BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	AS 2021-003
PETITION OF MIDWEST	)	
GENERATION, LLC FOR AN	)	
ADJUSTED STANDARD FROM	)	(Adjusted Standard)
845.740(a) AND FINDING OF	)	
INAPPLICABILITY OF PART 845 FOR	)	
THE WAUKEGAN STATION	)	

NOTICE OF FILING

To: See attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Petitioner Midwest Generation, LLC's Motion for Leave to File, *Instanter*, It's Reply in Support of Its Motion for Stay Pending Appeal and Midwest Generation, LLC's Reply in Support of Its Motion for Stay Pending Appeal, copies of which are herewith served upon you.

Dated: May 21, 2025

MIDWEST GENERATION, LLC

By: ___/s/Kristen L. Gale _____

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Petitioner Midwest Generation, LLC's Motion for Leave to File, *Instanter*, It's Reply in Support of Its Motion for Stay Pending Appeal and Midwest Generation, LLC's Reply in Support of Its Motion for Stay Pending Appeal was electronically filed on May 21, 2025 with the following:

Don Brown, Clerk of the Board
Illinois Pollution Control Board
60 E. Van Buren Street, Suite 630
Chicago, IL 60605
don.brown@illinois.gov

and that copies were sent via e-mail on May 21, 2025 to the parties on the service list.

Dated: May 21, 2025 /s/Kristen L. Gale

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MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTION FOR STAY PENDING APPEAL

Respondent, Midwest Generation, LLC ("MWG"), requests that the Illinois Pollution Control Board ("Board") grant this Motion for Leave to File, *Instanter*, its Reply in support of its Motion for Stay Pending Appeal, pursuant to Sections 101.500 and 101.514 of the Illinois Pollution Control Board's ("Board") Procedural Rules. 35 Ill. Adm. Code 101.500(e), 101.514. A reply is warranted because Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") raised new arguments in its Response to MWG's Motion to Stay Pending Appeal that the Board was statutorily barred from granting the stay. MWG will be materially prejudiced if it is not permitted to reply. In support of its motion seeking leave to file, *instanter*, MWG submits its Reply and states:

1. On April 23, 2025, MWG moved for a stay of the Board's March 20, 2025, Order finding that the area MWG describes as the "Grassy Field" was a CCR Surface Impoundment, concurrent with its petition for appeal of the Order.

2. On May 7, 2025, Illinois EPA filed its Response objecting to MWG's request for a stay claiming that a stay is not necessary to secure the fruits of the appeal or preserve the status quo, and that the Board may not stay the statutory fees under Section 22.59(j) of the Illinois Environmental Protection Act ("Act"). 415 ILCS 5/22.59(j).

3. Illinois EPA's response appears to misunderstand the purpose of the requested stay. The stay would apply to the effect of the Board's Order finding that the Grassy Field was a CCR surface impoundment, which is an extension of the automatic stay afforded under Section 28.1 of the Act. 415 ILCS 5/28.1(e). Accordingly, as Section 28.1 of the Act stayed the effect of the fees described under Section 22.59(j), the Board has the power to stay the effect of its Order pending the appeal.

4. The Agency's misunderstanding extends to its interpretation of the meaning of "fruits of the appeal" and "status quo." Securing the "fruits of the appeal" means ensuring that the potential results of the appeal are available to the movant if the movant is successful. *Stacke v. Bates*, 138 Ill. 2d 295, 305 (1990) (Supreme Court upheld a stay pending appeal because the non-movant could not demonstrate that it would be able provide reimbursement of the monies paid out if the appeal were successful). Here, the Agency does not dispute that if MWG's appeal were successful, the Agency would not reimburse it for the CCR program fees (approximately $375,000).[1] Avoiding a potential irreparable loss of $375,000 is the type of "fruits of the appeal" that a stay is designed to protect. Similarly, maintaining the "status quo" means "the last actual, peaceable, uncontested status which preceded the pending controversy." *O'Brien v. Matual*, 14 Ill. App. 2d 173, 187, 144 N.E.2d 446 (2d. Dist. 1957). In this case, the last actual uncontested status was that the Grassy Field was not a CCR surface impoundment, which in this case was before Illinois EPA issued its CCR Program Invoice in 2019. *See* MWG Ex. 28 (Illinois EPA CCR Invoice).

[1] MWG miscalculated the total CCR program fees that actually total $375,000. *See* Attachment 1 – Illinois EPA May 6, 2025 Invoice. The 2025 Invoice continues to call the Grassy Field an "Old Pond" even though the Agency conceded during the hearing that it fabricated the term "Old Pond". PCB21-3, 2/13/24 Tr., p. 258-59

5. MWG has prepared its Reply in support of its Motion for Stay Pending Appeal, which is attached hereto. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by allowing MWG the opportunity to address Illinois EPA's new arguments that it could not have anticipated its Motion for Stay Pending Appeal.

6. This Motion is timely filed on May 21, 2025, 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 Reply in support of its Motion for Stay Pending Appeal, and accept the attached Reply as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Kristen L. Gale
One of Its Attorneys

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ATTACHMENT 1

Illinois Environmental Protection Agency
Division of Water Pollution Control
1021 North Grand Avenue East
Springfield, IL 62794-9276

Will County Generating Station
Attn: Sharene Shealey
529 East 135th Street,
Romeoville, IL 60446

Billing Date	Tuesday May 6, 2025
Due Date	Tuesday July 1, 2025
Service Period	July 1, 2025, to June 30, 2026
Account Number	W0971900021
Facility Name	Waukegan Station

Annual Invoice

Pond ID	Pond Description	Amount
W0971900021-01	East Pond	25,000.00
W0971900021-02	West Pond	25,000.00
W0971900021-03	Old Pond	25,000.00
	Previous Unpaid Balance	350,000.00

Amount Due **$425,000.00**

Other Information/Messages

Questions. Please direct any technical/permit questions to the Permit Section at (217) 782-0610. Questions about the amount of your fee should be emailed to: EPA.AcctsReceivable@illinois.gov

- See Reverse Side for Additional Important Information –

Return bottom portion with a check made payable to Illinois EPA

Payment
Remittance Stub

Account Information

Acct. Number	W0971900021
Facility Name	Waukegan Station
IEPA Program	COALAN
Billing Date	Tue May 6, 2025

Amount Due

Tuesday July 1, 2025	$425,000.00
Amount Enclosed	

Please remit payment to:
Illinois Environmental Protection Agency
Fiscal Services #2
P.O. Box 19276
Springfield, IL 62794-9276

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR STAY PENDING APPEAL

Illinois Environmental Protection Agency's ("Illinois EPA" or "Agency") objection to Midwest Generation, LLC's ("MWG") request for a stay fundamentally misunderstands the purpose of a stay, misapplies the factors granting a stay, and, importantly, does not dispute that MWG has a substantial case on the merits. Illinois EPA incorrectly claims that the Board lacks the authority to grant the stay because Section 22.59(j) of the Act, which requires the payment of CCR program fees, precludes the stay of "a statutorily mandated fee." Response ¶38. However, a stay of the Board's March 20, 2025 Order would simply continue the automatic stay under Section 28.1(e) of the Act, which all parties have acknowledged stayed the required payment of the fees under Section 22.59(j). 415 ILCS 5/28.1(e), 22.59(j).

Also, Illinois EPA does not dispute MWG's concern that its payments to the CCR program would not be refunded if its appeal were successful, and it has still yet to dispute MWG's concern that MWG will face a logistical nightmare in attempting to comply with two related but distinct regulatory schemes for the same area at the same time. Both concerns are the "fruits of appeal" that will be irreparably lost without a stay. Further, Illinois EPA's claim that the status quo is the date Part 845 was adopted in 2021 is incorrect. Instead, the status quo is the status prior to the initiation of the original controversy, which occurred in this case 2019, when Illinois EPA first

notified MWG that it considered the "Grassy Field" (a/k/a the Former Slag/Fly Ash Storage Area) a CCR surface impoundment. Because the Agency does not dispute that the appeal presents a substantial case on the merits and the classification of the Grassy Field remains in dispute, including whether the area is a CCR surface impoundment or a CCRMU, preserving the status quo and the fruits of the appeal where they might otherwise be lost is the right approach. *Stacke v. Bates*, 138 Ill.2d 295, 302 (1990).

I. The Board Has the Authority to Grant the Stay Pending the Appeal

The Agency's claim that the Board lacks the authority to grant a stay of the enforcement of Section 22.59(j) of the Act is meritless and misunderstands the purpose of the stay. Indeed, Illinois EPA provides no authority to support its contention. A stay pending appeal "suspends enforcement of a judgment," nothing more. *Stacke v. Bates*, 138 Ill.2d 295, 302 (1990). Accordingly, here, the stay would simply and briefly suspend enforcement of the Board's finding with respect to MWG's Petition for Adjusted Standard that the Grassy Field is a CCR surface impoundment, pending resolution of the appeal.

Further, the claim that Section 22.59(j) of the Act bars the stay is incorrect. 415 ILCS 5/22.59(j). Section 22.59(j) delineates the program fees applicable to the owner or operator of a "CCR surface impoundment," which is defined in Section 3.143 of the Act. 415 ILCS 5/3.143. Section 3.143 is the definition of a CCR surface impoundment and neither it nor Section 22.59(j) identify any CCR surface impoundments in Illinois, including the Grassy Field. 415 ILCS 5/3.143, 22.59(j). Instead, during the rulemaking for the Illinois CCR Rule at Part 845, Illinois EPA presented a preliminary list of areas and ponds that it considered CCR surface impoundments, while acknowledging that the list was in dispute. *In the Matter of CCR Rules*, PCB R20-19, Aug. 11, 2020 Tr., p. 74:11-16; *In the Matter of CCR Rules*, PCB R20-19, Illinois EPA Answers to

Board Questions, p. 181-182 (Illinois EPA List of CCR surface impoundments). The Agency and the Board eventually agreed that the Agency's preliminary list was incorrect, acknowledging that at least three of the listed ponds were not CCR surface impoundments. *See In the Matter of: Midwest Generation LLC's Petition for Adjusted Standard (Joliet 29 Station)*, AS 21-1, Order (May 18, 2023) (Following Illinois EPA's agreement, the Board held that Ponds 1 and 3 were not CCR surface impoundments); *In the Matter of: Midwest Generation LLC's Petition for an Adjusted Standard and Finding of Inapplicability for the Powerton Station*, AS 21-2, Order (February 17, 2022) (Illinois EPA agreed, and the Board held, that the Service Water Basin was not a CCR surface impoundment).

As in the above, in this matter, there remains a dispute over the classification of the Grassy Field, requiring the continued application of the automatic stay afforded by Section 28.1 of the Act. 415 ILCS 5/28.1. Indeed, throughout each of these petitions for adjusted standards, the Agency has never made a claim that the automatic stay imposed by Section 28.1(e) of the Act did not also stay the fees assessed under Section 22.59(j) of the Act. *See In the Matter of: Midwest Generation LLC's Petition for an Adjusted Standard and Finding of Inapplicability for the Waukegan Station*, AS 21-3, Recommendation of the Illinois Environmental Protection Agency (October 31, 2022); *In the Matter of: Midwest Generation LLC's Petition for Adjusted Standard (Joliet 29 Station)*, AS 21-1, Recommendation of the Illinois Environmental Protection Agency (February 4, 2022); *In the Matter of: Midwest Generation LLC's Petition for an Adjusted Standard and Finding of Inapplicability for the Powerton Station*, AS 21-2, Recommendation of the Illinois Environmental Protection Agency (September 22, 2021). The present request for a stay is no different, and merely continues the stay allowed under Section 28.1(e) to maintain the status quo.

It also appears that both the Board and the Agency are conflicted about the Grassy Field's classification. Despite finding that the Grassy Field was a CCR surface impoundment, the Board concluded in its March 20, 2025 Order ("Order") that the Grassy Field was also a coal combustion residual management unit ("CCRMU"). Order at 15. Similarly, despite its stated position that the Grassy Field is a CCR surface impoundment, the Agency appears to conclude the same. In its Response, the Agency lobs an accusation that "MWG concedes that the [Grassy Field] is, at a minimum, a CCR management unit ("CCRMU") regulated under federal rules." Illinois EPA Response, ¶20. MWG is mystified by the Agency's statement that MWG "concedes" the Grassy Field is a CCRMU. MWG has ***always*** maintained that the Grassy Field is a CCRMU. 2/14/24 Tr., p. 66-68; MWG Post-Hearing Brief at 27-30. Rather, Illinois EPA is now making the concession that the Grassy Field is a CCRMU, after having vigorously denied the fact during the hearing and in its post-hearing brief. *See* 2/13/24 Tr., p. 47-49, 56; IEPA Post-Hearing Brief at 17-18. There is no dispute that the definitions of CCR surface impoundments and CCRMUs are mutually exclusive, and the Agency has never disputed that compliance with both regulatory schemes would be a logistical nightmare. *See* 415 ILCS 5/3.143 (definition of CCR surface impoundment) and 40 C.F.R. 257.53 (definition of CCRMU); MWG Post-Hearing Brief, Section IV.A at 27-30; 2/14/24 Tr., p. 65-69. Because the classification of the Grassy Field remains in dispute, including whether it is a CCR surface impoundment or a CCRMU, the Board should continue the stay that was allowed under Section 28.1(e) and as allowed under Board rules.

II. Because the Agency Does Not Dispute MWG's Irreparable Losses Absent a Stay, a Stay is Necessary for MWG to Secure the Fruits of the Appeal

Securing the "fruits of the appeal" means ensuring that the potential results of the appeal are available to the movant if the movant is successful. *Stacke v. Bates*, 138 Ill. 2d 295, 305 (1990) (Supreme Court upheld a stay pending appeal because the non-movant could not demonstrate that

it would be able provide reimbursement of the monies paid out if the appeal were successful). In this case, Illinois EPA does not dispute that the $375,000 in CCR program fees that MWG will be required to pay as a result of the Board's Order will not be reversed or refunded should MWG's appeal of the Board's Order be successful.[1] Illinois EPA also has never disputed MWG's extensive evidence that complying with both the Illinois CCR Rule and the CCRMU federal rule will be a "logistical nightmare." 2/14/24 Tr., p. 68-69. Prevention of the potential irreparable loss of $375,000 and the potential adverse consequences of venturing into a regulatory logistical nightmare is the exact type of "fruits of the appeal" that a stay is designed to protect. Accordingly, to protect MWG's fruits of the appeal should the appeal be successful, the Board should grant the stay pending the appeal.

III. Maintaining the Status Quo Means Treating the Grassy Field As It Was Treated Before the Controversy of Its Classification Arose

The Agency's claim that the status quo reverts to the Board's adoption of Part 845 in 2021 is incorrect. The "status quo" means "the last actual, peaceable, uncontested status which preceded the pending controversy." *O'Brien v. Matual*, 14 Ill. App. 2d 173, 187 (2d. Dist. 1957). In this case, the controversy of the classification of the Grassy Field originated on December 16, 2019, when Illinois EPA issued an invoice to MWG for an "Old Pond" which the Agency considered to be the Grassy Field. MWG Ex. 28 (Illinois EPA CCR Invoice).[2] Before receipt of the invoice, neither MWG nor Illinois EPA had ever treated the Grassy Field as a CCR surface impoundment.[3]

[1] MWG miscalculated the total CCR program fees that actually total $375,000. *See* Attachment 1 – Illinois EPA May 6, 2025 Invoice.

[2] Illinois EPA acknowledged during the hearing that it fabricated the term "Old Pond", and that the term was not used in any MWG documents or any documents within Illinois EPA's files. 2/13/24 Tr., p. 258-59.

[3] In fact, the Agency was fully aware during the rulemaking in 2020 that there was a controversy over its preliminary list of CCR surface impoundment classifications, which included the Grassy Field. *See In the Matter of CCR Rules*, PCB R20-19, Aug. 11, 2020 Tr., p. 74:11-16 (Q: "And is it correct that some of these ponds are subject to current dispute about whether they are regulated CCR surface impoundments?" A: "Lynn Dunaway. Yes, some of these have been disputed."

Thus, the last actual uncontested status of the Grassy Field was that it was not a CCR surface impoundment, and to maintain that status quo the Board should grant the stay pending the resolution of the appeal.

IV. No Dispute That MWG Has a Substantial Case on the Merits

Importantly, Illinois EPA does not dispute that MWG has a substantial case on the merits. *People v. AET Environmental and EOR Energy LLC*, PCB 7-95, slip op. 4 (June 20, 2013), citing *Stacke v. Bates*, 138 Ill. 2d 295, 309 (1990) (Board must consider whether a movant has a substantial case on the merits for its appeal and balance it with the other factors). Indeed, the Agency is correct, because the interpretation of a CCR surface impoundment under Section 3.143 of the Act, including the terms "hold," "accumulation," and "design," is precedent-setting. An undisputed substantial case on the merits, along with the necessity of a stay to secure the fruits of the appeal and preserve the status quo, heavily favors granting MWG a stay.

V. Conclusion

For the reasons stated above, MWG respectfully requests that the Board grant its motion for a stay of the Board's March 20, 2025 Order pending appeal, or at the very least, stay the effect of the Order to the extent it would require MWG to pay statutory fees.

Respectfully submitted,
MIDWEST GENERATION, LLC

BY: /s/Kristen L. Gale

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1021 North Grand Avenue East
Springfield, IL 62794-9276

Will County Generating Station
Attn: Sharene Shealey
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