BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' MOTION FOR LEAVE TO FILE, *INSTANTER*, THEIR REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANTS' MOTION FOR SANCTIONS**, and **COMPLAINANTS' REPLY IN SUPPORT OF COMPLAINANTS' MOTION FOR SANCTIONS** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

Faith E. Bugel

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Attorney for Sierra Club

Dated: March 18, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MIDWEST GENERATION, LLC,	)	
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COMPLAINANTS' MOTION FOR LEAVE TO FILE, *INSTANTER*, THEIR REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANTS' MOTION FOR SANCTIONS

Pursuant to Section 101.500(e) of the Illinois Pollution Control Board's ("Board") Procedural Rules, Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") submit this Motion for Leave to File, *Instanter*, their Reply to Respondent Midwest Generation, LLC's Response to Complainants' Motion for Sanctions. 35 Ill. Adm. Code 101.500(e). A reply brief is warranted because Midwest Generation, LLC's Response disregards applicable law, ignores ongoing harm caused by MWG's coal ash contamination, and fallaciously characterizes an inadvertent error of Complainants as intentional. In support of their motion, Complainants submit their Reply and state:

1. On January, 21, 2022, MWG filed a third motion to stay these proceedings. *See Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, MWG's Motion to Stay Proceedings (Jan.

21, 2022) ("Motion to Stay"). In this most recent Motion to Stay, MWG argues issues that the Board has already decided.

2. On February 4, 2022, Respondent Midwest Generation LLC's ("MWG") filed three motions *in limine* arguing that no remedy is needed at certain ash areas at Will County, Powerton, and Joliet Stations based upon Section 21(r) of the Illinois Environmental Protection Act.

3. On February 18, 2022, Complainants filed a Motion for Sanctions against MWG based upon MWG's repeated stay motions and motions *in limine* that raise liability-phase Section 21(r) issues in remedy phase. ("Complainants' Mot.")

4. On March 4, 2022, Respondent filed MWG's Response to Complainants' Motion for Sanctions. ("MWG's Resp.") MWG argues that the Board's prior decisions on MWG's stay motions "do not forbid any future motions and the Board rules have no preclusion against multiple motions to stay." MWG's Resp. at 2. This response disregards the "law of the case doctrine".

5. MWG argues that there will be no harm during the pendency of a stay, without even being able to identify how long a stay will last. MWG Resp. at 12-14. Again, MWG disregards a prior decision by the Board in this case that rejected MWG's request for a stay due to environmental harm and Board precedent in other cases regarding groundwater contamination causing harm. See, e.g., Board Order, at 6 (April 16, 2020). MWG also misstates the law regarding remediation objectives under the Illinois Environmental Protection Act.

6. MWG sows confusion with its arguments about Section 21 of the Illinois Environmental Protection Act.

7. Finally, MWG wrongly suggests that one inadvertent error that Complainants made in characterizing a single decision was for the purpose of intentionally misleading the Board.

8. Complainants will suffer material prejudice if they are not permitted to reply in order to establish what the applicable law requires, clear up confusion on Section 21 of the Act, and respond to MWG's fallacious argument about Complainants' inadvertent error.

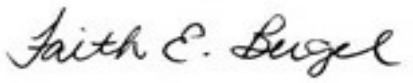
9. Complainants have prepared a Reply in support of their Motion for Sanctions, and have attached that Reply to this motion.

10. This Motion is timely filed on March 18, 2022, within fourteen days after service of MWG's Response, as required by 35 Ill. Admin. Code § 101.500(e).

WHEREFORE, Complainants respectfully request that the Board grant Complainants' Motion for Leave to File, *Instanter*, Complainants' Reply to Respondent Midwest Generation, LLC's Response to Complainants' Motion for Sanctions, and accept the attached Reply as filed on this date.

Dated: March 18, 2022

Respectfully submitted,



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Attorney for CARE

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COMPLAINANTS' MOTION FOR LEAVE TO FILE, *INSTANTER*, REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANTS' MOTION FOR SANCTIONS

I. MWG Has Not Demonstrated That Its Stay Motion or Motions *in Limine* Are Proper or Justified, and Therefore Has Not Shown Why MWG Should Not Be Subject to the Requested Sanctions.

A. MWG Is Not Entitled to an Unlimited Number of Stay Motions, And Has Failed to Identify Any Changes in Law or Facts Sufficient to Justify Its Repeated Motions.

MWG argues that "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." Midwest Generation, LLC's Resp. in Opp'n to Complainants' Mot. for Sanctions, at 2, March 4, 2022 ("MWG's Resp."). This sentence suggests that MWG thinks it can bring as many motions to stay as it wants, even if they repeat the same issues and arguments. This alone shows a disregard for the law of the case and for the Board's time and resources. "Generally, the law of the case doctrine bars relitigation of an issue previously decided in the same case." *Krautsack v.*

Anderson, 223 Ill. 2d 541, 552, 861 N.E.2d 633, 642 (2006), *citing People v. Tenner*, 206 Ill.2d 381, 395, 276 Ill. Dec. 343, 794 N.E.2d 238 (2002). MWG disregards its own previous citations when it overlooks the law of the case doctrine. As MWG has previously stated, law of the case "bars re-litigation of an issue previously decided in the same case," MWG Response to Complainants' Motion for Summary Judgment (July 19, 2016), at 45, *citing Krautsack v. Anderson*, 223 Ill. 2d 541, 552, 861 N.E.2d 633, 642 (2006). As much as it may not like the prior rulings of the Board denying its Motions to Stay, MWG is bound by those rulings. MWG may not bring unlimited stay motions in this proceeding, bogging down the Board and forcing Complainants to expend time and resources to respond.[1]

In an attempt to justify its motions, MWG argues that the facts and the law have changed, and that this makes its motions "objectively reasonable." MWG's Resp. at 7. None of the developments identified by MWG sufficiently alter the status quo present when the Board made its previous rulings such that MWG may reopen those issues through its repeated motions.

1. The Illinois CCR Rules do not change the law governing this enforcement action.

To begin with, contrary to MWG's assertions, the law governing this proceeding has not changed just because the Illinois CCR rules have gone into effect. *See* MWG's Resp. at 9-10. While those rules may apply to CCR in surface impoundments in Illinois, those rules do not apply to any issue in this enforcement proceeding. MWG also ignores the fact that the timing of any permit issuance under the Illinois CCR rules is uncertain. The Board has already stated, in

[1] MWG's attempt to cast Complainants' as the parties whose actions are actually delaying this case is unavailing. MWG points out that Complainants have sought three extensions during the remedy phase of the case. MWG Resp. at 4-5. MWG omits the fact that two of those extensions had no effect on the rest of the schedule and therefore caused no delays. For the single motion where Complainants sought an extension that affected the remainder of the case schedule, MWG omitted the fact that the extension was needed because one of Complainants' experts' mother was terminally ill and placed in hospice. Complainants' Unopposed Mot. for Extension of Time to File Expert Rebuttal Reports and to Adjust Remaining Schedule (May 5, 2021).

ruling on MWG's previous Motions to Stay, that cases will not be stayed for the sake of other proceedings where the timing and duration is uncertain. "The Board agrees with complainants that a stay is unwarranted based on the coal ash rulemaking proposals because of the uncertain timing and duration of the rulemakings." Board Order (Apr. 17, 2014). IEPA is not bound to any timeline on issuing construction permits. 35 Ill. Admin. Code Part 845, Subpart B. MWG has not even applied for permits for all of its stations yet. *See, e.g.*, Joliet Ash Pond 2, Powerton Ash Bypass Basin, Ash Surge Basin.[2] IEPA could issue the construction permits that MWG applied for next month, next year, or later (or never). In the present case, the coal ash permit applications do not warrant a stay because of "the uncertain timing and duration" of the permit issuance. As a result, the same reasoning applied to MWG's Motion for a Stay from 2014 again applies to MWG's current stay motion and MWG is disregarding the law of the case.

2. MWG's statements about Complainants' proposed remedy are misleading, and fail to establish how that remedy would be inconsistent with or precluded by the separate CCR permitting process.

MWG has completely ignored the remedial process that Complainants have recommended in arguing that Complainants have not proposed a remedy beyond removal. MWG Resp. at 10. First, if MWG agrees to remove all of the ash identified as sources of groundwater contamination in the Board's Interim Order, Complainants would not be opposed. That certainly would be one resolution to the prospective conflict that MWG expresses concern about between the Illinois CCR Rules permitting process and this proceeding. MWG argues that removal "is not the closure option for all of the CCR surface impoundments under the CCR Rules and MWG's permit applications." MWG Resp. at 10-11. However, the closure options for the CCR

[2] Available at https://www2.illinois.gov/epa/topics/water-quality/watershed-management/ccr-surface-impoundments/Pages/default.aspx.

impoundments contained in the permit applications were all identified and proposed by MWG, as part of its permit applications. 35 Ill. Admin Code §§845.220, 720. The rules do not place any constraints on when and where removal may be used as a closure option, 35 Ill. Admin. Code §845.740, (although there are constraints in the rules on how removal is conducted) and MWG could have proposed removal for all of the surface impoundments for which it has submitted applications. Had MWG done so, and since removal is presumptively the most protective option for groundwater, MWG would very likely not face any conflict between the permitting process and this proceeding.

Second, Complainants have recommended a remedy, in the form of a remedial process, to identify the ultimate actions to take regarding each source of ash at the plants. Expert Opinion of Mark A. Quarles, P.G. (Jan. 25, 2021); Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G. (July, 2021). Although this process could lead to a remedy of complete removal, the first step in the process involves a nature and extent investigation to identify the volume of ash, the depth of ash, the extent to which as is in contact with groundwater (which facilitates leaching), and the degree of contamination leaching from that ash. *Id*.

3. MWG cannot rehabilitate its inappropriate repeated motions by seeking to draw parallels to Complainants' entirely justified motion *in limine* to exclude portions of the Koch Report.

MWG seeks to excuse its own unjustified motion to stay and motions *in limine* through comparison to Complainants' own Motion *in Limine* to Exclude Portions of Respondent's Expert Report, or in the Alternative to Reinstate Portions of Complainants' Expert Report. MWG's Resp. at 11-12. This argument fails for two reasons: because Complainants' motion identifies an actual changed circumstance in the case relevant to its motion, and because Complainants' motion is consistent with the Board's relevant prior order.

First, counter to MWG's assertions, the new development on which Complainants' motion is premised is not "the same argument MWG is making in its Motion to Stay." MWG's Resp. at 11. Complainants' motion is based on new statements made by MWG's expert that lay the foundation for a new argument by MWG—namely MWG's inability to pay. Nothing in Complainants' motion can be interpreted as an assertion "that the facts and law about the CCR surface impoundments and other areas and have changed." *Id*. So the fact that Complainants have identified a specific new development within the confines of MWG's financial expert's report does not open the door for MWG to assert that much broader changes in fact and law have occurred such that MWG may reasonably repeat its requests for a stay.

Second, unlike MWG's motion to stay and motions *in limine* at issue here which are precluded by the Board's prior orders, Complainants' motion *in limine* is consistent with and contemplated by the Board's relevant prior order. As such, MWG is incorrect to characterize Complainants' motion as no more than an attempt to relitigate an issue already decided by both the Hearing Officer and the Board. MWG Resp. at 11-12.1 In fact, Complainants' Motion is the inevitable next step in the process initiated by MWG's original motion *in limine* to exclude those portions of Complainants' expert Mr. Shefftz's report addressing the finances of MWG's parent NRG. MWG's Feb. 10, 2021 Mot. *In Limine*. In its Order on Complainants' interlocutory appeal of the Hearing Officer's granting of that motion, the Board expressly recognized the potential that MWG would eventually assert an inability to pay argument, and invited Complainants to raise the issue at that time. Board Order, at 8-9, Sept. 9, 2021. Specifically, the Board held that "[s]hould Midwest make an inability to pay argument in the future, or should the facts being considered change, the Board will consider it at that time and the Environmental Groups may then renew their request for admission of NRG's financial information." *Id*. By presenting

evidence in Ms. Koch's report regarding MWG's finances and its inability to pay, the "facts being considered" have changed such that these issues are now ripe.

For these reasons, MWG's attempted conflation of its own motion to stay and motions *in limine* with Complainants' motion *in limine* is unpersuasive at best, and misleading at worst.

B. MWG Fails to Establish that Harm Will Not Occur During Its Requested Stay.

In order to render its motion to stay consistent with the Board's orders on its prior motions to stay, MWG must demonstrate that the requested stay will not increase the risk of environmental harm. *See* Complainants' Mot. at ¶ 8 (stating that "the Board has already decided, twice, that a stay would cause environmental harm and would prejudice the Complainants," and citing *Sierra Club et al. v. Midwest Generation, LLC*, PCB 13-15, Order of the Board, at 16 (Apr. 17, 2014) and *Sierra Club et al. v. Midwest Generation*, LLC, PCB 13-15, Order of the Board, at 6 (April 16, 2020)). MWG's Response fails to demonstrate that a stay would not cause environmental harm.

1. There is a risk of harm during the pendency of the requested stay.

MWG makes a big production of quoting Kari Lyderson's article over and over again in different filings. See, e.g., MWG's Resp. at 8. MWG pulls quotes out of context and misrepresents the meaning of these quotes. Lyderson's article stated 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)[3] ("Article"), (Ex. 4 to MWG's Resp.). MWG ignores several facts when relying on this quote, the first being the use of the word "immediate." Immediate means "relating to or

[3] *Available at* https://energynews.us/2021/12/21/historic-coal- ash-raises-concerns-at-iconic-illinois-coal-plant-site/.

existing at the present time." Oxford English Dictionary (2022). In other words, there is no risk to people at the present time because people are not currently drinking the water. This does not mean, and Complainants' experts have not said, that there is no risk to drinking water for the duration of any potential stay. Furthermore, this quote also only refers to drinking water, not groundwater more generally. There is ongoing harm to groundwater at these sites because there is ongoing contamination of groundwater. Finally, the quote only refers to ash ponds, and not the large coal ash fill areas. The Board found that coal ash fill areas at Waukegan are, more likely than not, causing or contributing to contamination of groundwater at the Station. Interim Board Order, at 68 (June 20, 2019). Nothing in the quote cited by MWG contradicts the fact that there is ongoing contamination at all four sites causing ongoing harm to groundwater, and presenting a risk to future users of that groundwater.

Without repeating all of the arguments from our Response to MWG's third Motion to Stay, Complainants will simply reiterate that the Board has already found that the ongoing contamination at the sites poses a risk of environmental harm: "The Board finds that prejudice to the nonmoving party, which includes ongoing environmental harm at the four Stations, weighs in favor of not granting a stay in this matter." Board Order, at 6 (April 16, 2020). Complainants should not have to expend resources arguing for findings that the Board has already made.

It is troubling that MWG shows complete disregard for the harm caused by its coal ash. MWG appears to argue that if there is no present harm to human health (because the water is not currently being used as drinking water) then there is no harm at all. The Board clearly rejected this position when it found "ongoing environmental harm at the four Stations." Board Order, at 6 (April 16, 2020). This is of course consistent with the Board's position in other cases. *See, e.g.*, *Illinois v. Jersey Sanitation Corp.*, PCB 97-2, at *32, 2005 WL 330438 (Feb. 3, 2005)

("The Board finds there was actual harm to the environment since wells downstream of the site showed exceedances of class II groundwater quality standards, while wells upstream showed none").

The Board's definition of harm is appropriate because it allows the Board to prevent degradation of groundwater and protect groundwater for future use. In *Central Illinois Public Service Co. v. Pollution Control Board*, the Illinois Supreme Court upheld the Board's position that "the Act treats water as a resource, and that pollution occurs whenever contamination is likely to render water unusable." 116 Ill.2d 397, 409 (1987). The Supreme Court also upheld the Board's position that "any contamination which prevents the State's water resources from being usable would constitute pollution, thus allowing the Board to protect those resources from unnecessary diminishment." *Id*. (emphasis added); *see also* 415 ILCS 55/2(b) (Illinois Groundwater Protection Act) (state policy is to prevent the "waste and degradation of the [groundwater] resources"); U.S. EPA, *Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals From Electric Utilities; Final Rule*, 80 Fed. Reg. 21302, 21455 (Apr. 17, 2015) ("Sources of drinking water are finite, and future users' interests must also be protected").

MWG's ongoing failure to control the source of persistent contamination continues to cause harm by degrading groundwater resources and rendering groundwater unusable. Groundwater would be further degraded during any stay because the onsite sources of contamination (coal ash) would continue to leach pollutants. Allowing MWG to continue to contaminate the groundwater during a stay is contrary to Board precedent, the Groundwater Protection Act, and State policy.

2. Remediation objectives in this case are not risk-based.

In an attempt to evade the implications of the Board's prior ruling on liability, MWG presents a red herring argument asserting that "determining remediation objectives is risk based." MWG's Resp. at 13. Setting aside that this argument does not allow MWG to evade the Board's clear prior holdings, MWG is wrong to suggest that setting remediation objectives should be risk-based. The standards that apply to a remedy are contained in Section 33(c) of the Act. 415 ILCS 5/33(c). Section 33(c) provides in part:

> (c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to:
> (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
> (ii) the social and economic value of the pollution source;
> (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
> (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
> (v) any subsequent compliance.

The Board found violations of Sections 12(a), 12(d) and 21(a) of the Act, and violations of Board regulations at 35 Ill. Adm. Code 620.115, 620.301(a) and 620.405, and directed the hearing officer to consider the Groundwater Protection Act (415 ILCS 5/33(c)) in determining the appropriate relief. Interim Board Order, at 92-93. The remedial objective should be full compliance with the statutes and regulations that MWG violated:

- MWG should restore groundwater to the point that it is no longer "polluted" (415 ILCS 5/12(a));
- Since the Board found that exceedances of "statewide 90th percentile" background levels "constitute water pollution and violation of Article 12(a) of the Act,"[4] MWG should restore groundwater to the point that it no longer exceeds these levels;

- MWG should also restore groundwater to the point that it no longer exceeds the groundwater protection standards at 35 Ill. Adm. Code 620;

- MWG should resolve the "water pollution hazard" at Powerton (415 ILCS 5/12(d); *see* Interim Board Order, at 86);

- And MWG should end its open dumping (415 ILCS 5/21(d)) by "remov[ing the coal ash] or prevent[ing] its leaking of contaminants into the groundwater[]." Interim Board Order, at 92.

MWG cites to 415 ILCS 5/58.5(c)(1), which is part of the authorizing statute for the Tiered Approach to Corrective Action Objectives ("TACO"). However, TACO is not relevant to this case. Section 58.5(c)(1) is part of Title XVII, the Site Remediation Program. Section 58.1 of Title XVII explains its applicability and states, in part: "This Title establishes the procedures for the investigative and remedial activities at sites where there is a release, threatened release, or suspected release of hazardous substances, pesticides, or petroleum and for the review and approval of those activities." 415 ILCS 5/58.1. Thus, the TACO remediation standards apply only to hazardous materials, pesticides and petroleum. Furthermore, TACO remediation is "administered by IEPA," and this proceeding is not before IEPA. *See, e.g.*, *Illinois Com. Comm'n v. Union Elec. Co.*, Illinois Commerce Commission No. 00-0441, 2003 WL 21108541, at *4 (Mar. 12, 2003) (describing "the Tiered Approach to Corrective Action Objectives ("TACO") program developed and administered by the IEPA.") The present case does not fall within the scope of the Site Remediation Program applicability.

C. MWG's Attempt to Justify Its Motions *in Limine* by Manufacturing a Conflict Within Section 21 of the Act is Misleading and Unpersuasive.

MWG attempts to muddy the waters regarding Section 21 of the Act, but ultimately provides nothing more than a misconstruction of the Act and unsupported speculation about legislative intent. MWG's Resp. at 15-22. The Board correctly found MWG liable for violating

Section 21(a) at a number of historical coal ash fill areas, and these violations must be remedied; nothing in Sections 21(d) or 21(r) changes either the violations or the need for a remedy.

In 2019, the Board characterized the material in the historic fill areas as Coal Combustion Waste (CCW), and also – correctly – found MWG liable for violating Section 21(a). MWG now argues that the Board was wrong, and that CCW cannot cause a Section 21(a) violation. *See, e.g.,* MWG Motion *In Limine* to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29 at 7 (Feb. 4, 2022) ("Section 21(r) is the provision that is applicable to the historic fill areas at Joliet 29, not Section 21(a) of the Act"). This an improper attack on the Board's liability finding disguised as an argument about remedy. Even if it were a proper argument, however, MWG is simply wrong on the law.

To begin with, MWG now acknowledges for the first time that Section 21(d)(1)(i) only allows unpermitted, onsite disposal of self-generated waste in "minor amounts." MWG Resp. at 16; *People ex rel. Madigan v. Dixon-Marquette Cement, Inc.*, 343 Ill. App. 3d 163, 175 (2003). Having finally acknowledged that limitation, MWG now argues that the limitation does not apply to coal ash because there is no case law explicitly applying the limitation to coal ash. *Id*. If this reasoning were to stand, then every form of waste in Illinois would be exempt from legal precedent until it was specifically named in a Board or court decision. This is not how the law operates.

Importantly, MWG has not argued that the coal ash in question is a "minor amount" of coal ash. Indeed, MWG effectively concedes that it is not a minor amount, stating that coal ash "is seldom found in small quantities." MWG Resp. at 19. Since the coal ash fill areas violating Section 21(a) are not minor amounts of coal ash, they are subject to Section 21(d)(1)'s general prohibition of unpermitted waste disposal. As a result, they are not covered by Section 21(r)(1),

and therefore not exempt from Section 21(r)'s general prohibition of unpermitted "storage or disposal of coal combustion waste." This means that MWG's arguments about possible conflicts between Sections 21(a) and 21(r) are beside the point. Assuming, *arguendo*, that Section 21(r) did render Section 21(a) inapplicable, Section 21(r) would still prohibit unpermitted coal ash disposal at the sites, and MWG would be no better off.

But MWG is also wrong about the conflict between Sections 21(a) and 21(r) – in fact, there is no conflict. Section 21(a) prohibits open dumping, and Section 21(r) prohibits unpermitted "storage or disposal of coal combustion waste," with some exceptions. MWG fails to provide any reason, beyond unfounded speculation about legislative intent, why these two Sections cannot be read in harmony.

MWG tries to argue that the Illinois General Assembly enacted Section 21(r)(1) "to legislatively overrule the *ComEd* decision," MWG Response at 17. There is no evidence of this being true. In 1976, the Board held that *ComEd* was not eligible for an onsite waste disposal exemption under Section 21(e) of the Act (the predecessor of what is now Section 21(d)). *Illinois v. Commonwealth Edison Co.,* PCB 75-368, 1976 WL 8158, *3 (Nov. 10, 1976). Fourteen years later, in 1990, the General Assembly enacted Section 21(r) in 1990. Public Act 86-0364 (eff. Jan. 1, 1990). MWG fails to provide any evidence of t the General Assembly choosing to overrule *ComEd* fourteen years after it was decided. The legislative history cited by MWG in support of this claim consists of two pages (attached to the MWG Response as Ex. 5), and the extent of the reference to coal ash is as follows:

> 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 fly ash, and then the last amendment, Amendment No. 2, gives clear specifications for

> qualifications to receive license to handle explosives, and be glad to answer any questions, and move for passage of... .

86th Ill. Gen. Assem., Senate Proceedings, June 21, 1989, at 220 (statements of Senator Dunn). It is important to note that the amendment in question was not, as MWG suggests, just about creating Section 21(r)(1). In fact, it created the whole of Section 21(r),[5] including subsections 21(r)(2) and (3), which pertain to disposal at mine sites. *See* Public Act 86-0364 (eff. Jan. 1, 1990). In this context, Senator Dunn's statement about "an agreement between the EPA, the Coal Association and the United Mine Workers" is noteworthy. To be clear, this short excerpt says virtually nothing about legislative purpose, but if one were to look for some hint of that purpose, a natural reading would suggest that it had something to do with mines.[6] It is not "safe to assume" that the purpose was to overrule *ComEd* and "allow coal ash to remain in place." MWG Resp., at 18. MWG cannot invent a legislative purpose out of thin air. There is no mention of *ComEd* in the legislative history cited by MWG, no mention of onsite waste disposal exemptions, and no support for the notion that the legislature was trying to overrule *ComEd*.

It is interesting that MWG is now raising the *ComEd* decision, because there are echoes of that case in MWG's current strategy. In 1976, *ComEd* argued that the legislature had implicitly overruled the Board's interpretation of Section 21(e) (the predecessor to Section 21(d)). *Illinois v. ComEd,* 1976 WL 8158, *3. This is of course very similar to the argument that MWG is making now. In 1976, the Board rejected that argument, stating that "[i]f indeed the Legislature did find the Board's interpretation incorrect, it would have been a simple matter to give us direction in the amendment." *Id*. This legal strategy came up again in the *Dixon-*

[5] At the time, it was enacted as Section 21(s).
[6] Similarly, MWG's later-cited extract of legislative history from 1996 appears to be related to the mine disposal provisions. *See, e.g.*, 89th Gen. Assem., House Proceedings, Apr. 26, 1996, at 72 (Rep. Bost), attached to MWG Response as Ex. 8, cited at MWG Response at 21.

Marquette Cement case in 2003, when the defendants attempted to argue that the legislature had abrogated the Board's interpretation and related court decisions through amendments to Section 21(d). The Court rebuffed this strategy again, stating that

> [B]oth the *Pielet Bros.* and *Reynolds Metals* cases were decided in 1982. Since that time, the legislature has amended section 21 of the Act numerous times; however, none of those amendments reflect a reconsideration or clarification in response to the decisions. It is a fundamental principle that, "[w]here the legislature chooses not to amend a statute after a judicial construction, it will be presumed that it has acquiesced in the court's statement of the legislative intent." *Miller v. Lockett*, 98 Ill.2d 478, 483, 75 Ill.Dec. 224, 457 N.E.2d 14 (1983).

People ex rel. Madigan v. Dixon-Marquette Cement, Inc., 343 Ill. App. 3d 163, 176 (2003). MWG argues that none of this matters, because the General Assembly only acquiesced to the *Pontiac* decision "in most regards." MWG Resp. at 20. But there is no evidence that the General Assembly's acquiescence was somehow partial or limited. MWG argues that the General Assembly "overruled the application of *Pontiac* with respect to CCW by enacting 21(r)(1)." *Id*. (emphasis added). Yet the General Assembly wrote into Section 21(r)(1) a specific, direct reference to Section 21(d), so the same interpretative principle applies. The General Assembly knew that the permit exemption in Section 21(d)(1) was a narrow one. If the General Assembly wanted to allow for unpermitted disposal of large quantities of coal ash, it could have said so, or it could have written Section 21(r) without a cross-reference to Section 21(d), or it could have tailored its cross-reference to Section 21(d). It did none of these things. There is simply no evidence that the General Assembly saw a problem with the Board's and the courts' interpretation of Section 21(d), or that they tried to partially overrule that interpretation.

MWG also tries to use the 2019 Coal Ash Pollution Prevention Act as evidence of legislative intent to abrogate the Board's longstanding interpretation of Section 21(d). Reading MWG's Response, one might think that the Act did little more than "repeal[] the Section

21(d)(1)(i) exception as applied to CCR Surface Impoundments," and that this repeal constituted "landmark legislation." MWG Resp. at 21-22. In fact, the amendment of Section 21(d) was a very small part of a comprehensive legislative package that created a statewide coal ash impoundment program to mirror federal coal ash regulations. Public Act 101-171 (eff. Date June 30, 2019). This is why "Prairie Rivers Network described the legislation as 'groundbreaking' and 'landmark legislation.'" MWG Resp. at 22. It is not surprising that this comprehensive legislation reached into multiple related statutory provisions and, among other things, clarified that coal ash impoundments can never be exempted from Section 21(d). This does not illuminate legislative intent with respect to other coal ash disposal areas.

MWG suggests that Complainants' reading of Section 21(r)(1) "does little more than repeat the sanitary landfill requirement in Section 21(a)." MWG Resp. at 19. Not at all – Section 21(r) is not limited to coal ash disposal, but also covers coal ash storage, and it clearly does allow for unpermitted storage and disposal of a minor amount of coal ash, presuming of course that it would not otherwise violate Section 21(a). Again, a harmonious reading of the two sections is possible, and there is no risk of Section 21(r) being "rendered inoperative." MWG Resp. at 19.

MWG argues that a harmonious reading of Sections 21(a) and 21(r) would allow a party to be "prosecuted under Section 21(a)" for activity "that is permitted by 21(r)(1)." MWG Resp. at 22. This is not necessarily true. As described above, Section 21(r) generally prohibits unpermitted coal ash storage or disposal, and only allows unpermitted storage or disposal in the narrow circumstances covered by Section 21(d)(1)(i). Although the kind of unpermitted disposal at issue in this case is not "permitted" by Section 21(r), clearly some kinds of unpermitted storage and disposal are authorized. Whether that storage or disposal violated Section 21(a) would depend on an application of the law to the facts, but it is not hard to imagine unpermitted

coal ash management practices that comport with both Sections 21(r)(1) and 21(a). For example, coal ash might not be "consolidated" (*see* Board Interim Order at 87, 91), or it might be "stored" (authorized by Section 21(r)(1)) without being "discarded" (prohibited by Section 21(a)). *See* Board Interim Order at 88.

Finally, MWG continues to conflate violations under Sections 12(a) (water pollution) and 21(a) (open dumping) by arguing that the coal ash fill areas at issue here are not "a source," presumably meaning a source of water pollution. MWG Resp.at 22. It is true that the Board found no conclusive link between the historic coal ash fill areas at Joliet, or the Former Ash Basin at Powerton, and the contamination in existing onsite monitoring wells. Board Interim Order at 28, 41. Yet the Board, knowing this, also found that the areas constituted open dumping, in violation of Section 21(a). Board Interim Order at 86-92. These Section 21(a) violations are the ones that must be remedied. MWG cannot avoid its liability under Section 21(a) by pointing to the Board's discussion of Section 12(a).

In sum, Illinois courts have repeatedly upheld the Board's interpretation of Section 21(d)(1)(i), the General Assembly has not attempted to change that provision, and it remains limited to minor amounts of waste. Section 21(d)(1)(i) does not exempt the coal ash fill areas at issue here from Section 21(d)(1)'s permit requirement, which means that the areas remain subject to Section 21(r)'s general prohibition of unpermitted coal ash storage or disposal. Neither Section 21(d) nor Section 21(r) negates Section 21(a), which the Board correctly found MWG liable for violating. All of this is clear in the letter of the law. MWG's attempts to fabricate legislative history in support of an improper attack on the Board's liability finding does a disservice to this process and should be sanctioned.

II. Complainants' Counsel Made an Inadvertent Error, but That Error Is Not Grave nor Impactful as MWG Suggests.

MWG accuses Complainants of an intentional "false representation" in Complainants' citation to the *Freedom Oil* case. MWG Resp. at 7. Complainants would like to acknowledge that they did in fact state incorrectly that sanctions were granted instead of denied. But this is the extent of the error and Complainants' quote from the case is correct and accurately reflects the Board's reasoning. Furthermore, this error was inadvertent, and MWG's "baseless aspersions on the motives" of Complainants violates the very duty that MWG now accuses Complainants of violating. MWG Resp. at 4.

To be clear, this was not the first glitch in Complainants' presentation of its case. Counsel for Complainants has, at times in this proceeding, struggled with organizing voluminous exhibits. Counsel for MWG has seized on those struggles and used them to attack Complainants. *See, e.g.,* MWG's Sanctions Mot. at 12 (March 20, 2018).[7] Counsel for MWG argued that Complainants' disorganized exhibits were somehow an elaborate ruse to delay the proceeding and impose added costs on MWG. And now MWG repeats the pattern by suggesting that Complainants' inadvertent error in the description of a single case in a long list of citations in Complainants' memorandum is an attempt to mislead the Board. MWG's "baseless aspersions on the motives" behind Complainants' inadvertent errors violate the very same duty of fairness that MWG accuses Complainants of violating. MWG Resp. at 4.

Suggesting that Complainants' error as to the *Freedom Oil* case was intentional is about as farfetched as suggesting that Complainants were somehow using exhibits with extra pages or missing pages as a means of imposing additional costs on MWG. MWG Resp., at 25-29.

[7] MWG argued that Complainants' disorganized exhibits at the liability hearing "must be interpreted to be part of an intentional effort to cause undue cost to MWG." MWG's Sanctions Mot. at 12.

Complainants' error as to the *Freedom Oil* case consisted of a single sentence in fourteen-page memorandum. Complainants' Memo. at 14. Complainants' memorandum and legal arguments did not turn on this single citation. *Freedom Oil* was not even one of the primary cases to which Complainants devoted the most discussion. *See* Complainants' Mem. in Support of Their Mot. for Sanctions, at 6-7, 14-15 (Feb. 18, 2022). This citation could be removed from Complainants' memorandum without substantively altering Complainants' arguments. It is impossible to believe that Complainants would intentionally mislead the Board about one citation when so little rides on that citation.

MWG's only basis for its claim that this was an intentional misrepresentation is that Complainants relied on the holding of *Freedom Oil* previously, in Complainants 2018 response to MWG's sanctions motion. Complainants' counsel cannot remember every case that they cited in a filing from four years ago, especially considering the volume of filings in this case. The Board acknowledges and makes allowances for inadvertent errors. "Where possible the Board should make allowances for inadvertent error by the hearing body or participants where no prejudice has been alleged or is clearly evident." *Hoesman v. Urbana*, 1985 WL 21156, at *8. *In re SDWA Update, USEPA Amendments (January 1, 2009 through June 30, 2009) SDWA Update, USEPA Amendments (July 1, 2009 through December 31, 2009) SDWA Update, USEPA Amendments (January 1, 2010 through June 3, 2010)*, WL 5060665, at *2 (updating in part to correct an error). MWG has even acknowledged that the General Assembly makes drafting errors. MWG Resp. at 20. In the present case, Complainants' error caused no prejudice because MWG identified the error, brought it to everyone's attention, and this should prevent the Board or any party from relying on the erroneous material.

MWG also makes the preposterous claim that Complainants misled the Hearing Officer about one of his holdings. At issue in 2017, the Hearing Officer entered a discovery schedule, which included deadlines for expert reports and deposition. Hr'g Officer Order, Sept. 30, 2015. Respondent took the Complainants' expert's deposition on March 17, 2016. Comp's Resp. to Mot. *In Limine* Regarding Expert Test., at 2 June 8, 2017. The Parties then timely exchanged over 4,000 pages of additional discovery, to include documents relevant to the opinions of both parties' experts. *Id.* Respondent then filed a motion *in limine* seeking to limit the expert to the opinions stated in the report and deposition. MWG's Mot. *In Limine* Regarding Expert Test., May 22, 2017. The Hearing Officer ruled that "[t]he testimony at hearing from Environmental Groups' experts may rely on discovery documents produced after those experts' depositions in order to elaborate previously disclosed opinions." Hr'g Officer Order, at 1, July 17, 2018.

According to MWG, Complainants claimed that the July 18, 2017 Hearing Officer Order "supported their motion to exclude." MWG Resp. to Sanctions Motion, at 26. MWG misunderstands and mischaracterizes Complainants' statements. Complainants stated that Complainants' Motion to Exclude is "consistent with the Hearing Officer's Order of July 18, 2017." Complainants' Mot. *in Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents, ¶¶9-10 (Feb. 4, 2022). This subtle distinction is important. MWG claims that Complainants' fail to "even attempt[] to explain or distinguish it." MWG Resp. in Opp. to Complainants' Mot. *In Limine* to Exclude New or Revised Expert Opinions (March 4, 2022). MWG is wrong. Complainants went on to do exactly what MWG said we didn't do—explain why Complainants' motion is consistent with the Hearing Officer's July 18, 2017—because it is distinguishable. In three sentences, Complainants explained all of this:

> 9. … In that instance, Respondent produced the documents at issue after the expert's deposition. Respondent then brought a motion *in limine* to exclude Complainant's experts from relying on these documents.
>
> 10. Currently at issue, the dockets containing the documents listed above were all initiated in May and September by MWG itself and before expert depositions, so those initial docket filings could have been disclosed at expert depositions.

Complainants' Mot. *In Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents, ¶¶9-10 (Feb. 4, 2022) (emphasis added). In short, Complainants' Motion *In Limine* is consistent with the Hearing Officer's July 17, 2018 order because the situations are distinguishable. There is nothing misleading here, let alone intentionally misleading, and Respondent is making a mountain out of a molehill in an attempt to divert the discussion from the substance of Complainants' motions.

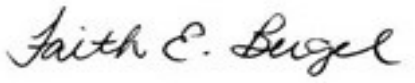
CONCLUSION

For all of these reasons stated above and as stated in Complainants' Motion for Sanctions, Complainants respectfully request that the Board grant Complainants' motion for sanctions and issue an order with the following relief and such other relief as the Board deems appropriate:

a. Striking MWG's Motion to Stay Proceedings filed on January 21, 2022;
b. Barring MWG from any filing further Motions to Stay Proceedings;
c. Barring MWG from repeating any of the arguments or claims in its three Motions to Stay;
d. Barring MWG from making any further arguments that the proceedings in this case should be delayed or deferred based on actions or proceedings (included by not limited to permitting, impoundment closures, or corrective action) pursuant to the Illinois coal ash rules found at 35. Ill. Admin. Code Part 845 or the federal coal ash rules found at 40 C.F.R. Part 257;
e. Striking MWG's Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29; MWG's Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy; and MWG's Motion in Limine to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station; all filed on February 4, 2022;

f. Barring MWG from repeating any of the arguments or claims in its Motion in Limine to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29; Motion in Limine to Exclude the Former Ash Basin at the Powerton Station from Consideration of a Remedy; and Motion in Limine to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station.

Respectfully submitted,



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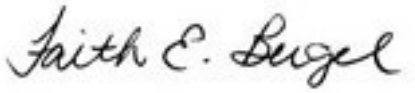
CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' MOTION FOR LEAVE TO FILE, *INSTANTER*, THEIR REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANTS' MOTION FOR SANCTIONS**, and **COMPLAINANTS' REPLY IN SUPPORT OF COMPLAINANTS' MOTION FOR SANCTIONS** before 5 p.m. Central Time on March 18, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 28 pages.

Respectfully submitted,



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