 (Public Act 101-171) Further Confirm that 21 (r) Contains No Quantity Limitation for CCW Areas

The lack of a quantitative limit in Section 21(r)(1) is further confirmed by the fact that the General Assembly specifically repealed the Section 21(d)(1)(i) exception as applied to "CCR Surface Impoundments" in 2019. Public Act 101-171 (eff. date June 30, 2019). The bill's sponsors did not want to merely eliminate a loophole in Section 21(r)(1) regarding small-scale CCW deposits. On the contrary, the change was intended to address environmental concerns related to CCW deposits large enough to "fill Chicago's . . . Sears Tower nearly two times." 101st Ill. Gen. Assem., House Proceedings, May 27, 2019, at 161 (statements of Rep. Ammons), attached as Ex. 10.

If the General Assembly wanted Public Act 101-171 to *prohibit* unpermitted, large-scale, self-generated, CCW deposits, then this confirms that prior to 2019, Section 21(r)(1) *condoned* such unpermitted, large-scale, self-generated CCW deposits. There is no evidence in the legislative history that Public Act 101-171 was intended merely to create a permitting requirement for small CCW impoundments. Nor does such a modest goal track with what the bill's advocates said at the

time. Complainant Prairie Rivers Network described the legislation as "groundbreaking" and "Landmark Legislation."[11]

MWG asked the Board to consider that there is no need for a remedy for "fill" areas at three of its Stations[12] – where there is no evidence of a source established and the CCW was disposed of under Section 21(r), allowing it to remain in place. The arguments in MWG's motions *in limine* are valid, supported by law and legislative intent, and there is no basis for Complainants' motion for sanctions simply because they misunderstood its application.

ii. <u>There is No Basis for Sanctions Because Complainants Further Misunderstand How to Apply the General-Specific Cannon of Statutory Construction.</u>

Complainants maintain that, if a party "causes or allows" the disposal of CCW outside of a sanitary landfill, they can be prosecuted under Section 21(a) for "causing or allowing" the disposal of "waste"- even if the disposal is "caused or allowed" in a manner that is permitted by Section 21(r)(1), (Mem. in Support at 12.) This approach to statutory interpretation contradicts Illinois caselaw. The *Knolls Condominium* decision forbids allowing a general statute to "eliminate" a remedy that "the legislature specifically provided for". 202 Ill.2d 450, 460 (2002).[13] Complainants do not "give effect to all of the provisions of" Section 21(r)(1) by saying that the protections in the "not otherwise required under subsection (d)" clause are made illusory by Section 21(a). *Cinkus v.*

[11] Prairie Rivers Network, Press Release: Illinois House and Senate Pass Landmark Legislation to Clean Up Coal Ash (May 27, 2019), https://prairierivers.org/uncategorized/2019/05/il-house-senate-pass-coal-ash-legislation/. Complainant Sierra Club called it "Landmark Legislation" that addresses "many waste pits . . . located all over the state." Sierraclub.org, Press Release: Illinois House and Senate Pass Landmark Legislation to Clean Up Coal Ash (May 28, 2019), https://www.sierraclub.org/press-releases/2019/05/illinois-house-and-senate-pass-landmark-legislation-clean-coal-ash.

[12] The areas consist of three fill areas at Joliet 29 and the former slag placement area at Will County, for which the Board determined the evidence did not support finding a source, and the former ash basin at Powerton, which the Board specifically found was not a source.

[13] S*ee also People ex rel. Kempiners v. Draper*, 113 Ill.2d 318, 320-21 (1986) (Mobile Home Act allows State officials to regulate any mobile home outside of the corporate limits of state municipalities, and that specific power is not limited by general provision in Municipal Code allowing municipalities to "enforce health and quarantine ordinances" outside of corporate limits).

Stickney Mun. Officers Electoral Bd., 228 Ill. 2d 200, 218 (2008). This is not a "harmonious" reading of the two sections, and the only solution is to recognize that the General Assembly did not intend for Section 21(a) to apply to activities regulated under Section 21(r)—"*the* current disposal program" for Illinois CCW. 89th Ill. Gen. Assem., Senate Proceedings, Mar. 22, 1996, at 27 (Sen. Luechtefeld), Ex. 9.

Complainants' final argument is complicated and tenuous. They note that Section 21(r) contains a general statement that parties complying with the provisions of Section 21(r)(2), and (r)(3) are "exempt from the other provisions of . . . Title V." (Comp. Memo in Support at 12.) Although general statement does not mention Section 21(r)(1), Complainants infer that parties complying with Section 21(r)(1) are not exempt from other provisions from Title V. And because Section 21(a) is within Title V, they say, this *must* mean that parties in compliance with Section 21(r)(1) are not "exempt" from Section 21(a). Complainants are simply ignoring the canons of statutory construction. There is no logic to an argument that the General Assembly would want Section 21(a) to punish behavior that Section 21(r)(1) explicitly allows. Rather, this portion of Section 21(r) is simply trying to avoid interpretive problems that might otherwise be created by having portions of Title V − Sections 21(r)(2) and (3) − cover sites that are primarily governed by laws other than the Illinois Environmental Protection Act (*i.e.*, the Abandoned Mined Lands and Water Reclamation Act and the federal Surface Mining Control and Reclamation Act). It reflects a prudent effort by the General Assembly to create a foresighted law that operates smoothly. It does not, as Complainants suggest, make Section 21(r) internally inconsistent, or override legislative intent and ordinary canons of construction.

iii. Requesting that the Board Properly Consider 21(r) to Exclude Areas from Requiring a Remedy is Not a Basis for Sanctions

The Board considers a variety of factors when determining whether a remedy is appropriate in a given case. MWG did not engage in sanctionable conduct by raising an issue that pertains to those factors. While the Board made a finding of open dumping at all the MWG Stations,[14] MWG's motions *in limine* argue that no remedy is required for the CCW in specified areas at three of its Stations, where those areas were not established as sources of contamination, and CCW was disposed in accord with 21(r). The motions present sound arguments in favor of excluding the areas from a remedy.

When determining a remedy under Section 33 of the Act the Board must consider "the reasonableness of the…deposits involved." 415 ILCS 5/33(c). Several factors influence this "reasonableness" determination, including the character and degree of injury. *Id.* at 5/33(c)(i). Here, it is inherently reasonable to allow CCW to remain in place with no required remedy when it was deposited pursuant to 21(r)(1), and is not established as a source.

iv. MWG's Motions *in Limine* and Consideration of 21 (r) were Timely Because 2019 was the first time the Board held that MWG's ash was "waste".

Complainants cannot argue that MWG's argument about the applicability of 21(r) was untimely and thus sanctionable, because MWG's argument is based on the Board's 2019 Interim Order finding of "waste" at the Stations. MWG consistently argued in the liability phase of this case that the coal ash at its Stations was not "waste" because it had not been "discarded." (Resp. Pre-Hearing Brief, at 7.) MWG elaborated in its post-hearing brief, explaining that the ash in the

[14] In this case, Complainants did not allege open dumping at Joliet 29 in its Amended Complaint, and thus it is unclear how the Board reached its finding as to Joliet 29. MWG did not defend that issue – because it was not alleged – and the Board has no jurisdiction to issue findings over claims that are not before it. *See Alton & Southern R.R. v. Ill. Commerce Comm'n*, 316 Ill. 625, 630 (1925) ("The Commerce Commission cannot enter a valid order which is broader than the written complaint filed in the case"). Subject-matter jurisdiction may be challenged at any time. *Tate v. PCB*, 188 Ill. App. 3d 994, 1018 (4th Dist. 1989).

impoundments was not discarded, because it was being regularly removed and beneficially reused. (Resp. Post-Hearing Br. at 55-56) And the historical ash outside of the ponds was serving as structural fill, which is an accepted use under Illinois law. (*Id*., citing 415 ILCS 5/3.135) Therefore, these materials were coal combustion byproducts (CCB), not coal combustion waste. These points were reiterated, unchanged, in MWG's Response to Complainants' Post-Hearing Brief. (Respondents Resp. to Compl.'s Post-Hearing Br. at 30-30.)

The Board made a determination on this issue for the first time in its 2019 Interim Order, finding that the coal ash at MWG's Stations was CCW. *Sierra Club*, PCB13-15, June 19, 2019 Order, pp. 87-88. Consequently, it was the first time that Section 21(r) − which is specific to CCW − became relevant to this case. Because of the history of this case, and the very late appearance of CCW as the focus of Complainants' open dumping claims, this is an appropriate time for MWG to raise Section 21(r) issues.[15]

V. Complainants Knowingly Made a False Statement of the Board's Law and Misrepresented the Board's Opinions on Sanctions

In addition to Complainants' baseless claims that MWG's motions are a scheme to delay, Complainants' citations to Board prior rulings on sanctions are, in the most generous light, misleading, and in one instance, knowingly false. Complainants falsely claim that the Board awarded sanctions in *Freedom Oil* and that the Board found a dilatory pattern or scheme designed to stall the proceedings. Complainants' Motion, p. 14. The Board's opinion in that case was entirely the opposite. Excerpt attached as Ex. 2. *Freedom Oil v. Illinois EPA*, PCB 03-54, *10. In its February 2, 2006 opinion in *Freedom Oil*, cited by Complainants, the Board ***denied*** Freedom Oil's request for sanctions against the Illinois EPA. *Id*. Freedom Oil moved for sanctions because

[15] The Board may, under 21(r), determine that it does not have subject matter jurisdiction to issue a remedy concerning the areas at issue in MWG's motions in limine because the CCW was disposed pursuant to 21(r), is not a source, and thus may remain in place.

the Agency had missed the deadlines to file the administrative records and discovery deadlines, claiming that the missed deadlines were a deliberate and continuous disregard of the Board's authority. *Id.* *8. The Board found that the Agency's failure to follow the deadlines *did not* amount to "bad faith, deliberate non-compliance with rules or orders, or a dilatory pattern or scheme designed to stall these proceedings." *Id*, *10 (emphases added).

Complainants' error was not inadvertent. Complainants are well aware of the *Freedom Oil* case, as well as this exact quote, because Complainants used the exact same sentence in one of their own briefs in this case. *See* Excerpt of Complainants' Response to MWG's Motion attached as Ex. 3, p. 5. Complainants' blatant misrepresentation of the holding in *Freedom Oil* to the Board is a direct violation of Illinois Rule of Professional Conduct Rule 3.3, which states that "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal…". Committee Comment No. 4 of the rule further explains that "legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal."

Complainants similarly deliberately mislead the Hearing Officer about the holding of one of his orders in this matter. As MWG thoroughly describes in its Response, in their Motion *in Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents, Complainants suggest that the Hearing Officer's prior Order of June 18, 2017 supported their motion to exclude expert opinions based upon documents disclosed after the expert reports and depositions. Comp. Mot. ¶9. [16] That was false. The Hearing Officer stated in 2017 that "although the experts have not stated exactly how post-deposition discovery informs their opinions, it would be unduly restrictive to completely bar experts from testifying about these documents." *Sierra*

[16] Complainants' motion states, "This is consistent with the Hearing Officer's Order of July 18, 2017 on MWG's Motion in Limine to limit Complainants' Expert Testimony. In that instance, Respondent produced the documents at issue after the expert's deposition. Respondent then brought a motion in limine to exclude Complainants' experts from relying on these documents." *Id*. Nothing further is provided about the 2017 Order. *See also* Ex. 11.

Club v. MWG, PCB13-15, H.O. Order, July 18, 2017, p. 1. Complainants clearly knew the Hearing Officer's decision because they referred to the order, yet failed to properly describe the decision or even state its holding. Comp. Mot. ¶9. The result is misleading, at best.

Complainants' false descriptions of the Board's and Hearing Officer's holdings are on par with the defendant's misrepresentation of a holding in *Morrisey v. Health Care Serv. Corp.* There, the court for Northern District of Illinois found that the defendant violated Federal Rule 11. *Morrisey v. Health Care Serv. Corp.,* No. 02 C 3150, 2004 U.S. Dist. LEXIS 87, at *10-13 (N.D. Ill. Jan. 5, 2004); Fed. R. Civ. P. 11. In *Morrisey*, the defendant, HCSC, relied on the case of *Silk v. City of Chicago* to argue that the Seventh Circuit had stated that the American Disabilities Act does not recognize a claim of hostile environment harassment. . *Morrissey*, at *11 *citing Silk v. City of Chicago*, 194 F.3d 788 (7th Cir. 1999). HCSC was wrong. *Silk* expressly stated that it was possible such claims were cognizable. *Morrisey*, at *11 *citing Silk*, 194 F.3d at 804. In support of its rebuke of HCSC's falsehood, the court pointed to its Local Rule 83.53.3(a)(1) and the Committee Comments, which are identical to Rule 3.3 of the Illinois Rules of Professional Conduct and Committee Comment No. 4. *Id,* at *12. The court stated that even a cursory review of *Silk* would have informed counsel that its position was incorrect, but instead HCSC's counsel "flaunted the rules of civil procedure by misrepresenting the holding." *Id*. The court found HCSC's counsel violated Federal Rule 11 and ordered HCSC's counsel to explain why HCSC should not be sanctioned. *Id*. *See also Multi-Media Distributing Co., Inc. v. United States*, 836 F.Supp. 606, 614 n. 7 (N.D. Ind. 1993) (Court found that plaintiff's misrepresentation of a citation is sanctionable); *Donohoe v. Consolidated Operating & Prod. Corp.*, 139 F.R.D. 626, 629 n. 6 (N.D. Ill. 1991) (Court stated that a lawyer engages in bad faith by acting recklessly or with indifference to the law, and their reckless indifference "may impose substantial costs on the adverse party.")

Just like HSCS's false representation of precedent, Complainants' flagrant and knowing misstatement of the Board's decision in *Freedom Oil* and the Hearing Officer's 2018 decision merit the Board's immediate denial of Complainants' motion, as well as the consideration of other remedies. [17]

While perhaps not quite as blatant, Complainants' attempt to frame MWG's objectively reasonable motions as akin to the actions of the parties in *Modine, Grigoliet,* and *Celotex,* is misleading and borders on misrepresentation. In each of those cases, the Board found that the offending party ***unreasonably violated*** multiple Board and Hearing Officer orders. In *Modine*, the Respondent failed to respond to discovery requests, violated multiple Hearing Officer discovery schedules, requested three extensions of the hearing date, and failed to file its post-hearing brief pursuant to multiple orders extending the due date. *Modine Mfg. v. Pollution Control Bd.*, 192 App. 3d. 511, 514-517 (2nd Dist. 1989). In *Grigoleit*, the Agency violated three Board orders to issue a permit. *Grigoleit Co. v. Pollution Control Board*, 245 Ill. App 3d 377 (4th Dist., 1993). In *Illinois EPA v. Celotex Corp.*, the Illinois EPA violated at least five Hearing Officer and Board orders to produce witnesses and documents. *Illinois EPA v. Celotex Corp*, Ill. App. 3d 592, 597-598 (3rd Dist. 1988). In upholding the Board's sanctions, the Court found that the Agency engaged in a pattern of dilatory response to hearing officer orders, unjustifiable cancellation of depositions, and engaged in an intentional pattern of refusal to meet deadlines"…and the explanations for the Agency's actions were not reasonable. *Id.* at 598.

[17] The Board may also award attorneys' fees in cases like this in which a complainant violates the rules concerning evidence and advocacy. In *Citizens Against Regional Landfill v. The County Board of Whiteside County and Waste Management of Illinois, Inc.*, Citizens Against Regional Landfill filed a brief not supported by evidence. PCB 92-156, 1993 Ill. ENV. LEXIS 75 (Jan. 21, 1993) * 12-13. Finding that the filing was a "serious violation of the rules concerning evidence and the rules regarding advocacy," the Board awarded respondent attorneys' fees for preparing its motion. Id. 12-13, 16.

Here, MWG has not missed one deadline, has not canceled depositions, has requested no extensions since the Board's February 2020 Interim Opinion, has not delayed this proceeding, and has not violated a single Hearing Officer or Board order. Complainants' unabashed comparison of MWG's legitimate motions to the behavior of the offending parties in the above motions merits the Board rejecting their motion for sanctions, at the very least.

VI. Conclusion

Complainants' Motion for Sanctions is baseless and should be denied. MWG has violated no Hearing Officer order, Board order, or Board rule. MWG's motions are reasonable, in good faith and based upon objectively reasonable arguments. MWG has not delayed this proceeding, there is no basis to claim that MWG's motions will delay the proceeding, or that MWG has any intention to delay. In fact, the Board may agree that a stay is appropriate. It is understandable that Complainants do not like or agree with MWG's positions. This is to be expected, but it is not sanctionable, nor is it reason to knowingly and flagrantly misrepresent Board opinions. For all of these reasons, the Board should deny Complainants' motion and order such other relief as it deems appropriate.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By ____/s/ Jennifer T. Nijman_____
One of Its Attorneys

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

EXHIBIT 1

Kristen Gale

From: Faith Bugel <fbugel@gmail.com>
Sent: Thursday, February 3, 2022 12:27 PM
To: Brad Halloran
Cc: Kristen Gale; Jennifer Nijman; Abel Russ; Greg Wannier; Kiana Courtney; Cantrell Jones
Subject: PCB13-15 Proposed Stipulations

Hearing Officer,
The parties have begun conferring regarding joint stipulations. Complainants need an extra week to respond to Respondent's proposed stipulations--extending the deadline from tomorrow 2/4 to 2/11/22. Respondent has indicated that they are not opposed to a one week extension.
Thank you,
Faith E. Bugel

--
Faith E. Bugel
Attorney at Law
1004 Mohawk Rd.
Wilmette, IL 60091
(312) 282-9119

EXHIBIT 2

ILLINOIS POLLUTION CONTROL BOARD
February 2, 2006

FREEDOM OIL COMPANY,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 03-54
	)	PCB 03-56
ILLINOIS ENVIRONMENTAL	)	PCB 03-105
PROTECTION AGENCY,	)	PCB 03-179
	)	PCB 04-2
Respondent.	)	(UST Appeal)
	)	(Consolidated)

ORDER OF THE BOARD (by A.S. Moore):

These consolidated appeals concern the cleanup of environmental contamination from leaking underground storage tanks (USTs) at a gasoline service station. Petitioner, Freedom Oil Company (Freedom Oil), has filed five petitions asking the Board to review five final determinations of respondent, the Illinois Environmental Protection Agency (Agency). All of the Agency's determinations pertain to Freedom Oil's service station at 401 South Main Street in Paris, Edgar County, which had a total of 11 USTs.

Several UST releases were reported in 2002 at the Freedom Oil station. Vapors impacted Paris High School, nearby residences, and the sewer system. Free product was found in the groundwater. At the State's request, the Edgar County Circuit Court entered an injunction requiring Freedom Oil to excavate "gross subsurface contamination" and perform air monitoring, among other things. Disputes between Freedom Oil and the Agency arose over the cleanup performed by Freedom Oil and the costs of it. Freedom Oil has appealed to the Board.

SUMMARY OF TODAY'S ACTION

Today, the Board rules on four motions: Freedom Oil's motion for default judgment or to bar the Agency from introducing evidence; the Agency's motion to strike an exhibit; Freedom Oil's motion for summary judgment; and the Agency's counter-motion for summary judgment. As detailed later, each party has prevailed on some of the issues.

Three of the five appeals (Board dockets PCB 03-105, 03-179, 04-2) involve Agency determinations to deny Freedom Oil reimbursement of cleanup costs from the State's UST Fund. The other two appeals (Board dockets PCB 03-54, 03-56) involve Agency determinations to reject aspects of Freedom Oil's cleanup activities at the site. The motions for summary judgment ruled on in this order, however, address only the UST Fund reimbursement denials.

Of the contested grounds in the three UST Fund reimbursement denials, the Agency's use of cost "apportionment" accounts for the largest dollar amount of deductions. Under Section

proposal made by the Agency was not a "proposal to settle the central issue in the case" nor was it "the proposal IEPA committed to make during the various status hearings." *Id*. at 3.

Freedom Oil states that many of the deadlines missed by the Agency were dates agreed to by the Agency, and yet the Agency made no effort, when it could not meet deadlines, to seek an extension before the passing of the deadlines. Def. Reply at 5. According to Freedom Oil, the Agency's "approach to order deadlines reflects an attitude that Hearing Officer orders are not binding but mere suggestions." *Id*. at 6.

In addition, Freedom Oil notes that its current motion is not its first motion for sanctions in this proceeding. On February 21, 2005, Freedom Oil filed a motion for discovery sanctions based on the Agency's failure to meet a discovery and record deadline, but Freedom Oil withdrew that motion when the Agency agreed to a new deadline. When the latter deadline was missed by the Agency, Freedom Oil filed this motion. Def. Reply at 5.

Lastly, Freedom Oil emphasizes that it, like many other oil companies, depends on proper operation of and reimbursement from the UST Fund to continue in business. Def. Reply at 5, 12. Freedom Oil states that it "remains frustrated" because it now has had to file a second motion for sanctions "as relief for failure to comply with discovery requests and record filing to allow the hearing to proceed." *Id*. at 12.

Board Analysis

Under its procedural rules, the Board may sanction parties for unreasonably failing to comply with Board or hearing officer orders or the Board's procedural rules. *See* 35 Ill. Adm. Code 101.800(a); *see also* 35 Ill. Adm. Code 105.118. Potential sanctions include entering a default judgment or barring the offending party from maintaining a claim or defense or presenting a witness. *See* 35 Ill. Adm. Code 101.800(b); E&L Trucking Co. v. IEPA, PCB 02-53 (Apr. 18, 2002) (among possible sanctions for the Agency's late record filing: "the petitioner [in UST Fund appeal] may be immediately awarded the result it seeks, regardless of the Agency's position in the matter").

The Board has broad discretion in determining the imposition of sanctions. *See* IEPA v. Celotex Corp., 168 Ill. App. 3d 592, 597, 522 N.E.2d 888, 891 (3d Dist. 1988); Modine Manufacturing Co. v. PCB, 192 Ill. App. 3d 511, 519, 548 N.E.2d 1145, 1150 (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).

In these consolidated appeals, the Agency concedes it has missed several deadlines, but the Agency has also often sought and received extensions and continuances, providing the hearing officer with justifications for delay. The Agency has now filed the administrative records for these five appeals. The Agency has also submitted discovery responses. It is nowhere apparent that the Agency has ever simply refused to provide this information.

Presumably in its own self-interest, Freedom Oil has filed numerous waivers of the Board's statutory decision deadlines in these appeals, ultimately filing open waivers, and only very recently reinstating the deadlines. *See* 35 Ill. Adm. Code 101.300(c). No matter how promising settlement discussions may appear, they simply do not always bear fruit. Further, the Board is mindful that both parties, in filing the counter-motions for summary judgment, are representing that the major reimbursement issue on appeal can be resolved short of hearing, despite the discovery and record-filing difficulties.

On this record, the Board cannot find that the Agency's behavior warrants the drastic sanctions requested by Freedom Oil. Freedom Oil has not persuaded the Board that the Agency's handling of these consolidated appeals, while at times tardy, amounts to bad faith, deliberate non-compliance with rules or orders, or a dilatory pattern or scheme designed to stall these proceedings. Nor can the Board find that Freedom Oil established material prejudice. *See* Celotex Corp., 168 Ill. App. 3d at 597-98, 522 N.E.2d at 891-92; Modine Manufacturing, 192 Ill. App. 3d at 517-18, 548 N.E.2d at 1149-50.

Considering all of the circumstances, the Board denies Freedom Oil's motion for default judgment and the company's alternative sanction request of precluding Agency evidence at hearing. *See* 35 Ill. Adm. Code 101.800(a), (c). The Board strongly cautions Agency counsel, however, that if extensions or continuances are needed in the future, they must be sought *before* the applicable deadline passes. Failure to do so may subject the Agency to sanctions. *See* 35 Ill. Adm. Code 101.800(a).

AGENCY'S MOTION TO STRIKE EXHIBIT

The Agency moves to strike one of the exhibits to Freedom Oil's motion for summary judgment. Specifically, the Agency moves to strike Exhibit 17 and "any and all references to that Exhibit [and] the information therein as such references may exist within the Petitioner's motion." Ag. Mot. Str. at 2.

Exhibit 17 of Freedom Oil's motion for summary judgment contains two affidavits. The first affidavit is from Michael J. Hoffman, a professional engineer with MACTEC (formerly Harding ESE), the company retained by Freedom Oil to remediate UST releases at the Paris service station site in 2002. The second affidavit is from Richard Pletz, a project scientist with MACTEC.

The Agency, in its motion to strike, argues that because the affiants' representations were made *after* the final determinations currently under appeal, the Board cannot consider them. Ag. Mot. Str. at 1-2. The Agency emphasizes that the Board's review in UST appeals is generally limited to information that was before the Agency at the time of the Agency determination, and is not based on information developed after that determination. *Id*. at 2.

In response, Freedom Oil argues that the Board's procedural rules (35 Ill. Adm. 101.516(b)) specifically permit the use of affidavits in summary judgment motions. Freedom Oil further asserts that the Agency's position is based not on the Exhibit 17 affidavits containing "new evidence," but rather the affiants' representations being "post record." FO Str. Resp. at 1.

EXHIBIT 3

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

COMPLAINANTS' JOINT RESPONSE TO RESPONDENT'S MOTION FOR SANCTIONS AND MOTION FOR LEAVE TO FILE SUPPLEMENT TO ITS MOTION FOR SANCTIONS

Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants"), by their undersigned counsel, hereby submit this Joint Response ("Response") to Respondent Midwest Generation, LLC's ("Midwest Generation's" or "MWG's" or "Respondent's") Motion for Sanctions ("Sanctions Motion") and Memorandum in Support ("Sanctions Memorandum") filed March 20, 2018, together with MWG's Motion for Leave to File *Instanter* ("Motion for Leave to Supplement") a supplement to its Motion for Sanctions ("Supplemental Memorandum") filed March 27, 2018.

The Board should deny the Sanctions Motion. Not only is Respondent's motion baseless, it is also a transparent attempt to malign Complainants. Respondent cannot identify one sanctionable offense, much less a pattern of sanctionable behavior. Although Respondent has

the Board need not make that same mistake; instead, it should summarily dismiss the Motion for Leave to Supplement.

I. Legal Background

Section 101.800 of the Illinois Administrative Code authorizes the Board to impose sanctions "[i]f 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." 35 Ill. Adm. Code § 101.800 (a). Furthermore,

> [i]n 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.

Ill. Adm. Code § 101.800 (c). The Board rarely imposes sanctions in the absence of a pattern of bad faith. *See, e.g.*, *Freedom Oil Co. v. Illinois EPA*, PCB 03-54 and consolidated appeals, 2006 WL 391850, *9 (Feb. 2, 2006) ("Freedom Oil has not persuaded the Board that the Agency's handling of these consolidated appeals, while at times tardy, amounts to bad faith, deliberate noncompliance with rules or orders, or a dilatory pattern or scheme designed to stall these proceedings."); *Illinois E.P.A. v. Celotex Corp.*, 168 Ill. App. 3d 592, 597–98 (1988) (Board granting sanctions because of "a pattern of dilatory response to hearing officer orders, unjustifiable cancellation of depositions, and . . . an intentional pattern of refusal to meet deadlines.").

II. Factual background

On February 26, 2018, Complainants moved to strike evidence and testimony related to a novel and flawed methodology employed by Mr. John Seymour, expert for Respondents

EXHIBIT 4

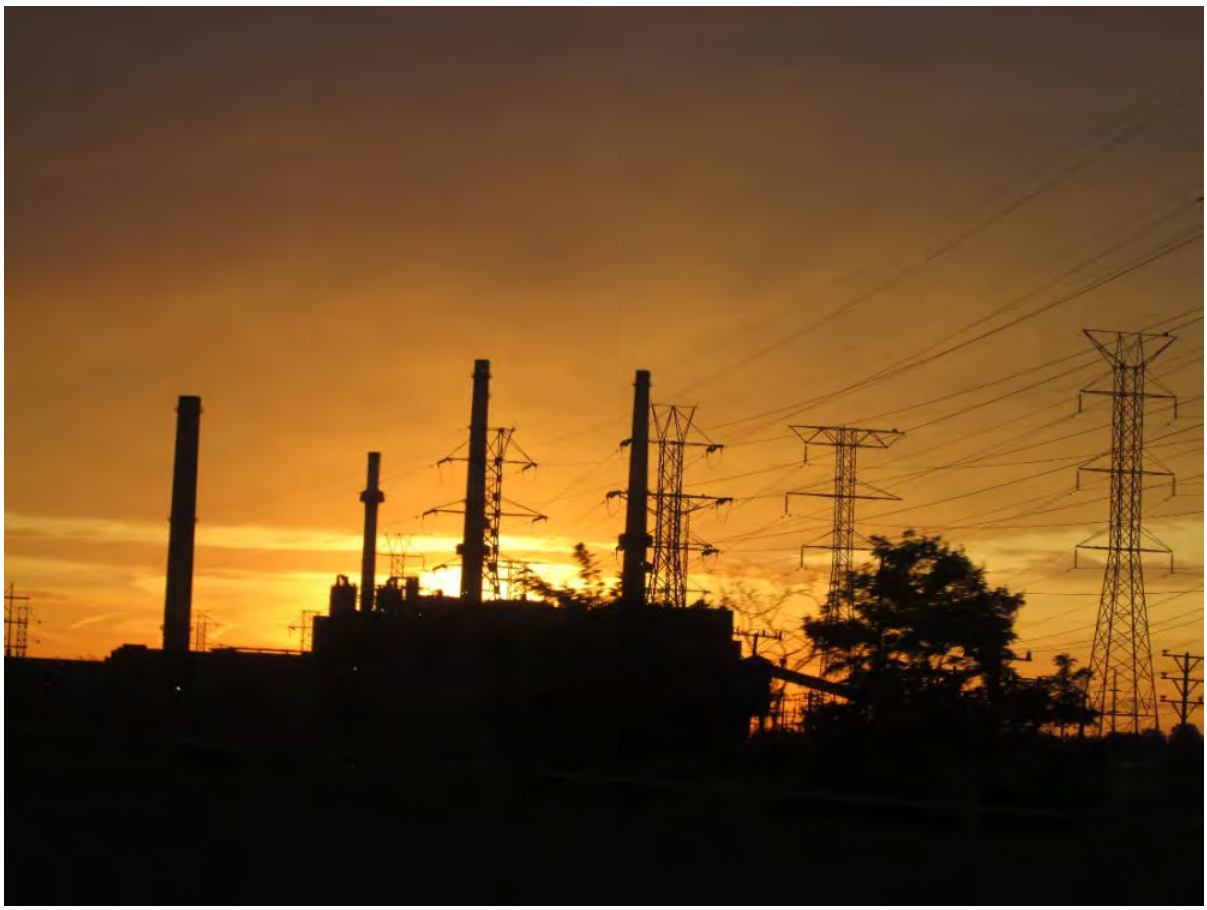
ENERGY NEWS NETWORK

MIDWEST

Historic coal ash raises concerns at iconic Illinois coal plant site

As owner NRG proposes a remediation plan for coal ash covered under state and federal law, other, older deposits that are exempt from the laws may pose a greater risk to water contamination and future redevelopment.

by **Kari Lydersen**
December 21, 2021



NRG's Waukegan plant on the shore of Lake Michigan north of Chicago. Credit: ribarnica / Creative Commons

Coal ash will remain in the ground at the site of a closing coal plant on the shores of Lake Michigan in Waukegan, Illinois.

Owner NRG explained its plans on Dec. 15 at a public meeting required under the state's coal ash law. Residents at the virtual meeting voiced concerns, given that significant groundwater contamination has been documented at the plant.

NRG officials said their modeling shows capping the coal ash in its East Pond and leaving it in place is safe, and that groundwater flowing toward Lake Michigan is not contaminated at levels above legal standards.

Meanwhile, older coal ash dumped long before current state and federal laws took effect may be a bigger concern, according to environmental experts, in terms of both groundwater contamination and limiting future redevelopment at the site.

Coal ash has been dumped around the Waukegan coal plant since at least the 1940s, according to historical photos and other evidence introduced in years-long legal proceedings about historic coal ash at four Illinois plants now owned by NRG. Much of it is dispersed throughout the site, including berms and other structural components actually built with coal ash, according to environmentalists and legal filings.

Not only does this historic coal ash pose a risk to groundwater, advocates fear the presence of coal ash will hamper redevelopment of the site and its surrounding area, **which has become** a regional symbol of the need for and **potential of a "just transition."** Waukegan is home to at **least five Superfund sites**, and the town has a largely Latinx immigrant population, with locals increasingly **mobilizing around environmental justice.**

The Waukegan coal plant is slated to close next year. Residents have long demanded a robust transition process protecting jobs and the tax base, and expressed hopes of seeing things like a park, brewery or educational facility at the lakefront site.

"You will never be able to put recreational or residential or any public use on that site" with extensive buried coal ash, said Faith Bugel, an attorney representing environmental groups that sued in 2012 regarding historic coal ash at Midwest Generation plants, bought by NRG in 2013. "Maybe something industrial, but Waukegan should not be burdened with more polluting industry, or another site that has waste on it that is undeveloped."

Closure plans

The Waukegan coal plant has two recently active ash ponds on-site, **subject to Illinois's 2019 coal ash law** and the federal coal ash rules created by 2015 legislation. One pond is nearly empty, as NRG officials explained at the Dec. 15 virtual meeting, so they propose to remove any ash and the liner, which will be cleaned and reused for stormwater retention.

Unlike many coal ash impoundments nationwide, the other pond is also lined, with a high-density polyethylene liner installed in 2003. NRG proposes to close that pond leaving the 70,000 cubic yards of ash in place and cover it with a thick artificial turf to prevent rainwater infiltration. Under the Illinois law, the company also must monitor surrounding groundwater for at least 30 years.

The company has acknowledged in past legal proceedings that contamination at the site is due to coal ash. At the meeting, NRG said its modeling suggests that contaminants in groundwater around the ponds would return to near-background levels within a decade under their proposed closure plans.

Residents entering questions into the Zoom webinar chat at the public meeting raised concerns about proven contamination and whether it could impact their drinking water, drawn from Lake Michigan or wells. Residents also asked whether NRG could instead move the ash off-site, a common demand at coal ash sites nationwide.

"Why are you capping in place at the East Pond when it is so close to our drinking water?" asked one resident. "My concern is with extreme shore

erosion … which Midwest Generation should be very aware of," said another. "We are experiencing accelerated storms in both frequency and power," which could hasten erosion along Lake Michigan and change groundwater flow. (Meeting participants' names could not be verified since NRG's virtual format did not allow the 65 attendees to publicly share comments or names.)

NRG officials said state officials have surveyed any impact on drinking water and found no evidence of risk. Environmentalists' expert witnesses have also not found an immediate risk to drinking water, Bugel said.

At the meeting, Rich Gnat, an environmental consultant hired by NRG, said that the groundwater contamination "concentrations we're seeing are generally already below groundwater drinking water standards, and by the time they reach the area around Lake Michigan, they would not be detected in water within the lake."

Under the Illinois coal ash law, NRG is required to publish a summary of the meeting and any changes made to their proposals as a result, and then their proposals go before state regulators for approval.

Historic ash

Bugel explained that most of the coal ash repositories at Midwest Generation's coal plants are lined, and unlike many other companies, Midwest Generation frequently emptied the ash and sold it for "beneficial reuse" as construction materials and other uses.

That means Midwest Generation's active coal ash ponds subject to the state and federal rules were probably less likely to be contaminating groundwater than at many other coal ash sites, she said. Since significant groundwater contamination has still been found, environmental groups that filed the ongoing litigation argue that historic ash — from repositories not subject to the laws and ash scattered throughout a site — are likely to blame for the contamination at Midwest Generation plants.

In Waukegan, they are especially focused on an area known as the Former Slag Area or "grassy field," where coal ash was deposited in decades past. A 1998 investigation identified contaminated groundwater coming from the site, though Midwest Generation argued the contamination was from a former leather tannery or a boiler facility upgradient of the former slag area.

Bugel noted that boron, found at high levels, is known as a prime indicator of coal ash, and "that site has lots and lots of boron — boron is not coming from the tannery, boron comes from coal ash."

In February 2020, the Illinois Pollution Control Board ruled as part of the historic ash litigation that Midwest Generation violated state groundwater protections with contamination at Waukegan and other Midwest Generation coal plant sites.

Expert testimony prepared for the Sierra Club by geologist Mark Quarles in July 2021 cited the pollution control board's opinion in writing: "Although MWG was aware of contamination, MWG did not undertake any further actions to stop or even identify the specific source(s) and had not taken actions to further investigate historic disposal areas, install additional groundwater monitoring wells, or complete further inspections of the ash ponds or the land around the ash ponds in areas that showed persistent groundwater exceedances."

In an email to Energy News Network, NRG spokesperson Dave Schrader said: "Since Midwest Generation began operating at the Waukegan Station, it has properly handled CCR [coal ash]. The Waukegan Station is more than 100 years old, and historic practices for handling CCR may have been different in the past. Midwest Generation is working with Illinois EPA to investigate and manage the Grassy Field, and there is ongoing litigation. As a result, there are challenges to taking any actions."

The litigation — in its ninth year — is now in the remedy phase, hammering out what should be done to address the risk. A consultant hired by NRG in an April 2021 report found that it would be "both technically practicable and

economically reasonable" to put a low-permeability cap on the former slag area, at a cost of $1.9 million to $3.3 million, to reduce rainwater infiltration and hence groundwater contamination. Schrader said NRG's actions at the site will depend on the ongoing proceedings before the pollution control board.

Bugel said it's impossible to know yet what the best solution might be for a site with potentially widespread coal ash dispersal, so more monitoring and study is needed.

"What we've said needs to be done as a first step is a deeper investigation," Bugel said. "Some of these areas don't have monitoring all the way around them. We need to know if ash is in contact with groundwater or above groundwater, because the remedy could be different. The next step is for Midwest Generation to do a complete nature and extent investigation with borings and monitoring, then lay out the alternatives. The burden is on the company to lay out all the alternatives and present back to us and the board, and quickly. It's hard to believe this case has been going on so long and we're still just fighting over getting them to do a full investigation."

KARI LYDERSEN

Kari has written for the Energy News Network since January 2011. She is an author and journalist who worked for the Washington Post's Midwest bureau from 1997 through 2009. Her work has also appeared in the New York Times, Chicago News Cooperative, Chicago Reader and other publications. Based in Chicago, Kari covers Illinois, Wisconsin and Indiana as well as environmental justice topics.

More by Kari Lydersen

EXHIBIT 5

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Senator Kustra. Any more ghosts? Senator Marovitz, to close.

SENATOR MAROVITZ:

Just solicit your Aye vote.

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Question is, shall House Bill 1620 pass. All in favor, vote Aye. All opposed, vote No. The voting is open. Have all voted who wish? Have all voted who wish? Please take the record. On this question, there are 43 Ayes, 10 Nays, 1 recorded as Present. This bill, having received the constitutional majority, is hereby declared passed. 1627. Senator Ralph Dunn. Read the bill, please.

ACTING SECRETARY: (MR. HARRY)

House Bill 1627.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR LECHOWICZ)

The Gentleman from Perry, Senator Dunn.

SENATOR R. DUNN:

Thank you, Mr. President and Members. This is a Department of Mines and Minerals bill that deals with the storage and handling of explosives. There's two amendments on it. One of them had to do with an agreement between the EPA, the Coal Association and the United Mine Workers on the disposal of flyash, and then the last amendment, Amendment No. 2, gives clear specifications for qualifications to receive license to handle explosives, and I'll be glad to answer any questions, and move for passage of...

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Any discussion?

SENATOR R. DUNN:

...House...

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Question is, shall House Bill 1627 pass. All in favor, vote

Aye. All opposed, vote Nay. The voting is open. Have all voted who wish? Have all voted who wish? Please take the record. On this question, there are 57 Ayes, no Nays, none recorded as Present. This bill, having received the constitutional majority, is hereby declared passed. 1662. Senator Schaffer. Read the bill, please.

ACTING SECRETARY: (MR. HARRY)

House Bill 1662.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR LECHOWICZ)

The Gentleman from McHenry, Senator Schaffer.

SENATOR SCHAFFER:

Mr. President, House Bill 1662 is a -- an attempt by the Department of Licensure and Registration to standardize the language of their various licensure Acts. It's a fairly lengthy bill, but it is not controversial. Provides some standard language and attempts to standardize some of the fees. I'm unaware of any opposition, although I haven't talked to the Senator from Galesburg.

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Any discussion? The Gentleman from Knox, Senator Hawkinson.

SENATOR HAWKINSON:

Will the sponsor yield for a question?

PRESIDING OFFICER: (SENATOR LECHOWICZ)

Indicates he will.

SENATOR HAWKINSON:

Senator, my analysis indicates there'll be a hundred-dollar fee for a bad check. Does -- does this mean if a check bounces for any reason, that's an overdrawn check that can happen to people from time to time, there's going to be a hundred-dollar fee?

PRESIDING OFFICER: (SENATOR LECHOWICZ)

EXHIBIT 6

DATA COLLECTION AND ANALYSES PERTINENT TO EPA'S DEVELOPMENT OF GUIDELINES FOR PROCUREMENT OF HIGHWAY CONSTRUCTION PRODUCTS CONTAINING RECOVERED MATERIAL

Vol. II

1981

DATA COLLECTION AND ANALYSES PERTINENT TO EPA'S DEVELOPMENT OF GUIDELINES FOR PROCUREMENT OF HIGHWAY CONSTRUCTION PRODUCTS CONTAINING RECOVERED MATERIALS

Volume II
Technical Data and Appendices

This report (ms. 2096) describes work performed
for the Office of Solid Waste under contract no. 68-01-6014
and is reproduced as received from the contractor.
The findings should be attributed to the contractor
and not to the Office of Solid Waste
and Emergency Response

U.S. ENVIRONMENTAL PROTECTION AGENCY
1981

Fly ash was hauled to the site in open trucks with no dusting problems during hauling or placement. The ash was tailgated and spread in 9-inch thick lifts and compacted by a rubber-tired vibratory roller to a density of 97 percent or more of Standard Proctor (ASTM D698 or AASHTO T-99) density values. Upon completion of compaction operations, the exposed surface of the fly ash embankment was sealed with a coat of hand-sprayed road tar (Reference I-32).

Melvin E. Amstutz Expressway - Waukegan, Illinois. The Melvin E. Amstutz project (Federal Aid Route 437, Section 8) in Lake County, Illinois involved the construction of a fill embankment for a four-lane divided highway with a 42-foot wide median between Grand and Greenwood Avenues in Waukegan, Illinois, some 40 miles north of Chicago. This is probably the most outstanding example of fly ash use in highway embankment construction thus far in the United States.

A total of 246,000 cubic yards of embankment material were required for this job. Fly ash was selected as an alternate because a nearby Commonwealth Edison power plant offered an available source of material at a potential cost savings. Alternate bids indicated that construction of a fly ash embankment would result in a savings of approximately $62,000 compared to an earth embankment (Reference I-33).

Prior to placement of the fly ash, unsuitable in-place soils were removed and replaced with granular fill to a height of 2 feet above the ground water table. The average height of the fly ash embankment was 3.5 feet, although 18 to 20 foot embankments were built in ramp areas. The fly ash embankment was covered by 8 feet of earth fill on the outside slopes and by 2 feet of earth fill in the median areas.

Fly ash was trucked to the site either from stockpiles located outside the power plant or from closed storage silos and placed in 6 inch layers. Each layer was compacted by means of a 10-ton vibratory single steel drum roller to densities in excess of 85 percent of the maximum dry density at optimum moisture levels of 25 percent.

The contractor added water where necessary to obtain the desired density. Side slopes of 2 to 1 were maintained and are performing satisfactorily.

The fly ash placed in this embankment is stronger than most natural soils because of its age-hardening characteristics. The material was workable and stable with excellent compaction characteristics, provided the proper construction methods and equipment are utilized. The use of fly ash enabled work to proceed under wet conditions when it might not have been possible to work with conventional soils. Moreover, the lighter weight fly ash was found to be advantageous in bridging over weak subsoils (Reference I-33).

EXHIBIT 7

A tribal solution to family woes

William Raspberry

WASHINGTON—Kent Amos, a committed family man, wants to say a couple of words on behalf of families: Back off!

Parents—especially single mothers—are taking an undeserved rap for what is happening to our children, he believes, when an important part of the blame may lie closer at hand.

"You keep hearing about what families and parents are doing, or not doing, and how this is the reason today's children are so terrible," he was saying the other day in response to a column I had written on the importance of family.

"I agree with what you say, but take a step back and look at the process by which children have been raised historically. That process is the tribe. Even going back to biblical times, you read of the tribe of this and the tribe of that. All people on this Earth were once tribal, and it was in this context that we historically raised our children.

"The problem with today's children is that the tribe is no longer functioning."

The tribe as he sees it—villages are nothing more than stationary tribes—embodies four vital elements: the core family, the wider community, the political leadership (village elders, councils, mayors) and the religious leadership (mediocre men, soothsayers, priests). The unwritten understanding has been that all four elements were responsible for bringing children to responsible adulthood.

"That covenant," he says, "has been broken—not so much by the family as by the rest of us."

Amos, a one-time Xerox executive who for 10 years has been "father" to a constantly shifting group of D.C. teenagers, evokes the image familiar to adults of his generation.

"I was just in Texas, listening to a white executive talking about growing up on a farm in the middle of Oklahoma, where if he threw a stone and hit somebody, there was always some adult to say, 'Boy, I'm gonna tell your mother what you did.' Well the same thing happened here in D.C. when I grew up, and all across America. There was always someone to tell your mother, or to admonish you directly, or to tell you: 'Now you behave yourself, you know the Amoses are not known for that.' "

But those were the days when adults disciplined (and were respected by) all the children in the community, when families stayed put for years, and where churches served the neighborhoods in which they were located.

"Now," says Amos, "adult neighbors often don't know each other, let alone one another's children. Families are dispersed. There are no neighborhoods and communities as before. The church community is scattered, parishioners often driving many miles to service and then back home, and the churches themselves may be dabbling in everything from politics to real-estate development. The government has lost its ability to serve the needs of its constituents in a covenant relationship, as opposed to a process relationship.

"Even our language suggests distance that keeps us from touching. Instead of taking care of children, we put them in programs. We call them 'youths' rather than children, and if we really want to put distance between us, we call them something like 'at-risk youth.' "

None of what Amos is talking about diminishes the importance of parents in the child-rearing enterprise. Their role was always vital, but, as Kent reminds, it was seldom exclusive. The most competent parents almost always had a hand in guiding and inspiring the neighbors' kids; the least able parents could at least exert tell-your-mother discipline.

The most competent parents almost always had a hand in guiding and inspiring the neighbors' kids; the least able parents could at least exert tell-your-mother discipline.

If we could restore some of that attitude—and Amos believes it is possible—it might be the best thing that could happen for single mothers struggling to raise decent children in a frequently harsh environment.

"Some of it still exists," says Amos. "If you go into the most drug-infested and violent neighborhood in the city, you'll find children who come through in reasonably good shape. Follow them back and you will find a covenant kind of environment, where families and neighbors work together to help bring the children up right. These kinds of environments exist all over the place. We need to hold them up, and do what we can to reinforce them."

Of course we do, and we need to do something else as well. We need to recapture not just the old arrangements but the old attitude that made the well-being of children the No. 1 priority: not to pamper them but to recognize that our children are the means through which we reproduce and preserve the best of ourselves.

Taking the Thomas-Hill story to heart

By Douglas E. Kneeland

Inside the paper

Maybe I'm wrong, but I've always thought most readers look upon those of us in the newspaper business as voyeurs with notebooks and cameras who stand aloof from and untouched by the real world we report on.

With another mega-story winding down—Clarence Thomas has been confirmed and sworn as a justice of the U.S. Supreme Court and Anita Hill is back at her law professorship at the University of Oklahoma—it might be a good time to talk about that.

Most news people are professional enough to keep their coverage even-handed. But it's a lot easier to do that when you're dealing with issues that touch you only intellectually.

Whatever special interest some reporters or editors may have in the CIA, for instance, the issue is not central to their personal lives. But the subject of sexual harassment has a reach so broad in this final decade of the 20th Century that it engages all of us.

Journalists worked hard to maintain their neutrality as they wrote and edited the news emanating from the emotional public conflict between the professor and the judge. But inside, all those I talked with acknowledged, their own feelings were churning.

I don't know how it is at all companies, or at all newspapers, but I have worked at five daily papers in my day, including this one, and I can tell you how it used to be. It's probably true of a lot of trades and professions, but over the years this newspaper business has been a rough-and-tumble one.

At least as recently as two decades ago, there weren't many women in the news departments of papers. And those who were there had to battle continuously for recognition and acceptance. A lot of them at the papers where I worked over most of the last four decades adopted about the only realistic defense they had at the time; they tried their best to be one of the boys. If that took a little cussing, listening to or telling the occasional off-color joke, enduring or exchanging a bit of sexual innuendo, they paid that price. Not always willingly, as I now know better than I knew then.

There are many more women in most newsrooms now and their numbers continue to increase, as do those in executive positions. For these reasons alone, there has been some improvement in the treatment of women in newspaper jobs. Most I know here at the Tribune agree to that, but I don't know any who would say they are dealt with as equals by every man at work in all situations.

Like a lot of other companies, the Chicago Tribune has taken steps in compliance with state and federal regulations to provide its employees "a professional work environment that is totally free of physical, psychological or verbal harassment." And in a policy statement to all employees, it defines harassment as "a pattern of behavior or language that creates or is perceived by an individual to create a hostile, offensive or intimidating work environment." The statement goes on to list such unacceptable things, among many others, as offensive jokes, unwelcome physical contact of any nature, unwelcome and unsolicited sexual advances.

Journalists worked hard to maintain their neutrality as they wrote and edited the news emanating from the conflict between the professor and the judge. But inside, their own feelings were churning.

All in all, the policy seems straightforward and about as clear as it can get. But people sometimes breach it to the point where warnings are necessary, if not action, which can include firing. And Judy Peres, the Tribune's national editor, in an article on this page the other day was moved to report that her male colleagues here were "exceedingly disconfited" by all the talk about sexual harassment that surrounded the Thomas-Hill case, wondering if "they too have been guilty—perhaps unwittingly—of sexual harassment."

Well, if they are like most of us who've been in the business awhile, they probably have been, at least at some time in the past. If they hadn't gotten the message from the rules as posted, they surely should know them by now. But it will probably take time to sort out just how much real understanding has come out of all this.

Associate editor Douglas E. Kneeland is the Tribune's public editor.

A Pandora's box of genetic bigotry

Joan Beck

Are some people genetically unfit to have children?

The question was raised in a vicious, ugly and public way recently in Los Angeles when Jane Norris spun her two-hour radio talk show on KFI-AM arguing that Bree Walker, an anchorwoman for KCBS-TV, should not be having a baby because the child might inherit Walker's finger and toe deformity.

Norris ignored the fact that Walker is beautiful, talented, healthy, intelligent, successful and happily married—and that she was already about eight months pregnant at the time of the verbal attack.

"Is it fair to bring a child into the world that you're pretty sure has a very good chance of having a disfiguring disease?" traped Norris

She carped on and on. "People judge you by your appearance .... God knows they are going to judge you by the shape of your hands and the shape of your body and the shape of your face. They just do."

The genetic abnormality at issue here is ectrodactyly, a condition in which the bones in the fingers and toes are partially fused. Walker was born with the disorder. Because it is inherited in an autosomal dominant pattern, each child she bears has a 50-50 chance of inheriting the problem. Walker and her previous husband already have a daughter with the deformity.

Several weeks after the broadcast, Walker's son with her current husband, Jan Lampley, also a TV anchor, was born—with ectrodactyly. Late in October, Walker, Lampley, other individuals and two dozen national organizations for the disabled filed a complaint with the Federal Communications Commission against KFI-AM, charging that the broadcast was inaccurate and biased.

Besides bias, however, Norris' mean-spirited broadcast does raise troubling questions about genetic and reproductive privacy, especially in the years ahead when new research will probably make all of our DNA an open book, spelling out our individual genetic makeup, our ancestry and our children's genetic potential.

"It's not just Bree," Norris snarled on the air. "It's not just her. We're all involved in this."

Already, bioethicists are expecting the time to come—perhaps in 25 or 30 years—when the human genome will be completely mapped and individual DNA blueprints for each of us will be easy to obtain.

Such personal readouts will warn about errors in genes that could mean serious problems for our offspring. (Scientists have already identified thousands of genetic disorders. Most of them are rare and caused by recessive genes, so don't occur in a child unless both parents have the same faulty gene.)

Our DNA profiles will also tell much more about us than the genetic abnormalities we carry (each of us probably has four to 20 such abnormal genes, scientists say). They will also reveal tendencies and susceptibilities, forecast whether we are likely to grow bald or fat, how resistant our bodies will be to cancer triggers, whether we will suffer from allergies or are likely to become alcoholic.

But who will have a right to such intimate information? To what use will such data be put?

Will prospective parents be given genetic profiles of their unborn children based on a few fetal cells and pressured to abort those who are less than perfect and will require extra medical care? Will "less than perfect" come to include not only the inevitably fatal Tay-Sachs disease, but Huntington's disease (which doesn't cause symptoms until middle age), cystic fibrosis—and ectrodactyly?

Will couples be expected to exchange DNA readouts, to ensure that genetic errors don't match up in ways that could produce a serious genetic disorder in a future offspring? Could a genetic susceptibility to alcoholism or depression be reason to reject a potential marriage partner?

Would a prospective employer have the right to insist on seeing an applicant's genetic profile before offering a job? Would he reject an otherwise qualified candidate because of a genetic tendency toward alcoholism or an illness that might run up health insurance costs? Or because of a susceptibility to certain chemicals he might be exposed to on the job?

Or, for an example posed by Robert Shapiro in his new book, "The Human Blueprint," suppose a congressional committee evaluating a Supreme Court nominee learns that two relatives suffer from manic-depression. If opponents demand he make public his DNA printout to show he has no genetic tendencies toward mental instability, dare he refuse?

In 25 to 30 years, perhaps, our DNA profiles will tell much more about us than the genetic abnormalities we carry. They will also reveal tendencies and susceptibilities. But who will have a right to such intimate information? To what use will such data be put?

As a practical matter, Shapiro notes that because most of our cells contain a full set of our DNA and very few cells are needed for testing, personal data will eventually be easy for others to obtain. It will be possible to get a DNA readout, for example, from hair in a lover's hairbrush, from skin cells rubbed off on a doorknob a job applicant has turned, even from an envelope whose flap a person has licked, he says.

The genome genie will not go back into the bottle. It shouldn't. We need the information about our essential selves that DNA can provide. Many of the most serious ills from which we suffer are caused by genetic factors. Deciphering the DNA code and its individual variations is the next, necessary step toward finding a way to cure and to prevent them.

But along with the scientific challenge comes the equally difficult task of learning to live wisely and fairly with unprecedented and enormously personal new information. It is important to stamp out genetic bigotry and to value each other for our unique selves.

EXHIBIT 8

121st Legislative Day April 26, 1996

Speaker Daniels: "The House will come to order. The Members will please be in their chairs. Those not entitled to the floor will please retire to the gallery. The Chaplain for the day is Pastor Herb Knudsen of the First Christian Church in Bloomington, Illinois. Pastor Knudsen is the guest of Representative Bill Brady. Guests in the gallery may wish to rise for the invocation. Pastor Knudsen."

Pastor Herb Knudsen: "Let us pray together. O God, our Creator and our Lord, how majestic is Thy name. We marvel at Your...which surrounds us and nurtures us and sustains us. Your blessings toward us are far more than we can count or deserve, but in these quiet moments, we recall the diversity and the presence of Your gifts in our midst. Our families and our friends, our critics and our supporters. The colleagues whose particular deaths surround each of us here, as well as those across the aisle. The constituents from the poor and beleaguered single parent to the the regular working Jane and Joe, to the wealthy corporate executive. From the little leaguer to the big leaguer. All those whom we seek to represent. From the teeming urban centers to the expansive rural farm lands which make up the millions of miles in this wondrous state we call Illinois. O Lord, our Lord, we call them into memory. We visualize them and we thank You for them. For indeed, each one of them is a child of Your creation made in Your image with whom we are called to live in community and together to build up Your Kingdom. Not our will, but Your will be done. Your will which calls for justice and mercy, love and compassion, generosity and peace. Especially this day, O Lord, we lift into Your comfort and healing presence, those of our neighbors suffering from the ravages of weather. The tornadoes and winds which swept across our

colleagues on the other side of the aisle for their favorable comments for this Bill. And I would ask for your favorable consideration."

Speaker Wojcik: "The question is, 'Shall Senate Bill 1266 pass?' All those in favor vote 'aye'; all those opposed vote 'nay'. The voting is open. This is final action. Have all voted who wish? Have all voted who wish? Have all voted who wish? Mr. Clerk, take the record. On this question, there are 90 'ayes', 14 'nays', 8 voting 'present'. And this Bill, having received a Constitutional Majority, is hereby declared passed. Mr. Clerk, what is the status of Senate Bill 1279?"

Clerk Rossi: "Senate Bill 1279 is on the Order of Senate Bills - Third Reading."

Speaker Wojcik: "Return that Bill to Second. Representative Lang, for what purpose do you rise? Mr. Clerk, please read Senate Bill 1360."

Clerk Rossi: "Senate Bill 1360. A Bill for an Act in relation to coal combustion waste. Third Reading of this Senate Bill."

Speaker Wojcik: "The Chair recognizes Representative Bost."

Bost: "Thank you, Madam Chairman, Members of the House. Senate Bill 1360 amends the Environmental Protection Act to provide that no person shall cause or allow the storage or disposal of coal combustion waste except under specific conditions. Basically, all it does, it replaces, last year we had Senate Bill 327 in which the words were put, 'coal combustible' or 'coal combustion by-products'. We want to change that and put 'coal combustible waste'. Be glad to answer any questions."

Speaker Wojcik: "Is there any discussion? The Gentleman from Kankakee, Representative Novak, is recognized."

Novak: "Thank you, Madam Speaker. Will the Sponsor yield?"

Speaker Wojcik: "He indicates he will."

Novak: "Representative Bost, could you explain for the Body the difference between 'coal combustion waste' and the other was it 'coal combustion by-products', I think you indicated. Could you explain the difference to us?"

Speaker Wojcik: "Representative Bost."

Bost: "Under the Mines and Minerals Program, the wording 'by-product' is going to require different standards than combustion waste."

Speaker Wojcik: "Representative Novak."

Novak: "Well, thank you, Madam Speaker. What do you mean by different standards, different items? I mean, will there be more things that will be included in the definition of coal combustion waste that were included in the definition of coal combustion by-products? I think that was the question I was asking."

Speaker Wojcik: "Representative Bost."

Bost: "Representative, maybe I can better answer your question of, and I'm hoping I am. I'm trying to here. By reading the word from the department, a coal mine facility wanting to dispose of coal combustion waste must submit an application obtaining approval for Illinois Environmental Protection Agency and Department of Natural Resources, offices of Mines and Minerals. The application for such a request must include a reclamation plan to demonstrate the disposal area will be covered in a manner that will support continuous vegetation. A demonstration that the facility will be adequately protected from wind and water and erosion. This demonstration shall also include a description of storage handling and placement operating and an estimate of the volume of waste to be disposed, demonstrating that the PH will be maintained so as to

prevent excessive leaching of metal ions that shall include the chemical analysis of the waste and/or waste mixture. Representative, fly ash is a product that is a coal combustible waste, and is one that would not fall under this the way it is now."

Speaker Wojcik: "Representative Novak."

Novak: "Thank you, Madam Speaker. Representative Bost, will the old railroad ties or scrap tires or other type of contaminated material be included in this?"

Speaker Wojcik: "Representative Bost."

Bost: "No, Representative. They will not."

Speaker Wojcik: "Representative Novak."

Novak: "There isn't any provision in this Bill that allows a certain percentage of scrap tires or wood or other materials to be allowed in this process? My analysis shows that."

Speaker Wojcik: "Representative Bost."

Bost: "The analysis that I have of the Bill and the word that we have from the department is it will not."

Speaker Wojcik: "Representative Novak."

Novak: "Well, so you can assure us that scrap tires, you can assure us that creosote saturated railroad ties, creosote saturated telephone poles that are no longer in use will not be used in this process? Is that correct?"

Speaker Wojcik: "Representative Bost."

Bost: "This is no change to the current program, so those are not in there now. They weren't protected under this law either."

Speaker Wojcik: "Representative Novak."

Novak: "What about fly ash?"

Speaker Wojcik: "Representative Bost."

Bost: "Fly ash is what we currently dispose of, and that is one

of the products that we're trying to make sure that we can still continue to dispose of."

Speaker Wojcik: "Representative Novak."

Novak: "I'm sorry, Representative. What did you say about fly ash? You said that product is included in this process?'

Speaker Wojcik: "Representative Bost."

Bost: "Yes it is. That's what we're trying to do, is make sure that we can still dispose of the fly ash."

Speaker Wojcik: "Representative Novak."

Novak: "I'm sure you are aware that certain fly ash products that are generated from an incineration process has been ruled as hazardous waste. Now, that type of fly ash certainly will not be included in this process. Is that correct?"

Speaker Wojcik: "Representative Bost."

Bost: "If it is not any different than the current standards. Now, if that fly ash, it is discovered that it does not meet those standards, then it will be a completely different situation."

Speaker Wojcik: "Representative Novak."

Novak: "And one last question. What is this filler material that's supposed to be involved in this?"

Speaker Wojcik: "Representative Bost."

Bost: "I don't have an answer for that."

Speaker Wojcik: "Representative Novak."

Novak: "No further questions."

Speaker Wojcik: "Are there any further discussion? The Gentleman from Washington, Representative Deering, is recognized."

Deering: "Thank you, Madam Speaker. Will the Sponsor yield?"

Speaker Wojcik: "He indicates he will."

Deering: "Representative, by changing this language, we worked on this Bill last year I know, and we do have some combustion by-products coming out of the utilities that are remnants

of a cogeneration with shredded tires and everything, some of the coal fired power plants. So we do have some of those burnt tires in the fly ash just so we can clarify the record. But by changing the wording here, we're not taking away any of the uses of the fly ash, the bottom ash or any of the other by-products could be used for structural fill to be used for filters in sanitary landfills. We can still use these products for those purposes. Is that not correct?"

Speaker Wojcik: "Representative Bost."

Bost: "That's correct, Representative. Thank you for bringing that up because that is the intent. There are times that we use these products, and we want to be able to continue to use these products. When the wording was changed, there became a problem with that. And that's why we're trying to change it back."

Speaker Wojcik: "Representative Deering."

Deering: "Thank you, Madam Speaker. Representative, I'm somewhat unfamiliar ... came about since I think we worked on some of this legislation last year, and I thought we had all the 't's' crossed and the 'i's' dotted. But this will clear up some problems that could be brought forth in the future. I know especially in our areas, the downstate areas that we represent, that a lot of these by-products are used to keep people working. They're used for fill for construction of highways, asphalt shingles, so this is good clarification language. I strongly support this Bill."

Speaker Wojcik: "Seeing no further discussion, Representative Bost to close."

Bost: "Thank you, Madam Speaker. Members of the House, this is a cleanup of some language. The Coal Association is in support of it. The United Mine Workers are in support of

this. I would ask for your 'aye' vote."

Speaker Wojcik: "The question is, 'Shall Senate Bill 1360 pass?' All those in favor vote 'aye'; all those opposed vote 'nay'. The voting is open. This is final action. Have all voted who wish? Have all voted who wish? Have all voted who wish? Mr. Clerk, take the record. On this question, there are 111 'ayes', 0 'nays', 0 voting 'present'. And this Bill, having received a Constitutional Majority, is hereby declared passed. Mr. Clerk, please read Senate Bill 1361."

Clerk McLennand: "Senate Bill 1361. A Bill for an Act concerning tax exemptions. Third Reading of this Senate Bill."

Speaker Wojcik: "The Chair recognizes Representative Bost."

Bost: "Thank you, Madam Speaker, Members of the House. Senate Bill 1361 amends the Use Tax Act and the Service Use Tax Acts, Service Occupation Tax Act and the Retailers Occupation Tax. It's identical to a Bill we moved in the House, Bill 2702, which is...basically what it does is it allows the people in the coal industry to purchase equipment less than $250 without the...makes them tax exempt, just puts them on line with farms and many other industries in the state. Be glad to answer any questions."

Speaker Wojcik: "Is there any discussion? The Gentleman from Cook, Representative Dart, is recognized."

Dart: "Thank you. Will the Sponsor yield?"

Speaker Wojcik: "He indicates he will."

Dart: "Representative, how many companies are going to be affected by this?"

Speaker Wojcik: "Representative Bost."

Bost: "We're not sure on the total number of companies that would be affected by this."

Speaker Wojcik: "Representative Dart."

EXHIBIT 9

STATE OF ILLINOIS
89TH GENERAL ASSEMBLY
REGULAR SESSION
SENATE TRANSCRIPT

86th Legislative Day March 22, 1996

PRESIDENT PHILIP:

The regular Session of the 89th General Assembly will please come to order. Will the Members please be at their desks, and will our guests in the galleries please rise. Our prayer today will be given by the Reverend Jean Martin, United Methodist Church, Oakford, Illinois. Reverend Martin.

THE REVEREND JEAN MARTIN:

(Prayer by the Reverend Jean Martin)

PRESIDENT PHILIP:

Will you please rise for the Pledge of Allegiance. Senator Sieben.

SENATOR SIEBEN:

(Pledge of Allegiance, led by Senator Sieben)

PRESIDENT PHILIP:

Reading of the Journal. Senator Butler.

SENATOR BUTLER:

Mr. President, I move that reading and approval of the Journals of Wednesday, March 20th and Thursday, March 21st, in the year 1996, be -- be postponed, pending arrival of the printed Journals.

PRESIDENT PHILIP:

Senator Butler moves to postpone the reading and the approval of the Journal, pending the arrival of the printed transcript. There being no objection, so ordered. Committee Reports.

SECRETARY HARRY:

Senator Woodyard, Chair of the Committee on Agriculture and Conservation, reports Senate Amendment 2 to Senate Bill 1633 Be Approved for Consideration; Senate Amendment 2 to Senate Bill 1749 Be Approved for Consideration; and Senate Amendment 2 to Senate Bill 1777 Be Approved for Consideration.

Senator Madigan, Chair of the Committee on Insurance, Pensions and Licensed Activities, reports Senate Amendment 2 to Senate Bill

1243 Be Adopted and Senate Amendment 3 to Senate Bill 1246 Be Adopted.

Senator Mahar, Chair of the Committee on Environment and Energy, reports Senate Amendment 3 to Senate Bill 1390 Be Adopted and Senate Amendment 2 to Senate Bill 1811 Be Adopted.

And Senator Peterson, Chair of the Committee on Revenue, reports Senate Amendment 1 to Senate Bill 1258 Be Adopted.

PRESIDENT PHILIP:

Messages from the House.

SECRETARY HARRY:

Message from the House by Mr. McLennand, Clerk.

Mr. President - I am directed to inform the Senate that the House of Representatives has passed a bill of the following title, in the passage of which I am instructed to ask the concurrence of the Senate, to wit:

House Bill 995.

We have a like Message on House Bills 1796, 2515, 2533, 3532 and 3578.

All passed the House March 21st, 1996.

PRESIDING OFFICER: (SENATOR MAITLAND)

Committee Reports.

SECRETARY HARRY:

Senator Cronin, Chair of the Committee on Education, reports Senate Amendment 1 to Senate Bill 1240 Be Adopted.

PRESIDING OFFICER: (SENATOR MAITLAND)

Resolutions.

SECRETARY HARRY:

Senate Resolution 180, offered by Senators O'Malley, DeAngelis and all Members.

It's a death resolution, Mr. President.

PRESIDING OFFICER: (SENATOR MAITLAND)

Consent Calendar. Messages from the House.

SECRETARY HARRY:

A Message from the House by Mr. McLennand, Clerk.

Mr. President - I am directed to inform the Senate that the House of Representatives has adopted the following joint resolution, in the adoption of which I am instructed to ask the concurrence of the Senate, to wit:

House Joint Resolution 94.

(Secretary reads HJR No. 94)

Adopted by the House, March 21st, 1996.

PRESIDING OFFICER: (SENATOR MAITLAND)

Senator Weaver moves to suspend the rules for the purpose of the immediate consideration and adoption of House Joint Resolution 94. Those in favor, say Aye. Opposed, Nay. The Ayes have it, and the rules are suspended. Now Senator Weaver on Senate Joint Resolution -- Senator Weaver has moved for the adoption of House Joint Resolution 94. Those in favor, say Aye. Opposed, Nay. The Ayes have it, and the resolution is adopted. House Bills 1st Reading.

SECRETARY HARRY:

House Bill 456, offered by Senators Rauschenberger and Burzynski.

(Secretary reads title of bill)

House Bill 995, offered by Senator Cronin.

(Secretary reads title of bill)

House Bill 1796, presented by Senator Madigan.

(Secretary reads title of bill)

House Bill 2659, offered by Senator Woodyard.

(Secretary reads title of bill)

House Bill 3177, offered by Senator Syverson.

(Secretary reads title of bill)

And House Bill 3230 is presented by Senator Watson.

(Secretary reads title of bill)

1st Reading of the bills.

PRESIDING OFFICER: (SENATOR MAITLAND)

Ladies and Gentlemen, it is our intent to move very quickly into Senate Bills 2nd Reading. I would advise the Members, it is getting late, and if at all possible, please move your bills to 3rd Reading today. When we have concluded Senate Bills 2nd Reading, we'll -- we will then move, as time permits, to Senate Bills 3rd Reading, obviously recessing a few moments before 12 o'clock so we can go to the other Chamber to hear the Governor's Message. So very shortly we will be moving into Senate Bills 2nd Reading. Senator Demuzio, for what purpose do you arise, sir?

SENATOR DEMUZIO:

I rise on a point of personal privilege.

PRESIDING OFFICER: (SENATOR MAITLAND)

State your point, sir.

SENATOR DEMUZIO:

Mr. President -- if I can the Members' attention for a moment. Senator Severns is not with us today. She is absent due to illness. And I think most of us know that -- what that illness is. And she will be out through the end of the Spring Session. I would like to make a request that the daily record reflect that she has an excused absence. And I would also like to note that -- as she has indicated to me, that this is the first day of Session that she has missed in nine years of the Senate. So, I know we're all praying for her that everything will work out, as we are with Senator O'Malley and others that are ill. But I would like the daily record to reflect that she has an excused absence rather than rising each day to make that request, if -- if that is in order.

PRESIDING OFFICER: (SENATOR MAITLAND)

That request is in order, Senator Demuzio, and -- and that,

obviously, will be granted. We thank you for that announcement and wish, obviously, Senator Severns well. Senator Philip, for what purpose do you arise, sir?

SENATOR PHILIP:

Thank you, Mr. President, Ladies and Gentlemen of the Senate. As you know, Senator O'Malley is out of the hospital, home convalescing. He's doing well. Would appreciate if the record would so indicate. I've been led to believe he may be down next week.

PRESIDING OFFICER: (SENATOR MAITLAND)

The record will so indicate, Senator Philip. All right, Ladies and Gentlemen. Page 2 of your Calendar - top of page 2 - Senate Bills 2nd Reading. Senate Bill 522. Senator Parker. Senator Parker on the Floor? Senate Bill 1246. Senator Madigan. Senate Bill 1322. Senator Rauschenberger. ...Bill 1335. Senator Peterson. Madam Secretary, read the bill.

ACTING SECRETARY HAWKER:

Senate Bill 1335.

(Secretary reads title of bill)

2nd Reading of the bill. The Committee on Local Government and Elections adopted Committee Amendment No. 1.

PRESIDING OFFICER: (SENATOR MAITLAND)

Have there been any Floor amendments approved for consideration?

ACTING SECRETARY HAWKER:

No further amendments reported.

PRESIDING OFFICER: (SENATOR MAITLAND)

3rd Reading. Senate Bill 1363. Senator DeAngelis. Senate Bill 1370. Senator Mahar. Senate Bill 1380. Senator Philip. Senate Bill 1381. Senator Sieben. Senate Bill 1424. Senator Madigan. Senate Bill 1437. Senator Woodyard. Senator Woodyard on the Floor? ...Sieben, for what purpose do you arise, sir?

SENATOR SIEBEN:

Mr. President, a point of personal privilege.

PRESIDING OFFICER: (SENATOR MAITLAND)

State your point, sir.

SENATOR SIEBEN:

Ladies and Gentlemen of the Senate, I would like to recognize today some Girl Scouts from my district, in the gallery above the President's seat. The Girl Scouts are from Junior Troop 2129 from Geneseo. Their leaders are Joy Clark and Jan Weber. If they'd please stand and be recognized.

PRESIDING OFFICER: (SENATOR MAITLAND)

Will our guests in the gallery please rise and be recognized? Welcome to Springfield. Senate Bill 1407. Senator Parker. Senate Bill 1424. Senator Madigan. Senate Bill 1437. Senator Woodyard. Senate Bill 1442. Senator Parker. Senate Bill 1490. Senator Lauzen. Senate Bill 1494. Senator Fitzgerald. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

...Bill 1494.

(Secretary reads title of bill)

2nd Reading of the bill. The Committee on Executive adopted Committee Amendment No. 1.

PRESIDING OFFICER: (SENATOR MAITLAND)

Have there been any Floor amendments approved for consideration?

ACTING SECRETARY HAWKER:

No further amendments reported.

PRESIDING OFFICER: (SENATOR MAITLAND)

3rd Reading. Senate Bill 1504. Senator Petka. Senator Petka? Senate Bill 1511. Senator Syverson. Senate Bill 1515. Senator Madigan. ...Bill 1556. Senator Palmer. Senate Bill 1578. Senator Mahar. Senate Bill 1633. Senator Woodyard.

Senate Bill 1640. Senator Weaver. Senator Weaver. Senate Bill 1643. Senator Dillard. Senate Bill 1712. Senator Lauzen. Senate Bill 1749. Senator Woodyard. Senate Bill 1557. Senator Stan Weaver. Senate Bill -- 1758. Senator Weaver. Senate Bill 1770. Senator Woodyard. Senate Bill 1777. Senator Donahue. Senate Bill 1823. Senator Syverson. Senator Syverson, on 1823. Senate Bill 1887. Senator Burzynski. ...Jacobs, for what purpose do you arise, sir?

SENATOR JACOBS:

Thank -- thank you, Mr. President. We would request a Democratic Caucus in Emil Jones' Office at this time. And we will probably take about a half hour.

PRESIDING OFFICER: (SENATOR MAITLAND)

That request is -- is in order, Senator Jacobs. I would -- it'd be about a half an hour you -- you think? All right. The Senate will stand in recess until 11 a.m.

(SENATE STANDS IN RECESS)

(SENATE RECONVENES)

PRESIDING OFFICER: (SENATOR MAITLAND)

...Senate will come to order. House Bills 1st Reading.

SECRETARY HARRY:

House Bill 1645, offered by Senator Luechtefeld.

(Secretary reads title of bill)

1st Reading of the bill.

PRESIDING OFFICER: (SENATOR MAITLAND)

...Ladies and Gentlemen, if I could have your attention, please. Senator Hawkinson has a group of special people here this

morning who he'd like to introduce, so if you would give -- give us your attention, please. Senator Hawkinson.

SENATOR HAWKINSON:

Thank you, Mr. President. I'm going to turn the mike over to Senator Shadid because these young men and -- and ladies are -- are from his district, but they're from one of the cities that I represent and I'll say a word in a few minutes. But we'll turn it over to Senator Shadid.

SENATOR SHADID:

Thank you very much, Carl. I'm sure -- I'm sure you're all aware, and you follow basketball, that we are very pleased, in Peoria area, that we've got the Manual Rams here today to honor them because they -- whereas -- we have a proclamation by Senator Hawkinson and myself:

Whereas, the Peoria Manual High School Rams basketball team won the IHSA Class AA State Basketball Championship on March 16; and

Whereas, this team is the second in history to win this championship three consecutive years; and

Whereas, the Rams were able to play this game in their hometown of the great City of Peoria with numerous fans in attendance; ...

Ladies and Gentlemen, it gives me great pleasure to introduce to you the Manual Rams basketball team, the cheerleaders, the coaching staff of Wayne McClain. Where is Wayne? ...gives me great pleasure to present this proclamation to Coach Wayne McClain, who, by the way, has not lost. He's been the Head Coach at Manual. He succeeded Coach Van Scyoc, who is the largest or the biggest game winner in the history of high school basketball in Illinois, and this young man here has not lost a postseason game in two years. So how about a big hand for Wayne McClain and his staff.

COACH WAYNE McCLAIN:

(Remarks and introductions by Coach McClain)

SENATOR HAWKINSON:

These young men of which we're so proud are also, of course, represented in the House by Representative Don Saltsman, who -- who's here. Don. Right down here. Thanks for joining us. I take particular pleasure this year not only in representing Peoria, but in congratulating the City of Peoria for running the tournament for the first time since 1913. They did an outstanding job. We look forward to next year, and to -- as I said last year, to having these same young men, or many of them, back here for a unprecedented fourth State title. And with all due respect, Aldo, I also take particular pleasure, because thirty years ago the Thornton team defeated my Galesburg team. So I was really rooting for Manual this year. And I want to congratulate them again for a tremendous job.

COACH WAYNE McCLAIN:

(Remarks by Coach McClain)

SENATOR SHADID:

Not only are they great basketball players, and the cheerleaders are great, but they were great sportsmen. They really did a job, and we are very, very proud of them in the way they handled themselves and the way they handle success. Some people, you know, have a problem handling success. These young people, along with Coach McClain and his staff, did a great job. So, I want to thank you all for giving them the big hand and supporting us. Thank you.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Geo-Karis, for what purpose do you rise?

SENATOR GEO-KARIS:

A point of personal privilege, Madam President.

PRESIDING OFFICER: (SENATOR DONAHUE)

State your point.

SENATOR GEO-KARIS:

I'm delighted to introduce to this august Assembly a good friend of ours and -- from Shields Township -- to a Supervisor of Shields Township, who is a constituent of my good friend, Senator David Barkhausen, none other than Charles Fitzgerald, III, known to us as "Chuck". I'd like you all to welcome Chuck.

PRESIDING OFFICER: (SENATOR DONAHUE)

Please rise and be recognized. Welcome. We are -- for your information, Senators, we are going to the middle of page 11 on Consideration Postponed. Senator Weaver, on Senate Bill 1298. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1298.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Weaver.

SENATOR WEAVER:

Thank you, Madam President. This bill was before us yesterday and I think there was a little bit of a confusion. It allows counties to pay for courthouse and jail facility construction renovation through a sales tax levy of a quarter percent. We have given this authority to counties of over a hundred and eighty thousand population, and this would just extend it to all counties in the State who wish to take advantage. It is preceded with a front-door referendum before they could enact this. And if anyone has any questions, I would be happy to try to answer them.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Senator Cullerton.

SENATOR CULLERTON:

Yes. Will the sponsor yield?

PRESIDING OFFICER: (SENATOR DONAHUE)

Indicates he'll yield, Senator Cullerton.

SENATOR CULLERTON:

Senator, I think the -- the reason why there was some confusion yesterday is that, you know, we just came out of a primary season where we saw a lot of television ads where people would attack us for increasing taxes and how many times we voted to increase taxes, and if I understand it correctly, this would be misconstrued by some to -- to be able to describe us as having voted for a tax increase. So could you explain to me why that would not be accurate if someone accused us of voting for a tax increase?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Weaver.

SENATOR WEAVER:

Well, presently, Senator Cullerton, they issue bonds. Oftentimes the chief judge of a circuit will demand that the court facilities be improved, that jails' holding facilities for juveniles be built in the county, and they are now bonded and paid for through bonds on real property. This would give a county the authority to use sales tax revenues and abate the bonding on real property. So really it's a substitution, and in many counties, it's a more equitable way to pay for jail and -- and courthouse facilities than just on the real property of the county. As I said, we've given this authority to counties over a hundred and eighty thousand. This would just extend it to smaller counties statewide.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Further discussion? Senator Weaver, to close.

SENATOR WEAVER:

I would appreciate a favorable roll call.

PRESIDING OFFICER: (SENATOR DONAHUE)

The question is, shall Senate Bill 1298 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Have all voted who wish? Last time. Take the record. On that question, there are 25 Ayes, 21 Nays, 1 voting Present. Senate Bill 1298, having not received the required constitutional majority, is declared failed. Senator Maitland, for what purpose do you rise?

SENATOR MAITLAND:

Thank you very much, Madam President. On a point of personal privilege.

PRESIDING OFFICER: (SENATOR DONAHUE)

State your point.

SENATOR MAITLAND:

Madam President, Members of Body, in the gallery beside the -- behind the -- the Republican side of the Chamber is the fifth grade class from Bent Elementary School in Bloomington. I would like the Senate to please recognize them and welcome them to Springfield.

PRESIDING OFFICER: (SENATOR DONAHUE)

Will you all please rise and be recognized by the Senate? Welcome. On page 5 of today's Calendar, the Order of Senate Bills 3rd Reading. I would ask that you all be in your seats. And we are going to the Order of 3rd Reading. Senator Watson, on Senate Bill 542. Out of the record. Senator Cronin, on Senate Bill 1239. Out of the record. Senator Cronin, on Senate Bill 1240. Do you wish this bill to be -- or -- returned to 2nd Reading for the purposes on an amendment? Senator Cronin seeks leave of the Body to return Senate Bill 1240 to the Order of 2nd Reading for the purposes of an amendment. Hearing no objection, leave is granted. On the Order of 2nd Reading is Senate Bill 1240. Madam

Secretary, are there any Floor amendments approved for consideration?

ACTING SECRETARY HAWKER:

Amendment No. 1, offered by Senator Butler.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Butler, on Amendment No. 1.

SENATOR BUTLER:

Thank you, Madam President. Ladies and Gentlemen, this amendment is the one that -- it pertains to driver's education and it is -- it removes the mandate and places the responsibility on the local school board as to whether or not they will provide a driver's education, and if so, they are permitted to use a private firm.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Senator Cullerton.

SENATOR CULLERTON:

Yes. Will the sponsor yield?

PRESIDING OFFICER: (SENATOR DONAHUE)

Indicates he'll yield, Senator Cullerton.

SENATOR CULLERTON:

Senator Butler, before someone can obtain a driver's license for the first time - a sixteen-year-old or a seventeen-year-old, for example - do they need to have taken driver's ed before they can obtain a license?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Butler.

SENATOR BUTLER:

If they're under eighteen.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Cullerton.

SENATOR CULLERTON:

So, does the effect of this -- I take it that right now

there's a mandate that driver's ed has to be provided by school districts, and this amendment makes that optional. I guess the question would be: What would happen if we pass this to those high school students that cannot get their driver's license unless they've taken driver's ed?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Butler.

SENATOR BUTLER:

Well, first of all, the option remains with the school district to provide this. They can provide -- there are several ways: One is that they can use the classroom instruction and -- and conduct it with a -- with one of the teachers and have the on -- the driver's ed behind-the-wheel conducted by a private firm, or they can continue as they are now, or the third option is that the child goes to the -- goes to a private driving school.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Cullerton.

SENATOR CULLERTON:

Well, if the school district is poor and they are given the option to drop this and they -- they do it to save money and the students cannot afford to go to a private course, I take it then that they just have to wait until they're nineteen before they could go take the -- and get their driver's license.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Butler.

SENATOR BUTLER:

Well, as I said, it's an option of the school district; however, we should understand that right now the State reimburses only a hundred and twenty-three dollars. So this -- the difference, which is estimated around four hundred dollars, it must be paid for by the taxpayers. So, you know, this is a question whether or not we -- we relieve the schools of some

burden of -- of providing all of that extra money for driver's education.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Cullerton.

SENATOR CULLERTON:

So is it your intention with this amendment to hope that in some cases the driver's ed is dropped and so that taxpayer dollars would be saved, but that the service would not be performed?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Butler.

SENATOR BUTLER:

Senator, I don't hope anything. I -- I believe that the school boards are qualified to make that kind of a decision.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Senator Palmer.

SENATOR PALMER:

Thank you, Madam President. A question of the sponsor.

PRESIDING OFFICER: (SENATOR DONAHUE)

Indicates he'll yield, Senator Palmer.

SENATOR PALMER:

Senator Butler, couldn't this have been handled through the waivers that were passed last year, rather than through this piece of legislation, for those school districts that would -- might want to do this?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Butler.

SENATOR BUTLER:

It could be, and I think, if you'll recall, that we have a number of requests, but it seemed to be a much -- a much more efficient way to do it this way.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Palmer.

SENATOR PALMER:

Thank you. With all due respect, it would seem to me that this would be duplicative with -- since we already have a means by which school districts can make this choice. I would hope that they would consider it very seriously, because to make driver's education permissive, I think has an impact on insurance rates and everything else, much less safety. Thank you.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Geo-Karis.

SENATOR GEO-KARIS:

Sponsor yield for a question?

PRESIDING OFFICER: (SENATOR DONAHUE)

Indicates he'll yield, Senator Geo-Karis.

SENATOR GEO-KARIS:

Is your amendment, Senator, the bill?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Butler.

SENATOR BUTLER:

Yes.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Geo-Karis.

SENATOR GEO-KARIS:

Is that the only thing in the bill then?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Butler.

SENATOR BUTLER:

Yes.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Senator Berman.

SENATOR BERMAN:

Thank you. This -- thank you, Madam President. This amendment was before us this morning in Education Committee. Let

me tell you why I stand in strong opposition to this amendment and if it gets adopted to the -- to the bill. I'm using part of my district as the example, and I'm talking about the part that I represent where I have Chicago students that go to high school and, at the present time, they get driver's education at no cost or a maximum of fifty dollars. If you vote Yes for this bill and if the Chicago Board of Education or your local board of education decides to eliminate - to eliminate - driver's education, what I heard this morning is that everyone of my parents - voters - who want their kid to take a driver's ed course is going to have to pay two hundred and seventy-five dollars. In addition to that, Chicago presently receives a hundred and twenty-three dollars from the Secretary of State's driver's education program, which will be terminated if the Chicago Board of Education decides that they want to drop driver's ed. And I've got to tell you, and you know this better than I, a high school diploma is important, but probably even more so to every one of those kids is their driver's license. If you vote Yes on this amendment or on this bill, as amended, you're saying that you're going to allow private enterprise to be preferred so that they can charge your -- your voters two hundred and seventy-five dollars to teach their kids how to drive and eliminate this from the high school curriculum where they're getting it either for nothing or for a nominal amount not to exceed fifty bucks. I think this is outrageous, and once your voters know it, you'll hear about it. I'd urge a No vote.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Senator Clayborne.

SENATOR CLAYBORNE:

Thank you, Madam President. Senator...

PRESIDING OFFICER: (SENATOR DONAHUE)

Excuse me, Senator Clayborne. Senator Butler.

SENATOR BUTLER:

Ladies and Gentlemen, I was just given some information that I think needs to be looked at. I will take this out of the record for the moment.

PRESIDING OFFICER: (SENATOR DONAHUE)

Out of the record. Senator Hawkinson, on Senate Bill 1251? Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1251.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Hawkinson.

SENATOR HAWKINSON:

Thank you, Madam President. Senate Bill 1251 is, I think, important legislation in our ongoing fight to keep drunk drivers off the roads in Illinois. I introduced this bill because my experience over the years has been, as a prosecutor and as an observer lately, that by far the majority of those who are charged with driving under the influence end up with what's called court supervision. And that that -- a disposition of court supervision means there is no conviction for the offense of driving under the influence, and perhaps more importantly, it takes away the deterrent of the revocation of the license for a year. I've been watching our area newspapers every week for dispositions, and by far most offenders are having this disposition. And it seems to me that in -- then in the fight that is being led now by George Ryan and formerly by our -- our Governor when he was Secretary of State that increasing the penalties and the fear of losing one's license can be a real deterrent to those who think about driving and drinking. We sponsored last year the initiative and -- was -- were successful for zero tolerance for our young people who are

not allowed to drive, but for our adults, with court supervision on the horizon, many of them don't have the deterrent. What this bill does is say that once you've had court supervision, once you've gotten that break and have kept your license, that you will not be able to get it a second time. It doesn't eliminate court supervision. This bill doesn't. But it does say, if you've had court supervision for driving under the influence of alcohol and you've escaped the penalty of a conviction, that should you ever again be caught driving under the influence that you will not be able to get court supervision a second time. Right now, you're not allowed -- formerly you weren't allowed to get it within five years. Recently we've changed it to ten. But this would say, once you've had it, you can't get it a second time. I think it's supported by those who want to get drunk driving off the road. It's supported by Secretary Ryan, who in many ways has led the fight against drunk driving in Illinois, and I would appreciate an Aye vote.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Senator Jacobs.

SENATOR JACOBS:

Thank you, Madam President, Ladies and Gentlemen of the Senate. Would the sponsor yield for a question?

PRESIDING OFFICER: (SENATOR DONAHUE)

Indicates he'll yield, Senator Jacobs.

SENATOR JACOBS:

Senator, as you indicate, if they have a suspended sentence once, they can't apply for it a second time. That's for the legal implications because -- am -- am I correct? Because the summary suspension, even if you have a suspended sentence, goes into the Secretary of State. So even if you had a suspended sentence, your second DUI would still be counted as a second DUI, correct?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Hawkinson.

SENATOR HAWKINSON:

I -- I believe that is correct. And, of course, even if you get supervision the first time, if you have failed the Breathalyzer or refused to take it, there are those summary suspensions. But the difference between that and a conviction is the revocation of a license for at least a year.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Further discussion? Senator Hawkinson, to close.

SENATOR HAWKINSON:

I think this is an important tool in -- in the fight that Secretary of State Ryan is leading and that all of us want to do to keep drunk drivers off the road, and I would ask for an Aye vote.

PRESIDING OFFICER: (SENATOR DONAHUE)

The question is, shall Senate Bill 1251 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 52 Ayes, no Nays, none voting Present. Senate Bill 1251, having received the required constitutional majority, is declared passed. Senator Bomke, on Senate Bill 1255. Senator Bomke? Out of the record. Senator Bomke, on Senate Bill 1256. Out of the record. Senator Parker, do you wish to have Senate Bill 1258 returned to the Order of 2nd Reading for the purposes of amendment? Senator Parker seeks leave of the Body to return Senate Bill 1258 to the Order of 2nd Reading for the purposes of an amendment. Hearing no objection, leave is -- granted. On the Order of 2nd Reading is Senate Bill 1258. Madam Secretary, are there any Floor amendments approved for consideration?

ACTING SECRETARY HAWKER:

Amendment No. 1, offered by Senators Carroll and Parker.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Carroll, on Amendment No. 1.

SENATOR CARROLL:

Thank you, Madam President and Members of the Senate. Amendment No. 1 would add to the potential checkoff list a Children's Cancer Fund. This -- the Senate two years ago had adopted a similar method but it got bogged down in the multiple checkoffs and -- and was not a surviving one at the time. Senator Parker has been nice enough to say that this is consistent with what she wishes to do. And this would just allow on the checkoff system for income tax a Children's Cancer Fund, and I would urge its adoption.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Any discussion? Seeing none, all those in favor, say Aye. Opposed, Nay. The Ayes have it, and the amendment is adopted. Are there any other Floor amendments approved for consideration?

ACTING SECRETARY HAWKER:

No further amendments reported, Madam President.

PRESIDING OFFICER: (SENATOR DONAHUE)

3rd Reading. Senator Maitland, on Senate Bill 1266. Out of the record. Senator Syverson, on Senate Bill 1268? Out of the record. Senator Geo-Karis. Out of the record. Senator Madigan, on Senate Bill 1279? Senator Madigan. Senator Klemm, on Senate Bill 1288? Out of the record. Senator Parker, on Senate Bill 1300? Out of the record. Senator Jacobs, on Senate Bill 1350. Out of the record. 15. Excuse me. Senator Maitland. Out of the record. Senator Raica, on Senate Bill 1326. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1326.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Raica.

SENATOR RAICA:

Thank you, Madam President, Ladies and Gentlemen of the Senate. Senate Bill 1326 has to do with the heat -- is as a result of the heat wave that we had last year in Cook County and throughout the State of Illinois. Basically what this bill does, it amends the EMS Act and allows the Department of Public Health to determine if a hospital went on bypass, whether it did so properly. It asks them to review the various hospital plans for their bypass procedures. And Senate Floor Amendment No. 2 made the bill applicable throughout the State of Illinois. And I would just ask for a favorable roll call.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Senator Rea.

SENATOR REA:

Just a question of the sponsor, please.

PRESIDING OFFICER: (SENATOR DONAHUE)

Indicates he'll yield, Senator Rea.

SENATOR REA:

Since the hospital bypass problem appears to only affect Cook County, how come you're including the rest of the State?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Raica.

SENATOR RAICA:

Hospital bypass doesn't only affect Cook County. Any hospital in the State of Illinois has the opportunity -- or the ability to go on either diversion or bypass, and we just feel -- we wanted to treat the whole State fairly and give the Department of Public Health the authority to review policy throughout the State of

Illinois and not limit it just to Cook County.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Further discussion? Senator Raica, to close.

SENATOR RAICA:

No, thank you.

PRESIDING OFFICER: (SENATOR DONAHUE)

The question is, shall Senate Bill 1326 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 51 Ayes, 1 Nay, none voting Present. Senate Bill 1326, having received the required constitutional majority, is declared passed. Senator Raica, on Senate Bill 1327. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1327.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Raica.

SENATOR RAICA:

Thank you, Madam President and Ladies and Gentlemen of the Senate. Senate Bill 1327 is also a result of those heat hearings that were held in Cook County. And what 1327 does is it says that the Department of Public Health will review internal hospital plans that various hospitals throughout the State of Illinois have as far as evacuation, should some type of an emergency occur. And it -- basically that's exactly what it has. Just allows the Department to review the plans. I just ask for a favorable roll call.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Any discussion? Seeing none, the

question is, shall Senate Bill 1327 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 51 Ayes, no Nays, none voting Present. Senate Bill 1327, having received the required constitutional majority, is declared passed. Senator Weaver, on Senate Bill 1338? Out of the record. Senator Hawkinson, on Senate Bill 1354. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1354.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Hawkinson.

SENATOR HAWKINSON:

Thank you, Madam President. I would like to yield to Senator Bowles to explain Amendment No. 2, as amended by No. 3, which was originally her -- a bill of hers.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Bowles.

SENATOR BOWLES:

...Madam President, and thank you, Senator Hawkinson. This amendment provides that the Criminal Code would be amended to include child endangerment to anyone eighteen years of age or older and knowingly and without legal justification and by any means causes bodily harm to an individual under the age of thirteen years. What has happened is that it was a misdemeanor and we had two occasions where children were killed because they were put into an endangered situation by the person under whose custody they were being kept, and there was nothing that could be done by the prosecution except to declare it a misdemeanor. The State's Attorney of Madison County suggested that I try to get an

amendment to the Criminal Code to incorporate this amendment. And I would be welcome to answer any questions, but I certainly would like to request an affirmative vote. Thank you.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Any discussion? Senator Hawkinson, to close.

SENATOR HAWKINSON:

Thank you, Madam President. I think it's a good bill. It fills a -- a needed gap in those cases where the bodily harm may not be life-threatening and otherwise qualify for the aggravated battery of a child, and I would urge its adoption.

PRESIDING OFFICER: (SENATOR DONAHUE)

The question is, shall Senate Bill 1354 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 53 Ayes, no Nays, none voting Present. Senate Bill 1354, having received the required constitutional majority, is declared passed. Senator Dudycz, on Senate Bill 1357. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1357.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Dudycz.

SENATOR DUDYCZ:

Thank you, Madam President. Senate Bill 1357 contains enabling language to implement the Cook County boot camps. Last year we passed boot camps for Cook County, and the contents of Senate Bill 1357 is a combined effort brought between the Sheriff of Cook County, the State's Attorney, and the Department of Correction. They all agree to the language. This is something

that they worked out to be able to implement boot camps.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Any discussion? Seeing none, the question is, shall Senate Bill 1357 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 51 Ayes, no Nays, none voting Present. Senate Bill 1357, having received the required constitutional majority, is declared passed. Senator Raica, for what purpose do you rise?

SENATOR RAICA:

Madam President, point of personal privilege, if I may.

PRESIDING OFFICER: (SENATOR DONAHUE)

State your point, please.

SENATOR RAICA:

Thank you, Madam President. In the visitor's gallery, on the Republican side of the aisle, we have no stranger to Springfield. He's a Police Chief from Elmhurst who's been involved in -- in -- in law enforcement for many years. He's been appointed to numerous committees by the Attorney General and by the Governor of the State of Illinois. With him also, we have Sergeant Tom Tureck, Sergeant Bob Kopchinski, and then John Milner, who is the Police Chief of the Elmhurst Police Department, and with him is the newest member who just graduated the Academy of the Police Academy, from Elmhurst, Recruit Ken Laffin and his family. And I would just ask if they would be -- stand and be recognized by the Senate.

PRESIDING OFFICER: (SENATOR DONAHUE)

Will you please stand and be recognized by the Senate? Welcome. On the Order of 3rd Reading is Senate Bill 1360. Senator Luechtefeld. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1360.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Luechtefeld.

SENATOR LUECHTEFELD:

Thank you, Madam President and Members of the Senate. Senate Bill 1360 simply clears up some language of an earlier bill. It amends the Environmental Protection Act. And this bill replaces the term "coal combustion by-product" with "coal combustion waste" in the provisions of the Environmental Protection Act regarding disposal. This will allow the current disposal program to continue. I would ask for a favorable vote on this bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Any discussion? Seeing none, the question is, shall Senate Bill 1360 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 50 Ayes, no Nays, none voting Present. Senate Bill 1360, having received the required constitutional majority, is declared passed. Senator Luechtefeld, on Senate Bill 1361. Read the bill, Madam Secretary.

ACTING SECRETARY HAWKER:

Senate Bill 1361.

(Secretary reads title of bill)

3rd Reading of the bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Luechtefeld.

SENATOR LUECHTEFELD:

Thank you, Madam -- Madam President and Members of the Senate. Senate Bill 1361 would remove a -- a tax on coal equipment and spare parts of under two hundred and fifty dollars. This -- this

tax was removed on coal equipment and machinery above two fifty a number of years ago. We have done this, for instance, for a number of other industries, in particular the farming industry, and we feel that this would help the coal industry in southern Illinois, which is in -- in really bad shape, and actually throughout the State -- help them possibly survive the next few years, until phase two of the Clean Air Act. I would appreciate a very favorable vote on this issue.

PRESIDING OFFICER: (SENATOR DONAHUE)

There any questions? Any discussion? Senator Cullerton.

SENATOR CULLERTON:

Yes. Would the sponsor yield?

PRESIDING OFFICER: (SENATOR DONAHUE)

Indicates he'll yield, Senator Cullerton.

SENATOR CULLERTON:

Senator, when we vote for a bill that results in the loss in State revenues of two and a half million dollars, does that -- is that something that you contact the Governor's Office on and -- have them work that into the budget in some way before we end up passing a budget for next year?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Luechtefeld.

SENATOR LUECHTEFELD:

No. I have not.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Cullerton.

SENATOR CULLERTON:

So when we pass the bill and there is this loss of two and a half million dollars, do we then cut two and a half million dollars out of some other State appropriation, or do we just maybe add another day on to our -- the time it takes us to pay our Medicaid bills?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Luechtefeld.

SENATOR LUECHTEFELD:

Well, I would think that if we can keep just a -- a couple of those mines open, we can save that kind of money in unemployment and a lot of other things.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Cullerton.

SENATOR CULLERTON:

So, then, you would dispute the Department of Revenue's estimate that this would result in a two-and-a-half-million-dollar loss. You're -- you'd suggest that maybe we're going to make money if we pass this bill?

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Luechtefeld.

SENATOR LUECHTEFELD:

That -- that particular loss is what -- what they will lose in the tax. But that -- we -- we'd have no idea what will be made up in the other areas, such as possibly doing away with some of the unemployment and that sort of thing.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Senator Rea.

SENATOR REA:

Thank you, Madam President. I rise in support of this legislation. The original legislation passed in 1986 and we -- at that time, of course, we had left the two hundred and fifty. Anything below that would not be exempt. However, with the clean air legislation that has taken place at the federal level and the need for more equipment and parts for cleaning of the coal so we can use high sulfur, this legislation is very important. We've lost many coal-mining jobs, and as a result, this will help us as far as the economy and will -- in our opinion, will help offset

the loss of revenues through other means, including the income tax returns that will come into the State. So I would ask for a favorable vote.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Senator O'Daniel.

SENATOR O'DANIEL:

Thank you, Madam President. I also rise in support of this legislation. I handled the original legislation several years ago to exempt all except the two-hundred-and-fifty-dollar threshold. And at this time, we're having all kind of problems with miners being laid off as a result, as Senator Rea said, of the Clean Air Act. If we can keep from losing so many of these jobs till the year 2000 when the second phase of the Clean Air Act kicks in, where they require all coal-burning power plants to -- to have scrubbers, then I think, you know, our coal industry might begin to pick back up. We also -- we don't have the threshold on manufacturing equipment, farming equipment, a lot of different other tax breaks that we give different industries. So I would ask a favorable vote for this legislation. Think it's very important.

PRESIDING OFFICER: (SENATOR DONAHUE)

Further discussion? Further discussion? Senator Luechtefeld, to close.

SENATOR LUECHTEFELD:

Yes. I would simply ask the support of this Assembly on the -- on this bill.

PRESIDING OFFICER: (SENATOR DONAHUE)

The question is, shall Senate Bill 1361 pass. Those in favor will vote Aye. Opposed, Nay. The voting is open. Have all voted who wish? Have all voted who wish? Have all voted who wish? Take the record. On that question, there are 52 Ayes, no Nays, none voting Present. Senate Bill 1361, having received the

required constitutional majority, is declared passed. Resolutions Consent Calendar. Resolutions.

SECRETARY HARRY:

Senate Resolution 181, offered by Senators Maitland, Madigan, and all Members.

It's a death resolution, Madam President.

PRESIDING OFFICER: (SENATOR DONAHUE)

Consent Calendar. We'll now proceed to the Order of Resolutions Consent Calendar. With leave of the Body, all those read in today will be added to the Consent Calendar. Mr. Secretary, have there been any objections filed to any resolution?

SECRETARY HARRY:

No objections have been filed, Madam President.

PRESIDING OFFICER: (SENATOR DONAHUE)

Is there any discussion? Any discussion? If not, shall the resolutions on the Consent Calendar be adopted? All those in favor, say Aye. Opposed, Nay. The motion carries, and the resolutions are adopted. Resolutions.

SECRETARY HARRY:

Senate Joint Resolution 83, offered by Senator Weaver.

(Secretary reads SJR No. 83)

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Weaver moves to suspend the rules for the purpose of the immediate consideration and adoption of Senate Joint Resolution 83. Those in favor, say Aye. Opposed, Nay. The Ayes have it, and the rules are suspended. Senator Weaver has moved to -- for the adoption of Senate Joint Resolution 83. Those in favor, say Aye. Opposed, Nay. The Ayes have it, and the resolution is adopted. Now, for the edification of the Members of the Senate, let us -- let me explain to you what's going to happen: We are now going to proceed to the Governor's Joint Session in the House of Representatives. And the following

Senators have been appointed as a Committee of Five from the Senate to wait upon his excellence, Governor Jim Edgar, and invite him to address the Joint Assembly. Those are Senator Maitland, Senator DeAngelis, Senator Madigan, Senator Smith and Senator Dunn. We encourage all of you to attend this. But immediately following the Governor's Address, the Senate will reconvene. We will reconvene to continue our business. And we will do 2nds and 3rd Readings after the Governor's Message. Have I made myself clear? All right. The Senate will stand at ease till the conclusion of the Governor's Message. Senator Demuzio, for what purpose do you rise?

SENATOR DEMUZIO:

A point of inquiry. Do you have any idea what time we might be adjourning today, so our Members could make their travel plans? I know we are coming back.

PRESIDING OFFICER: (SENATOR DONAHUE)

Senator Demuzio, I'd like to be very specific, but at this point, all I can say is when we complete our business. Thank you. Any other inquiries? Any other questions? That point, we stand at ease and we'll reconvene after the Governor's Message.

(SENATE STANDS AT EASE)

(SENATE RECONVENES)

PRESIDING OFFICER: (SENATOR WEAVER)

Senate will come to order. Is there leave of the Body to allow Senator Petka to move -- Senator O'Malley's bills to the Order of 3rd Reading? Leave is granted. Senator Petka, on Senate Bill 1243? Read the bill, Mr. Secretary.

SECRETARY HARRY:

Senate Bill 1243.

(Secretary reads title of bill)

2nd Reading of the bill. The Committee on Insurance, Pensions and Licensed Activities adopted Amendment No. 1.

PRESIDING OFFICER: (SENATOR WEAVER)

Have there been any Floor amendments approved for consideration?

SECRETARY HARRY:

Amendment No. 2, offered by Senator Cullerton.

PRESIDING OFFICER: (SENATOR WEAVER)

Senator Cullerton.

SENATOR CULLERTON:

Yes. Thank you -- yes. Thank you, Mr. President, Members of the Senate. This amendment was adopted this morning in the Insurance Committee. It allows for an early retirement option for the Chicago Teachers' Pension Fund, which is identical to the option that is now available for the downstate teachers. Move for its adoption.

PRESIDING OFFICER: (SENATOR WEAVER)

Is there discussion? If not, all in favor -- excuse me. All in favor, signify by saying Aye. Opposed, Nay. The Ayes have it. The amendment's adopted. Are there further amendments?

SECRETARY HARRY:

No further amendments reported, Mr. President.

PRESIDING OFFICER: (SENATOR WEAVER)

3rd Reading. Senate Bill 1313, Mr. Secretary.

SECRETARY HARRY:

Senate Bill 1313.

(Secretary reads title of bill)

2nd Reading of the bill. The Committee on Revenue adopted Amendment No. 1.

PRESIDING OFFICER: (SENATOR WEAVER)

Have there been any Floor amendments approved for consideration?

SECRETARY HARRY:

No further amendments reported.

PRESIDING OFFICER: (SENATOR WEAVER)

3rd Reading. Senate Bill 1502, Mr. Secretary. ...of the record. 1550, Mr. Secretary. ...of the record. Senate Bill 1881, Mr. Secretary.

SECRETARY HARRY:

...Bill 1881.

(Secretary reads title of bill)

2nd Reading of the bill. No committee or Floor amendments.

PRESIDING OFFICER: (SENATOR WEAVER)

3rd Reading. ...Bill 1550, Mr. Secretary.

SECRETARY HARRY:

Senate Bill 1550.

(Secretary reads title of bill)

2nd Reading of the bill. No committee or Floor amendments.

PRESIDING OFFICER: (SENATOR WEAVER)

3rd Reading. ...appears that there's no further business to come before the Senate. So if not, the Senate will stand adjourned until 4 p.m., Monday, May the 25th. ...what purpose does Senator Demuzio arise?

SENATOR DEMUZIO:

Yes. Mr. President, I'd like the record to reflect that Senator Collins and Shaw and Hendon are here -- are not here today. They are absent due to illness.

PRESIDING OFFICER: (SENATOR WEAVER)

The record so -- shall so indicate. If not any more business, the Senate will stand adjourned.

SENATE

DAILY TRANSCRIPTION OF DEBATE INDEX

MARCH 22, 1996

SUBJECT MATTER

EXHIBIT 10

passed. Senate Bill 9, Representative Ammons. Mr. Clerk, please read the Bill."

Clerk Hollman: "Senate Bill 9, a Bill for an Act concerning coal ash. This Bill was read a second time a previous day. No Committee Amendments. No Floor Amendments have been approved for consideration. No Motions are filed."

Speaker Manley: "Third Reading. Representative Ammons, Senate Bill 9. Mr. Clerk, please read the Bill."

Clerk Hollman: "Senate Bill 9, a Bill for an Act concerning coal ash. Third Reading of this Senate Bill."

Speaker Manley: "Representative Ammons."

Ammons: "Thank you, Madam Speaker. Senate Bill 9 is a Coal Ash Pollution Prevention Act. Coal ash is a by-product that is produced when burning coal. It contains toxic metals that cause serious health problems, including cancer. For over seven years, we've been working to try to address the issue of coal ash. For over 55 years, power plant operators at the Vermilion Power Station dumped over 3.3 million cubic yards of toxic ash in the floodplains of the Middle Fork. This is enough to fill Chicago's Willis or Sears Tower nearly two times. Protecting our communities and our environment is our number one option. This Bill will set the parameters of how coal ash will be handled in the State of Illinois. It is a good piece of legislation negotiated with many, many partners. And we look forward to passing coal ash this evening for the taxpayers of Illinois but, specifically for those who are impacted by the coal ash that is in their backward. We highly urge a 'yes' vote for this Bill, Senate Bill 9. And I'll take any questions."

Speaker Manley: "This matter is on Short Debate. Representative Batinick."

Batinick: "Thank you, Madam Speaker. While I like Short Debate, I'm going to request that this particular Bill be put on Standard Debate."

Speaker Manley: "I had a feeling."

Batinick: "Thank you."

Speaker Manley: "Would you like to proceed with any questions, Representative Batinick?"

Batinick: "I do have a question or two, Madam Speaker. Will the Representative yield?"

Speaker Manley: "She indicates that she will."

Batinick: "Representative, I appreciate some of the work that you did on this and I know that there was an amendment that was going to take off a whole bunch of the opponents. Can you speak to that Amendment?"

Ammons: "The final Amendment that we ultimately did not pass in the Environmental Committee, that Amendment had various opposing views in one Amendment that we could not work out. What we hope to do is, Senator Bennett has committed to a trailer Bill to address some of the remaining issues that were not addressed in this Bill, and we've made a commitment to come back to those issues at a later date."

Batinick: "I'm hearing that there's a problem with the constitutionality and rulemaking because this would require clean up within 18 months. Has that been one of the issues that's been brought forth by some of the opponents? Rulemaking is going to take up to 18 months, but they're required to

clean up immediately. How do they start cleaning up immediately if it takes time for the rule making?"

Ammons: "So, there… first of all, the portion that covers Vermilion County is in the AG's Office and that is being moved by lawsuit, unfortunately. The other provisions will be implemented as we get the rulemaking in place. They already have some provisions to start clean up. The Amendment would have caused some other constitutional challenges, which is why we did not move that Amendment, and moving Senate Bill 9 as it is."

Batinick: "Okay. So, you have… I mean, you have a Vista Energy, you have the AFLCIO opposed, along with the IMA opposed, Illinois Energy Association, Chamber of Commerce is opposed, IBEW, Illinois Environmental Regulatory Group, Illinois Coal Association, although I believe they may be neutral now, Illinois Municipal Utilities Association, Operating Engineers. So, you have a mix of business groups and unions that are opposed to this and you have some environmental groups that are for it. I'm going to actually try and do something here, and let's just try and simplify down what happened in Vermilion County so everybody can understand it 'cause it's really a mish mosh of proponents and opponents. So, you have the coal ash from what, about 70 years, correct? That's built up on the banks of the river?"

Ammons: "That's right."

Batinick: "Okay, and what does your Bill do to propose that it immediately starts the clean up?"

Ammons: "So, this Bill would allow U.S. EPA rules given… Illinois power companies until October 31, 2020 to close any of those

coal ash disposable areas that fail ground water protection requirements. The companies have known about this for years and they haven't done anything about it. So, this Bill gives the rulemaking process for Illinois so that they can clean these up. And any of those who are not cleaned up, they have an opportunity to set aside some rules to do so."

Batinick: "So, how do they start immediate clean up if the rules aren't going to be set for 18 months?"

Ammons: "Well, there is a process already that they can work with the EPA to clean up these. These coal ash… we don't prevent them from cleaning it up now. This Bill does not stop them from cleaning any of this up tomorrow. They can do it if they want to. But this Bill just set parameters in place for going forward."

Batinick: "Right. Now, there was an issue with… the Amendment wanted to allow bonding so you could get an insurance bond so that you don't bankrupt some of these companies. So, some of the concerns that I've heard from Members of our Caucus is that if you enact this Bill as is, without some of the ideas that were in the Amendment, you're going to have companies go bankrupt and then the state or, you know, the local… I don't know would then be in charge of the clean-up. Can you speak to that? Because that sounds important. If you're asking them to clean it up immediately, there's a high cost, right?"

Ammons: "Well, unfortunately, the high cost is to the people who have been exposed to the toxic waste. That's actually the high cost."

Batinick: "I don't disagree with you, but I don't want them to go bankrupt. So, we're on the same page on that. I want to be

clear. I want these cleaned up as much as you do. What I want to understand is that if we pass up legislation that bankrupts the companies that will be responsible for the clean-up, it's not going to be cleaned up on their dime."

Ammons: "Unfortunately, the insurance that was being proposed in the Amendment we did not move, it was too much of a risk to taxpayers. Because, unfortunately, there is evidence already that the insurance provisions for other coal plants, they literally just close up shop and left and insurance companies found a way not to pay, left the taxpayers having to pay the Bill. We don't want that to happen in this case, which is why we did not move that Amendment."

Batinick: "So, how many coal plants in Illinois does this effect? My understanding is there might be one bad actor, there are seven or eight other coal plants. Is that correct?"

Ammons: "That's correct."

Batinick: "Okay. And one bad actor that we know of. So, what will happen to those other seven or eight? Will they be in financial duress with the passage of this Bill?"

Ammons: "I don't think so."

Batinick: "Okay. That's where my concern lies. I'm going to go ahead and speak to the Bill. I think we've fared this out enough to kind of explain what it does. These are difficult situations where we're trying to make decisions to protect the citizens from bad ground water. But the issue is, is we're trying to force these companies to pay for the clean-up. But if we force it in too much of an onerous way, they may just go belly up, go bankrupt, and leave the state and we're going to be on the hook. So, I'm going to sit back and listen to

the rest of the debate. I very much thank you for your answers. Thank you, Madam Speaker."

Speaker Manley: "Representative Marron is recognized. I'm assuming you're in favor?"

Marron: "Yes, Madam Speaker. Thank you. To the Bill. I'd like to thank Representative Ammons for bringing this Bill forward and for her hard work on this very important issue. I want to thank her for her willingness, along with Senator Bennett, to address a few more issues in a trailer Bill. And this is a very, very important issue to my district. It is so critically important to Vermillion County. We are home to the only National Scenic River in the State of Illinois. And on the banks of that river are 3.3 million cubic yards of coal ash. So, not only do you have the short-term environmental liability of ground water contamination from the toxins and the coal ash, you also have a chance for a catastrophic spill into the only National Scenic River in this state, as the bank of that river erodes over the years. Not only do you have an environmental liability there, you have an economic liability because the river has become a very, very strong destination for people around the Midwest coming to Vermilion County. It's become and economic engine for the City of Danville and surrounding communities as people come to enjoy the river and the natural amenities that it provides the area. And finally the last thing, the taxpayers of Vermillion County and the taxpayers of the State of Illinois should not be on the hook for cleaning up this liability. And although this actual issue is tied up in litigation right now, it is very important to the residents of Vermilion County that no other

areas have to go through the same problem that we see with our beautiful river. So, I ask for an 'aye' vote. And thank you, Representative Ammons."

Speaker Manley: "Leader Wheeler, for what reason do you rise? Do you rise in support or against?"

Wheeler: "I voted 'no' in the committee and I have questions for the Sponsor."

Speaker Manley: "Please proceed."

Wheeler: "Thank you. Will the Sponsor yield?"

Speaker Manley: "She indicates that she will."

Wheeler: "Thank you. Representative… Representative, we did… you had a great discussion in committee. I appreciate that all of those questions got asked. I want to clarify a few things that were brought up in that committee meeting regarding the insurance element. That was an important aspect to me and I wanted to go back to what was said in committee from the representatives of the Illinois EPA who were asked to come and speak. Do you remember that part of the committee?"

Ammons: "Vaguely."

Wheeler: "Vaguely. Well, I'll try and refresh your memory then. The representatives of the Illinois EPA got up and they said that they use insurance in other situations like landfills which have a similarity to this situation. And they were willing to accept that approach. Is that why the Amendment that was drafted had that element in it? Is that something you were willing to accept as an approach on this?"

Ammons: "That was part of what we were trying to do, but the full provision was problematic, ultimately leading to questions of constitutionality."

Wheeler: "Regarding the insurance?"

Ammons: "Regarding the way the insurance provision was written for that Amendment."

Wheeler: "Okay. Because my impression is that insurance companies, if they write the policy, as long as the insurance company is solvent, even if the company who had, you know, wrote… actually bought the policy goes out of business, that insurance is still in effect. Is that your understanding as well?"

Ammons: "Well, it just really depends. What we've seen from other similar kind of issues like this, and I can share with you specifically. Issues facing the insurance as self-bonding, it's the same for all of them. We've seen many, many plants go bankrupt and the insurance companies not pay out the clean-up. And that is the problem that we had with the insurance provision in the first place."

Wheeler: "Didn't some of the business community folks, who were testifying, tell us in that hearing that they were willing to let the IEPA actually pretty much pick the insurance policy that they would accept to clarify that problem, to clear it up so that could not happen?"

Ammons: "They did say that in a committee. Unfortunately, when we looked at the provisions, this was still one of those that could not be cleared up at this time for us to pass on this Bill."

Wheeler: "So then, my question becomes the trailer Bill. You mentioned it, I think, in your earlier statement. Is that something that would be a component of that trailer Bill, Representative?"

Ammons: "I can't answer that because that would be up to the Senate Sponsor of this Bill. I lean towards him on that question, on an insurance question."

Wheeler: "I ask 'cause it's very important to all of us that this measure… that something happened here to take a positive effect. We all want this to be cleaned up, but I understand also that the company who owns that now purchased this site after much of this had already taken place. The people who are now responsible for it are not the ones who actually put the coal ash in the current situation. I think it would be appropriate for us to give them some flexibility to move forward with this. We don't want the Floor Leader had mentioned earlier, a company not owning up to this and somehow the taxpayers of Illinois being on the hook. We all want to prevent that from happening, but I think some measured flexibility would be in order for this. Would you agree with that?"

Ammons: "I have a different view on what we would consider measured flexibility here. We have many examples of insurance companies not paying out for the clean-up. That was our concern in committee, that's still our concern now. My Senate Sponsor of this Bill can continue to work on this with industry, as well as with labor over the summer, as he has made a commitment that he will look back at this issue. But we have too many examples already to lean towards, even in this case, where we're talking about Dynegy and Vistra, they are in legal action because they failed to clean this up."

Wheeler: "Thank you. To the Bill. Ladies and Gentlemen, this is an issue where we are, I think, really close to getting

something done that meets everyone's standards here. I know that there's questions about promulgation of rules. As a member of JCAR, I'm always paying attention to those situations closely. I wish that we got a little further on this part of it. I really wanted to vote 'yes' on this Bill. I'm not there yet. Representative, if there's more we can do to get this done right, please reach out. I'd love to work with you on it. But this is something I'm not ready to vote 'yes' on yet, but I'm so darn close. I wish we could. Thank you, Representative."

Speaker Manley: "Chair recognizes Leader Wehrli, who is in favor."

Wehrli: "That is correct. Thank you. To the Bill. Illinois is a national leader, I believe, in the amount or the quantity of coal ash pits that we have in our state. And some of them that are still currently being used, or are in need of being cleaned up, date back to the 1950's. Now, when this practice started, technology was different, and now here we find ourselves down the road with the problems still remaining. And this is not something that is just Illinois centric, but we are seeing this issue all across the nation. And when we take no action, we see this leach into rivers where it has a serious environmental impact on those bodies of water. I am glad to hear that there is mention of a trailer Bill, because I do believe the concerns of the business community are real and they're worthy of us addressing. So, when I hear a trailer Bill, that to me is good. And I look forward to working collaboratively on those solutions as well. But here we are today with this Bill in front of us, and it's a time for action in the sense that we don't know when this environmental

disaster could potentially happen. But to do nothing in hopes of coming up with the perfect solution, you know, I'm not going to let perfect be the enemy of good. This is a healthy first step. I remain open to the business communities concerns. I want to address those, but we have to stop this now, because once it gets into our water, into our environment, it takes years and decades to clean up. With that, I strongly urge an 'aye' vote."

Speaker Manley: "There being no further discussion, Representative Ammons to close."

Ammons: "Thank you, Madam Speaker. And thank you to all of those who have taken this issue very seriously. Protecting our communities and natural resources, like our state's only National Scenic River, is nonpartisan. We all benefit from this. We need Senate Bill 9 to give us consistent and enforceable regulations that ensure timely and safe closure of Illinois' unlined leaking coal ash impounds. We need to put this in place to protect the people of our state and we want to give them some real assurances that we are taking this very seriously. This is a significant step forward. I will continue to work with my colleagues on both sides of the aisle to continue to work on environmental protections that are in the best interest of the people of Illinois. And I appreciate an 'aye' vote for Senate Bill 9. And thank everyone so much for helping us to get this done. Thank you to Representative Marron, for Vermilion County standing strong, and certainly thank you to Leader Wehrli who has helped us to get this far. And we urge an 'aye' vote."

Speaker Manley: "The question is, 'Shall Senate Bill 9 pass?' All in favor vote 'aye'; opposed vote 'nay'. And the voting is open. Have all voted who wish? Have all voted who wish? Walsh. Halbrook. Butler. Have all voted who wish? Mr. Speaker… excuse me, Mr. Clerk, please take the record. On the question, there are 77 voting in 'favor', 35 voting 'opposed', 1 voting 'present'. And this Bill, having received the Constitutional Majority, is hereby declared passed. Moving onto Senate Bill 653, Representative Jones. Mr. Clerk, please read the Bill."

Clerk Hollman: "Senate Bill 653, a Bill for an Act concerning regulation. This Bill was read a second time a previous day. Amendment #1 was adopted in committee. No Floor Amendments. No Motions are filed."

Speaker Manley: "Third Reading. Representative Jones, Senate Bill 653. Please read the Bill."

Clerk Hollman: "Senate Bill 653, a Bill for an Act concerning regulation. Third Reading of this Senate Bill."

Speaker Manley: "Representative Jones."

Jones: "Thank you, Madam Speaker. Senate Bill 653 is an initiative of the Physical Therapist Association. This Bill comes after some disagreement with the insurance companies that attempted to reduce the reimbursement on a time-based system that all insurance companies go through. I know that we have some opposition to this Bill. And I would like to state for the record, I haven't spoken to Illinois Chamber of Commerce or the Illinois Retail Merchants Association. This dispute involves Blue Cross Blue Shield, did an audit two years ago and it changed the way that CPT codes were done. It allowed the reimbursement rate which Blue Cross Blue Shield

implemented. They didn't notify all of the physical therapists that this Bill would apply to. They cut the reimbursement rates to physical therapists by approximately 13 percent, or $68 million. So, I'm available for any questions. But this Bill is a check and balance, not only on the insurance company, but it allows us to protect our residents who are going in for physical therapy, and also the 4000 thousand physical therapists around the State of Illinois. I'm available for any questions."

Speaker Manley: "This Bill is on Short Debate. Chair recognizes Leader Batinick."

Batinick: "Thank you, Madam Speaker. Will the Sponsor yield?"

Speaker Manley: "He indicates that he will."

Batinick: "A couple of… just before we get into the meat of this, curiosity thing. Landscape architecture sunset, Representative, and I don't see an Amendment on this. How did this start as a landscape? This is anything but a landscape architecture sunset Bill. Do you have any explanation for that?"

Jones: "For the record, Representative, there was House Floor Amendment #1 which become the Bill."

Batinick: "Okay."

Jones: "Although it says landscape architect, this Amendment applied the language to the Bill."

Batinick: "Okay. So… and I believe I want to simplify what you just went through in your introduction. Basically, somebody changed… was it Blue Cross Blue Shield, changed the way that they calculate billable hours. So, depending on quarter hours, half hours, however they calculate billable hours,

their system was changed, correct? It's a little bit different than what some of the other insurers used. Is that correct?"

Jones: "Yes, that's correct."

Batinick: "However, my understanding was that it does exactly what the contract allows, right? So, this is something where the contract is… we're legislating away something that was already allowed by contract. Isn't this a dispute that could be solved by the two parties the next time they renew their contract?"

Jones: "This is not… well, to answer your question, no, because Blue Cross Blue Shield decided to make this change through an audit without notifying any of the physical therapists around the state. And Blue Cross Blue Shield, they chose this fight and it's up to us to provide a check and balance on Blue Cross Blue Shield. We do this all the time. We did it with locomotive engineers. So, we do this all the time. Our goal is to protect our residents."

Batinick: "I certainly didn't vote for the locomotive engineers Bill."

Jones: "I'm sure you didn't."

Batinick: "But my understanding is, is what they're doing is, is allowed in current practice and it's within the agreement. Madam Speaker, if you would indulge me to move this to Standard Debate, that would be swell."

Speaker Manley: "We will move it to Standard Debate."

Batinick: "Okay. Thank you."

Jones: "And, Representative, I disagree with you that it's not standard practice for an insurance company to go through this process, bring in an outside auditor, audit a company, change

the course of the contract, the agreement that they agreed to, and then not notify any of the physical therapists. Now, this costs, when they do that, gets passed onto our residents and our constituents. So, this is a check and balance on the insurance company."

Batinick: "Okay. So… and the reason I know this Bill, I think it went through Labor Committee. I believe this Bill was at some point, some version of it, was going to go through insurance company, correct? It was in one of my insurance packets. My issue was, sometimes it was a win loss. We're talking about the way we calculate billable hours if there's quarterly hours, half hours, and how the billing gets worked that way. I think at this point, there are some others that want to speak on it and might be able to provide more clarity. My issue is that this is something that's allowed under their contract and then just when the contract gets redone, it's something that could be renegotiated. But I'm sure you and others will have other things to say, so I appreciate the answers to my questions, Representative."

Speaker Manley: "The Chair recognizes Leader Brady."

Brady: "Thank you very much, Madam Speaker. Will the Sponsor yield?"

Speaker Manley: "He indicates that he will."

Brady: "Representative, in Insurance Committee, which you're the Chair of and I'm Minority Spokes of, I came out with an understanding from the action that day, even though the Bill was voted out, that we had… I thought was a clear understanding that the parties were going back to have

discussions and that this Bill would not move to Third Reading. Am I mistaken on that?"

Jones: "Yes, Representative. As I stated in committee, I gave no commitment to not… to hold this Bill on Second. The goal was that the parties would negotiate. Now, I will state for the record that this happened in 2016. So, Blue Cross Blue Shield undertook this audit in 2016 and this has been going on for three years and Blue Cross Blue Shield had the opportunity to negotiate and settle this. And now, we're here because we have these physical therapists, 4000 physical therapists around the State of Illinois who are not… Blue Cross Blue Shield is holding onto the money that they're guaranteed for the physical therapists."

Brady: "Okay. Well, I thought I saw or read where the audit finding the change that they made was in 2017. And then I also had, what I thought, was an understanding that negotiations were going to continue. So, if I'm mistaken there, I'm sorry for that, but I was a 'no' in committee and I'm going to stay a 'no' on the House Floor because we're entering into a private business contracts' ability here. And I think it's a bigger picture, especially when the companies were testifying in front of us, that they were going to negotiate on the legislation and get things resolved. Thank you."

Jones: "And let me just address that. So, these are national standards that Blue Cross Blue Shield has decided, through an audit that they conducted, to change. So, it's not like these are not standards that every physical therapist and every insurance company has to go through. Blue Cross Blue Shield

decided to change the rules in the middle of the game. So again, we want to provide a check and balance on Blue Cross Blue Shield to make sure that they're not only adhering to what they promised the physical therapists, but also that our residents are not caught up in this disagreement."

Speaker Manley: "Leader Brady."

Brady: "Thank you very much. Representative, my understanding though is that, I mean, the company certainly has the ability to do what they want when they enter into the contracts. And if the contract spells this out, federal or otherwise, they still have that flexibility under the contract, from my understanding, of what they did with those they negotiated the contracts with. And so, I came away with the understanding, and if that's my mistake, that this was going to be… something that was going to be worked through and worked on before we stand on the House Floor like this today."

Speaker Manley: "Representative Unes."

Unes: "Thank you, Madam Speaker. Will the Sponsor yield?"

Speaker Manley: "He indicates that he will."

Unes: "Representative, during committee, I think there was a little bit of confusion because there was talk about a professional audit being done, but I think there needs to be some clarification. The company was not audited, and then in those audit findings, it was reported that they had to change this policy. Is that correct? The company actually hired another company to do an audit to see if there were findings in areas where they could save costs."

Jones: "So, Representative, it wasn't the company, it was Blue Cross Blue Shield who did the audit. They audited the codes.

So, they have the right to pay the codes or deny the codes and Blue Cross Blue Shield has taken the process of bringing in a company called Verscend. And it was Verscend who recommended to Blue Cross Blue Shield that they take the steps with the physical therapists and deny the codes based on the units that they were charging for physical therapy."

Unes: "So… and that was my point, that Blue Cross Blue Shield was not audited. They did not have somebody come in and audit them. They actually hired a company. They hired a company to audit those codes for ways where they could save costs."

Jones: "So, for the record, Blue Cross Blue Shield hired Verscend to audit the CP codes of the physical therapists around the State of Illinois."

Unes: "And so… and I think that's where the confusion was in committee. In committee, I think some Members thought that there was a… like revenue came in and audited them, and that wasn't the case. It was that they actually hired a company to come in and audit those codes."

Jones: "Yes, they hired… Blue Cross Blue Shield hired an out of state company to audit the CPT codes and they didn't notify any of the physical therapists around the state regarding these codes. So, they actually took money back where they wanted to… where the unit was 15 minutes, or 1 unit or 2 units, they changed it and it made it that they would only pay for two units which is what is in dispute right now."

Unes: "So, if I'm not mistaken, Representative, current AMA guidelines say that if there is a therapist… it doesn't even have to be a physical therapist, correct? We could be talking about any type of therapy, speech therapy, occupational

therapy, it could be any of those. And if they bill for… if they do work for… let's say, one unit is 15 minutes. Anything over half of that, AMA guidelines say that you can bill for one unit."

Jones: "That's correct, Representative."

Unes: "And so, this would then change, in the middle of the game, change the rules and say that no longer can they bill that one unit the way the rest of the insurance companies… the way I understand it, the way the rest of the private insurance companies do, as they follow AMA guidelines."

Jones: "So, this Bill wouldn't do that. That's what Blue Cross Blue Shield did to the physical therapists. And to your point, we have 7000 occupational therapists, 3000 certified occupational therapist assistants; we have speech pathologists, 9000; speech language pathologist assistants, 241; licensed physical therapists, 12,000; and also, licensed physical therapy assistants that Blue Cross Blue Shield audit would impact. So, this is the numbers that… the changes that Blue Cross Blue Shield implemented through the audit of the out of state company that it would impact."

Unes: "You know where the hospitals or the med society weighs in on this?"

Jones: "I believe that they're neutral."

Unes: "And there's only one insurance company that has made this change. Is that correct?"

Jones: "Yes."

Unes: "Thank you. I urge an 'aye' vote."

Speaker Manley: "Representative Jones to close."

EXHIBIT 11

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

MIDWEST GENERATION, LLC'S RESPONSE IN OPPOSITION TO COMPLAINANTS' MOTION *IN LIMINE* TO EXCLUDE NEW OR REVISED EXPERT OPINIONS

Complainants' claim – that MWG is providing new expert opinions based on supplemental documents disclosed – is simply wrong. As required by the Hearing Officer's discovery order, MWG timely produced its "notice of any *additional items* experts will rely on based on supplemental production." (Hearing Officer Order, Dec. 10, 2021). The items identified were exactly as the Order required – additional materials. MWG did not offer new opinions. The additional items MWG identified were public documents that support the opinions previously made in the Weaver Expert Report dated April 22, 2021 ("Weaver Report"). To the extent Complainants seek to preclude some future, unknown statement that MWG's experts *might* make during their testimony, the Hearing Officer, on July 18, 2017, previously ruled that experts may use supplemental documents to elaborate on previously disclosed opinions.[1] Rather than deal in

[1] See July 18, 2017 Order, attached as Exhibit 1. As discussed in section II (p.8) below, Complainants cite to this 2017 Order in support of their motion to exclude, suggesting the Hearing Officer did not allow an expert to testify as to later-produced documents. In fact, the Hearing Officer came to the opposite conclusion and specifically allowed expert

Complainants' notice of additional items, attached as Ex. 5, does not identify documents by name, or by expert, or by opinion. It is strange that Complainants suggest that MWG had some additional obligation to identify "which expert and which opinion" in MWG's notice, given the very cursory information in Complainants' own disclosure (Comp. Mot. ¶ 5).

To the extent Complainants seek to preclude a future, unknown statement that MWG's experts *might* make that *might be* beyond Weaver's existing opinions, the Hearing Officer already decided that issue in 2017. See July 18, 2017 Order, Ex. 1. Complainants, in what can only be interpreted as directly misleading, cite to the Hearing Officer's 2017 Order in support of their current motion to exclude documents identified after Weaver's deposition, clearly suggesting that the 2017 Order finds in their favor. Comp. Mot., ¶9. The Order is not in their favor. The 2017 Order was issued in response to MWG's motion *in limine* to preclude Complainants from issuing new opinions based on documents disclosed after their expert's deposition – essentially the same situation before the Hearing Officer now. Complainants argue that their current motion to exclude additional expert opinions "is consistent with the Hearing Officer's Order of July 18, 2017." Comp. Mot., ¶9. For obvious reasons, however, Complainants do not attach the Hearing Officer's 2017 Order, nor even state the Hearing Officer's decision. That is because the Hearing officer *denied* MWG's motion and specifically allowed Complainants' experts to testify about documents produced after the deposition "in order to elaborate previously disclosed opinions." July 18, 2017 Order, Ex. 1. The Hearing Officer held, "although the experts have not stated exactly how post-deposition discovery informs their opinions, it would be unduly restrictive to completely bar experts from testifying about these documents." *Id*. Complainants' reference to this holding in their current motion means that not only were they aware of this Order, but they purposefully misled the Hearing Officer by failing to state the actual 2017 holding, or even attempting to explain

or distinguish it. Complainants' conduct is highly questionable and arguably sanctionable.[4] Because Complainants clearly knew how the Hearing Officer would decide their current motion in light of the 2017 holding, Complainants' motion has no purpose other than to harass and cause MWG, and the Hearing Officer, to waste judicial resources. MWG's Notice of Additional Documents is doing exactly what the Hearing Officer's 2017 Order provides – using properly identified "additional items" to support an existing opinion.

MWG requests that the Court deny Complainants' Motion *in Limine* to Exclude New or Revised Expert Opinions because MWG complied with the Hearing Officer discovery Order to identify supplemental materials that support its existing opinions, and because MWG's use of timely identified "additional items" that support its experts' opinions complies with the Hearing Officer's 2017 Order specifically allowing such testimony.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By ____/s/ Jennifer T. Nijman_____
One of Its Attorneys

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[4] This is the second time Complainants blatantly mispresented the holding of an order in a Board case. In their unwarranted Motion for Sanctions, Complainants falsely represent a Board holding, stating that the Board issued sanctions in a case when the Board held exactly the opposite – no sanctions were warranted. See discussion of *Freedom Oil v IEPA,* MWG Response to Comp.'s Motion for Sanctions, Sec. V. Even more distressing is that Complainants, once again, knew of the issue because they had previously cited to this same case, for its opposite holding of no sanctions, in their own brief in 2018. *Id.*

EXHIBIT 1

ILLINOIS POLLUTION CONTROL BOARD
July 18, 2017

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

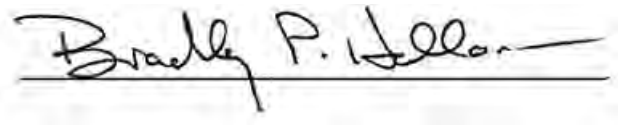
HEARING OFFICER ORDER

On May 22, 2017, Midwest Generation, LLC (Midwest Gen) filed a motion *in limine* seeking to limit expert testimony at hearing (Mot.). Midwest Gen requested that the Hearing Officer limit expert testimony to only the information in the expert reports submitted and the expert depositions taken during discovery. That is, Midwest Gen asks the Hearing Officer to prohibit experts' testimony concerning discovery documents developed after an expert's deposition. On June 8, 2017, Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, Environmental Groups) submitted a response opposing the motion (Resp.).

The Board's procedural rules are silent on this issue, so Illinois Supreme Court Rules 213(f) and 213(g) guide the Hearing Officer's ruling. *See* 35 Ill. Adm. Code 101.100(b). Rule 213(f) requires a party, upon written interrogatory, to identify a controlled expert witness's opinions and the opinions' bases. Rule 213(g) then limits the expert's testimony at trial to the information disclosed in the interrogatory's answer. Though Rule 213 does not directly apply to Board procedures, its intent still provides general guidance: the rule is intended "to prevent unfair surprise at trial, without creating an undue burden on the parties before trial." Committee Comment to Ill. Sup. Ct. R. 213(f).

Rule 213 does not guide the Hearing Officer to limit expert testimony to exchanged reports and deposition testimony, as Midwest Gen requests. *See* Mot. at ¶ 4. The Environmental Groups argue that discovery produced after the experts' depositions may be used to expand upon experts' already-stated opinions. Resp. at 4. Although the experts have not stated exactly how post-deposition discovery informs their opinions, it would be unduly restrictive to completely bar experts from testifying about these documents. The testimony at hearing from Environmental Groups' experts may rely on discovery documents produced after those experts' depositions in order to elaborate previously disclosed opinions. The motion is denied.

IT IS SO ORDERED.



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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on July 18, 2017, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on July 18, 2017:

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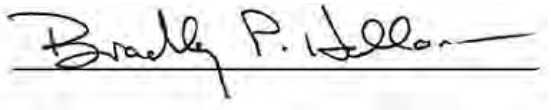

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