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' OPPOSITION TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTIONS *IN LIMINE* TO EXLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS, OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS SURREPLY TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTIONS *IN LIMINE* TO EXLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS,** 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: April 1, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
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COMPLAINANTS' OPPOSITION TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTIONS *IN LIMINE* TO EXLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS, OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS SURREPLY TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTIONS *IN LIMINE* TO EXLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS

Complainants Sierra Club, Inc., Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") oppose Midwest Generation, LLC's ("MWG") Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motions *In Limine* to Exclude Evidence of the Need for a Remedy at the Historic Areas at the Joliet 29 Station, the Former Ash Basin at the Powerton Station, and the Former Slag and Bottom Ash Area at the Will County Station ("MWG's Reply Motion"). In the alternative, Complainants move for leave to file, *instanter*, a surreply to MWG's Reply Motion. As grounds for their opposition, Complainants state as follows:

1. On February 4, 2022, MWG filed its Motions *In Limine* to Exclude Evidence of

the Need for a Remedy at the Historic Areas at the Joliet 29 Station, the Former Ash Basin at the Powerton Station, and the Former Slag and Bottom Ash Area at the Will County Station ("MWG's Motions In Limine"). On March 4, 2022, Complainants filed their Response to MWG's Motions *in Limine*. On March 18, 2022, MWG filed a Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motions to Exclude Evidence of the Need for a Remedy at the Historic Areas at the Joliet 29 Station, the Former Ash Basin at the Powerton Station, and the Former Slag and Bottom Ash Area at the Will County Station. Arguments regarding MWG's Motions *in Limine*, and specifically regarding MWG's interpretation of Section 21 of the Act, have also been briefed in Complainants' February 18 Motion for Sanctions, MWG's Response to that Motion, and Complainants' Reply.[1]

2. MWG states that "a reply brief is warranted because Complainants raised new claims on how Sections 21(r) and 21(d)(1) of the [Act] interact, incorrectly claiming that Section 21(r) did not allow disposal of coal combustion waste ("CCW") onsite." MWG Reply Motion at 1. This is not true. It was MWG, not Complainants, who raised the issue of Sections 21(r) and 21(d). *See, e.g.*, MWG Joliet Mot. *in Limine* at 5 ("Subsection 21(r) of the Act, coupled with Section 21(d), allows disposal of coal combustion waste on a person's property that was generated by a person's own activities"). Complainants responded to this argument, but did not "raise new claims." Complainants' response was proper in scope and does not justify a reply by MWG.

3. It is also not true that Complainants "claim[ed] that Section 21(r) did not allow

[1] *See* Complainants' Memorandum in Support of their Motion for Sanctions at 10-14 (Feb. 18, 2022); Midwest Generation, LLC's Response to Complainants' Motion for Sanctions at 14-25 (Mar. 4, 2022); Complainants' Motion for Leave to File, Instanter, Reply to Respondent's Response to Complainants' Motion for Sanctions at 10-16 (Mar. 18, 2022).

disposal of [CCW] onsite." MWG Reply Motion at 1. Complainants stated that "Section 21(r) generally prohibits coal ash storage or disposal," but "provides an exemption from that general prohibition for two circumstances—where either the facility has a permit, or a permit is not required pursuant to Section 21(d)." Comp. Resp. at 7. Again, to the extent that MWG offers this argument as justification for a reply, it must be rejected, because it is not true.

4. MWG also asserts that "Complainants incorrectly assert, for the first time in their Response, that any finding of liability by the Board mandates a remedy." MWG Reply Motion at 2. This is a red herring, and deeply misleading. The issue that MWG placed before the Board in its *Motions in Limine* is not the ultimate question of whether a remedy is required, but instead whether the Board should, prior to a hearing, bar all further evidence and discussion of a remedy. In its motions, MWG made the bizarre assertions that Complainants bear the burden, even after the Board's liability determination, to "prove their case," and "prove that a remedy is required." Comp. Resp. at 4, citing MWG Joliet Mot. *in Limine* at 3-5. In response, Complainants pointed out that the Board had already made a liability determination, which is why we are now in the remedy phase of this matter. *Id*. While Complainants did say that "the fact that a remedy is required has already been established by the Board," Complainants also went on to say that "[t]he question before the Board now is what kinds of relief are appropriate." *Id*. Complainants also pointed to the Board's reasoning behind finding open dumping liability to suggest that there are obvious ways in which MWG could remedy its violations. Comp. Resp. at 2-4. For example, where the Board found that MWG violated Section 21(a) by, among other things, "failing to remove [coal ash]" from historical fill and storage areas, Interim Order at 91, an obvious remedy would be removal of coal ash. Broadly speaking, the fact that Complainants seek a remedy is not a new argument – it is in fact the whole point of this case. The larger point remains that MWG is

seeking to nullify the Board's liability holding and exclude all evidence of the need for a remedy before the Board has had an opportunity to consider "what kinds of relief are appropriate." Interim Order at 92-93.

5. MWG has also failed to demonstrate material prejudice as required by Rule 500(e). 35 Ill. Adm. Code 101.500(e). MWG will not be prejudiced by denial of its motion for leave to file because MWG's proffered reply brief does not properly offer any argument beyond what it already provided in its original February 4, 2022 Motions *in Limine*. Denial of the right to file a reply is appropriate and will not prejudice a party when that party has already "adequately stated its position." *People of the State of Illinois vs. Peabody Coal Co.*, PCB 99-134, 2002 WL 745609, at *3 (Apr. 18, 2002).

6. Because MWG failed to identify any new arguments that warrant a reply, Complainants oppose MWG's Reply Motion.

7. In the alternative, if the Board decides to grant MWG's Reply Motion, Complainants move for leave to file a surreply for the following reasons.

8. Arguments regarding MWG's Motions *in Limine*, and specifically regarding MWG's interpretation of Section 21 of the Act and its legislative history, have also been briefed in Complainants' February 18 Motion for Sanctions, MWG's Response to that Motion, and Complainants' Reply.[2] In order to assist the Board, it may be helpful to reproduce those arguments here.

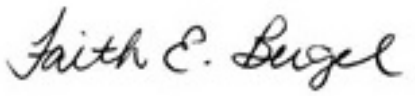
9. In its Reply, MWG adds a substantial discussion of legislative history, incorrectly

[2] *See* Complainants' Memorandum in Support of their Motion for Sanctions at 10-14 (Feb. 18, 2022); Midwest Generation, LLC's Response to Complainants' Motion for Sanctions at 14-25 (Mar. 4, 2022); Complainants' Motion for Leave to File, Instanter, Reply to Respondent's Response to Complainants' Motion for Sanctions at 10-16 (Mar. 18, 2022).

claiming that it supports MWG's interpretation of Section 21 of the Act. Complainants would be prejudiced if they were not allowed to rebut MWG's misrepresentation of Section 21's legislative history.

Dated: April 1, 2022

Respectfully submitted,



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	)	PCB No-2013-015
Complainants,	)	(Enforcement – Water)
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MIDWEST GENERATION, LLC,	)	
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Respondent.	)	

COMPLAINANTS' SURREPLY TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTIONS *IN LIMINE* TO EXLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS

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.

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 acknowledges that Section 21(d)(1)(i) only allows unpermitted, onsite disposal of self-generated waste in minor amounts. MWG Reply at 3. Having acknowledged that limitation, MWG then argues that the limitation does not apply to coal ash because there is no case law explicitly applying the limitation to coal ash. *Id.*; *see also* Midwest Generation, LLC's Response to Complainants' Motion for Sanctions at 16 ("What is not established, however, is whether the quantity limitation in *Pontiac* applies to CCW"). 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 Reply at 6. 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 Reply at 4. There is no evidence of this being true. In 1976, the Board held that the Commonwealth Edison Company 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) ("*ComEd*"). Fourteen years later, in 1990, the General Assembly enacted Section 21(r) in 1990. Public Act 86-0364 (eff. Jan. 1, 1990). MWG cites the Collins case for the notion that "[a]n 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." MWG Reply at 5, citing *Collins v. Bd. of Trustees of Firemen's Annuity & Benefit Fund*, 155 Ill. 2d 103, 111 (1993). Fourteen years is not "recent," and for that reason alone *Collins v. Bd. of Trustees of Firemen's Annuity & Benefit Fund* is inapposite. But there is also no "contradict[ion]" between Section 21(r) and the *ComEd* decision; as discussed in more detail below, the Board's and the courts' longstanding interpretation of Section 21(d) is perfectly consistent with Section 21(r).

MWG cites legislative history in support of the idea that the General Assembly was attempting to overrule *ComEd*, but the legislative history does not help MWG. First, MWG attaches two pages (attached to the MWG Reply as Ex. 1), 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),[3] 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.[4] It is not "safe to assume" that the purpose was to overrule *ComEd* and "allow coal ash to remain in place." MWG Reply at 2. 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, no mention of Section 21(d), 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

[3] At the time, it was enacted as Section 21(s).
[4] 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.

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-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 Reply at 7. 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 the General Assembly tried to partially overrule that interpretation.

MWG cites revisions to Section 21(r) in 1995 and 1996 as evidence that the General Assembly saw Section 21(r)(1) as a "key component of CCW disposal," and "necessary for the current program to continue." MWG Reply at 7. This fails for the simple reason that the General Assembly was not, as MWG asserts, changing Section 21(r)(1), but rather Section 21(r), which is where the words "coal combustion waste" appear. This change affected not only onsite coal ash storage and disposal under Section 21(r)(1), but also the use of coal ash in mines pursuant to Sections 21(r)(2) and 21(r)(3).

It is clear from the legislative history that the General Assembly was focused on mine disposal, and perhaps the use of coal ash in sanitary landfills, when it referred to "the current disposal program." MWG Reply at 7-8; *id.* at Ex. 5, at 27. There is no evidence, contrary to MWG's argument, that the General Assembly was concerned with unpermitted onsite coal ash disposal, and certainly no evidence that the General Assembly saw such disposal as a "key component" of the program. When 21(r) was amended to apply to coal combustion waste instead of coal combustion byproduct, Representative Bost explained the amendment as follows:

> 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."

MWG Reply, Ex. 4, at 72 (emphasis added). This could not be clearer – the "program" that

Representative Bost was talking about was the Mines and Minerals Program. Representative Bost went on to explain the elements of the program as follows:

> 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.

MWG Reply, Ex. 4, at 72-73 (emphasis added). There is no discussion here of unpermitted onsite disposal of self-generated coal ash. The reference to the current program referred to the use of CCW for mine reclamation. The program required an application to IEPA and Department of Natural Resources. The current program did not allow tires, creosote-soaked telephone poles, or railroad ties. Id. at 73. That was the current program under 21(r) that Representative Bost was referencing. Representative Bost and Representative Deering also discussed the use of coal ash as structural fill at sanitary landfills and preserving that use:

> Deering: … '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?'
>
> 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 back.'

MWG Reply, Ex. 4, at 75. A sanitary landfill is "a site or facility for which a permit has been obtained," which does implicate Section 21(r)(1). However, it is important to remember how

Section 21(r)(1) is written: No person shall store or dispose of CCW unless "(1) such waste is stored or disposed of at a site or facility for which a permit has been obtained or is not otherwise required under subsection (d) of this Section." 415 ILCS 5/21(r)(1). The discussion cited above pertains to the first half of Section 21(r)(1) (permitted sites) but says nothing about the second half of Section 21(r)(1) (unpermitted sites authorized by Section 21(d)). Again, there is simply no evidence that the General Assembly sought to overrule the *ComEd* decision, exempt coal ash from the Board's and the court's interpretation of Section 21(d)(1)(i), or allow coal ash disposal that would otherwise be prohibited by Section 21(d) or 21(a).

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 Reply, 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 Reply at 8. 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 Reply at 8. 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) would render part of that subsection meaningless. MWG Reply at 6. This is not true. Open dumping is defined as "the consolidation of refuse from one or more sources at a disposal site that does not fulfill the

requirements of a sanitary landfill." 415 ILCS 5/3.305. Section 21(a), which prohibits open dumping, is therefore focused on "disposal." Section 21(r), on the other hand, is not limited to coal ash disposal, but also covers coal ash "storage." Furthermore, Section 21(r) clearly does allow for some amount of coal ash to be stored or disposed of onsite, as long as it falls within the Board's interpretation of Section 21(d)(1)(i)'s exemption for self-generated, onsite waste, and presuming of course that it would not otherwise violate Section 21(a). The two provisions are not coextensive, and they are compatible. A harmonious reading of the two sections is possible, and there is no risk of Section 21(r) being "rendered inoperative." MWG Reply at 6.

In its Response to Complainants' Motion for Sanctions, MWG made a similar argument, which was 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. to Comp. Mot. for Sanctions at 22. Whether this is true depends on the facts. Activities permitted by Section 21(r)(1) may or may not violate Section 21(a). It is certainly not true that <u>all</u> activities permitted by Section 21(r)(1) automatically violate Section 21(a). Section 21(r) allows storage or disposal at permitted sites (e.g., sanitary landfills), and allows for unpermitted storage or disposal in the narrow circumstances covered by Section 21(d)(1)(i). 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. In either case, there would be no violation of Section 21(a).

MWG also provided this confusing sentence: "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)." MWG Reply at 9. This must be

a grammatical or typographical error, because Complainants never argued that the clause in question was "made illusory by Section 21(a)." As discussed above, Sections 21(a), 21(d), and 21(r) are all mutually compatible, they are not in conflict, and they can be read harmoniously. Section 21(r)(1), in conjunction with Section 21(d)(1)(i), authorizes a minor amount of unpermitted, self-generated, onsite coal ash storage or disposal. That storage or disposal may or may not violate Section 21(a)'s open dumping prohibition, depending on the facts. In this case, however, the sites do not have permits, and they hold more than a minor amount of coal ash, so Section 21(r)(1) does not apply.

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 Reply at 1, 10. It is true that the Board found no conclusive link between certain historic coal ash storage and fill areas at Joliet, or the Former Ash Basin at Powerton, and the contamination in existing onsite monitoring wells. 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).

The Board went even further regarding findings of contamination at Joliet, stating that "the Board finds that the evidence establishes that it is more probable than not that these historical coal ash storage and fill areas are contributing to the groundwater contamination." Interim Order at 28. In addition, despite finding that "the exceedances appearing in the monitoring wells are not representing contamination from the historic coal ash storage areas" the Board still concluded that the same exceedances "do show contaminants leaking from historic

fill areas outside of the ash ponds and historic storage areas." *Id.* In other words, despite finding that the historical coal ash storage areas are not contributing to contamination in existing monitoring wells, those areas are still likely contributing to groundwater contamination. Instead of suggesting that no remedy is required, as MWG argues, this language in fact supports Complainants' first step of a remedy: an investigation of these areas including installation of monitoring wells.

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. In addition, while MWG continues to conflate violations under Sections 12(a) and 21(a) in an attempt to avoid its liability under Section 21(a), it is clear that the Board found MWG liable for violations of Section 21(a) at the fill areas at issue in MWG's Motions *in Limine*, and there is no reason to bar further discussion of a remedy of those violations.

Dated: April 1, 2022

Respectfully submitted,

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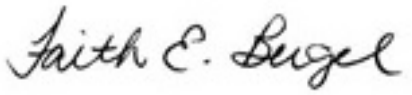
CERTIFICATE OF SERVICE

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' OPPOSITION TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTIONS *IN LIMINE* TO EXLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS, OR, IN THE ALTERNATIVE, MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS SURREPLY TO MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTIONS *IN LIMINE* TO EXLUDE EVIDENCE OF THE NEED FOR A REMEDY AT CERTAIN AREAS AT THREE STATIONS,** before 5 p.m. Central Time on April 1, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 21 pages.

Respectfully submitted,



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