BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
	)	
PETITION OF MIDWEST	)	AS 19-1
GENERATION, LLC FOR AN	)	(Adjusted Standard – RCRA)
ADJUSTED STANDARD FROM 35 ILL.	)	
ADM. CODE PARTS 811 AND 814	)	

NOTICE OF FILING

To:

Don Brown, Clerk of the Board Illinois Pollution Control Board James R. Thompson Center, Suite 11-500 100 W. Randolph Street Chicago, IL 60601 don.brown@illinois.gov	Michelle M. Ryan, Assistant Counsel Illinois Environmental Protection Agency 1021 N. Grand Avenue East P.O. Box 19276 Springfield, IL 62794 michelle.ryan@illinois.gov
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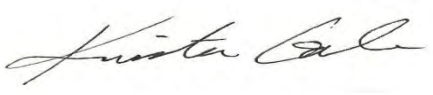
PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Petitioner, Midwest Generation, LLC's Response to the Public Comments by Citizens Against Ruining the Environment, Earthjustice, Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club on the Petition for Adjusted Standard, a copy of which is herewith served upon you.

Dated: May 30, 2019

MIDWEST GENERATION, LLC



By: _____

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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 Response to the Public Comments by Citizens Against Ruining the Environment, Earthjustice, Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club on the Petition for Adjusted Standard was electronically filed on May 30, 2019 with the following:

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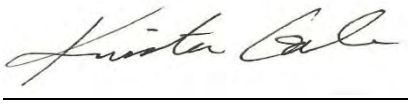
and that a true copy was emailed on May 30, 2019 to the parties listed on the above foregoing Service List.

Dated: May 30, 2019



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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:	)	
PETITION OF MIDWEST GENERATION, LLC FOR AN ADJUSTED STANDARD FROM 35 ILL. ADM. CODE PARTS 811 and 814	)	**AS 19-1 (Adjusted Standard)**

MIDWEST GENERATION, LLC'S RESPONSE TO THE PUBLIC COMMENTS BY CITIZENS AGAINST RUINING THE ENVIRONMENT, EARTHJUSTICE, ENVIRONMENTAL LAW & POLICY CENTER, PRAIRIE RIVERS NETWORK, AND SIERRA CLUB ON THE PETITION FOR ADJUSTED STANDARD

Midwest Generation, LLC ("MWGen"), by its undersigned counsel, hereby responds to the Citizens Against Ruining the Environment, Earthjustice, Environmental Law & Policy Center, Prairie Rivers Network, and Sierra Club (collectively, the "Environmental Groups") Public Comments and Request for a Public Hearing on MWGen's Petition for Adjusted Standard ("Comments"). The Environmental Groups' request that the Illinois Pollution Control Board ("Board") hold a public hearing for oral public comments on MWGen's Petition for an Adjusted Standard ("Petition") is untimely and unnecessary under the Board's rules. It should be denied because it will unnecessarily delay MWGen's right to commence closure of the Quarry.

The Environmental Groups' comments are primarily unrelated to MWGen's Petition, which is a limited request to use an alternative two-stage cover system, commonly called "ClosureTurf" for the Quarry's final cover. Other than an incorrect implication that the ClosureTurf is not a two-stage cover system, the Environmental Groups make no comment on the Petition. Instead, the Environmental Groups object to how the Quarry will close, claiming that the closure will violate the Federal Coal Combustion Residual Rule ("Federal CCR Rule") in 40 C.F.R. Part 257 and Illinois environmental law. The Board has held that it does not have the

authority to enforce Part 257, but even if it did the Environmental Groups' claims are incorrect. Moreover, the Environmental Groups' arguments that the Quarry's closure plan violates the Illinois Environmental Protection Act ("Act") are in error. The Quarry's operation and closure in place are sanctioned by the Quarry's permit issued by the Illinois EPA, consistent with regulatory closure requirements and the adjusted standard previously granted by the Board.

I. Environmental Groups' Request for Public Hearing is Untimely and Unnecessary

Under Section 104.420 of the Board's rules, a request for a public hearing regarding a petition for an adjusted standard "must be filed not later than 21 days after the date of the publication of the petition notice in accordance with Section 104.408." 35 Ill. Adm. Code 104.420. MWGen published notice of the Petition on February 8, 2019, and any request for hearing must have been made by March 1, 2019. *See* Certificate of Publication, AS19-1, February 8, 2019. The Environmental Groups' request for public hearing is untimely because it was filed on May 7, 2019, over two months after the window for requesting a hearing was closed.

Additionally, a public hearing is unnecessary because the Environmental Groups have elected to file written comments. Under Section 101.628(c) of the Board Rules, oral public comments and written public comments are prescribed as alternative means for public participation in hearings before the Board. 35 Ill. Adm. Code 101.628(c). The Environmental Groups provide no explanation as to why the information presented in their written comments is incomplete or why the substance of the proposed oral public comments is not adequately addressed in their comments. Any public hearing would unnecessarily expend time and resources to communicate information already conveyed in their written comments.

Moreover, a public hearing for oral comments that are already addressed in the Environmental Groups' written comments would unnecessarily delay this proceeding and MWGen's efforts to commence closure of the Lincoln Stone Quarry. Until the Board decides whether MWGen is

authorized to use the alternative two-stage cover material known as "ClosureTurf", it cannot proceed to implement the Closure Plan, including ordering and purchasing the requisite material required for the cover. The Environmental Groups have not presented any reasons why postponing a decision in this adjusted standard proceeding is warranted when weighed against the prejudice that would be caused to MWGen by extending the time required before the Board may rule on the Petition.

Because the Environmental Groups' request for a public hearing is untimely and unnecessary under the Board's rules, it should be denied.

II. Environmental Groups' Comments Inaccurately Address the Limited Scope of Relief Requested in the Petition

MWGen's Petition presents a straightforward and minor modification to Condition 7(c) of its adjusted standard AS-96-9. It requests an adjusted standard to allow new technology for a cover system, commonly called ClosureTurf, that fully meets the requirements of Section 811.314(b) of the Illinois landfill regulations, and the performance standards required under Section 811.314(c). 35 Ill. Adm. Code 811.314(b), (c). Petition at 7-8.[1] With one very limited exception, the Environmental Groups' comments are unrelated to MWGen's request to use the new ClosureTurf technology for the final cover of the Quarry.

The one comment the Environmental Groups do make about ClosureTurf is incorrect. They mistakenly imply that ClosureTurf is not a two-stage cover system. Comments at 1. As explained in the Petition, ClosureTurf is a two-stage cover system as mandated by the Illinois landfill closure regulations. Petition at 7, 11 and Ex. 13 of Petition at 4. Further, the Illinois EPA would not have recommended that the Board grant MWGen's Petition without finding that the ClosureTurf

[1] After review of MWGen's Petition, Illinois EPA recommended that the Board grant MWGen's Petition to use the ClosureTurf two-stage cover system. See Recommendation of Illinois EPA, at 2.

technology satisfies the requirements for a two-stage cover system. The Board should not rely on the mistaken and unsubstantiated assertion by the Environmental Groups that ClosureTurf is not a two-stage cover system.

III. The Board Should Not Consider the Claims Regarding the Federal Coal Combustion Residual Rule

The Board should not consider the Environmental Groups' claims that the Federal CCR Rule prohibits closure in place at the Quarry because the Board lacks authority to enforce 40 C.F.R. part 257. *Sierra Club et al. v. Midwest Generation, LLC,* PCB13-15, Order, slip op. at 25 (October 3, 2013). The Federal CCR Rule is located at 40 C.F.R. 257.50-257.107. In *Sierra Club*, the Board stated that it has not "adopted through general or identical-in substance-rulemaking 40 C.F.R. part 257..." *Id.* at 23. Additionally, the Board stated that the "Board's identical in substance mandate under Section 22.40(a) of the Act (415 ILCS 5/22.40(a) (2012), which relates to RCRA municipal solid waste landfill unit regulations, does not extend to 40 C.F.R. part 257." *Id.* at 23-24, *citing, RCRA Subtitle D Update, U.S.EPA Regulations (July 1, 1996 through December 31, 1996),* PCB R97-20, slip op. at 3 (Nov. 20, 1997). Thus, the Board concluded that it lacked the authority to enforce 40 C.F.R. Part 257. Because the Board does not have the authority to enforce 40 C.F.R. 257, the Board should not consider the allegations of violations of the Federal CCR Rule in the Environmental Groups' comment.

IV. Closure In Place at the Quarry Does Not Violate the Federal CCR Rule

Even if the Board were to consider the Environmental Groups' claim that the Federal CCR Rule prohibits closure in place, it would find that claim to be incorrect. MWGen is complying with the Federal CCR Rule at the Quarry, including preparing for the Quarry's eventual closure as required under 40 C.F.R. 257.102. Section 257.102(d) of the Federal CCR Rule allows for closure in place of a CCR unit and includes performance standards under which the CCR unit may close,

including slope stability, stabilization of the CCR, and a final cover system. More specifically, under Section 257.102(d)(i), the CCR unit must be closed in a manner that will: "Control, minimize or eliminate, *to the maximum extent feasible*, post-closure infiltration of liquids into the waste and releases of CCR, leachate, or contaminated run-off to the ground or surface waters or to the atmosphere." 40 C.F.R. 257.102(d)(i) (*emphasis added*). In other words, contrary to the Environmental Groups' contention, the rules do not state that MWGen must eliminate all infiltration of groundwater into the Quarry and release of Quarry water.[2] Rather, MWGen must control or minimize, to the maximum extent feasible, infiltration of the groundwater and release of Quarry water, which MWGen is doing through the corrective actions taken at the landfill pursuant to its Illinois EPA issued permit.

"Maximum extent feasible" is not defined in the Federal CCR Rule, nor in other Federal or Illinois environmental regulations.[3] In fact, MWGen was unable to locate a federal case related to environmental law interpreting that exact phrase. The Merriam-Webster dictionary defines the ordinary meaning of "feasible" as "capable of being done or carried out." *Merriam-Webster.com.* Retrieved May 22, 2019 from https://www.merriam-webster.com/dictionary/feasible. Additionally, in the Coal Combustion Waste and Surface Impoundment Rulemaking pending before the Board, the Environmental Law and Policy Center, one of the Environmental Groups here, agreed that if a company is not capable of closure by CCR removal because it is too expensive to remove the CCR from an impoundment, then the Agency could consider that as technically

[2] The Environmental Groups' comparison to the Federal hazardous waste regulations is inapplicable. *See* Comments at 6. The Federal CCR Rule was codified in 40 CFR part 257, which is part of the regulation that regulate solid waste. Hazardous waste is regulated under the hazardous waste regulations in 40 CFR parts 260 through 273.

[3] The Federal CCR Rule uses feasible as part of the definition of "reasonable", when discussing location restrictions of CCR landfills and CCR impoundments, implying that that "feasible" is similar in meaning to "reasonable" in consideration of the regulatory requirements. 80 Fed. Reg. 21364.

infeasible. *In the Matter of: Coal Combustion Waste (CCW) and Surface Impoundment Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, PCB R14-10, Transcript of June 18, 2014, Testimony of Andrew B. Armstrong, pp. 125:18-127:1. ("We believe that if a company is incapable because it is too expensive to perform the operation, that would qualify for technical infeasibility.")

In *78 Olive St., Partners, LLC v. New Haven City Plan Comm'n., 78 Olive St., Partners, LLC v. New Haven City Plan Comm'n*, No. CV156052363S, 2016 Conn. Super. LEXIS 1047, (Super. Ct. May 12, 2016) (*unreported*), a Connecticut court interpreted a similar regulatory mandate to implement a measure "to the maximum extent feasible." The plaintiff objected to the City Planning Commission's approval of a development plan, claiming it violated a zoning ordinance. *Id.* at *13-14. The zoning ordinance at issue stated that "on-site infiltration and on-site storage of stormwater shall be employed to the maximum extent feasible." *Id.* at 13. Yet, the development plan specifically excluded use of infiltration of groundwater as a stormwater management practice. *Id.* at 13. The court noted that had the ordinance not contained the phrase "to the maximum extent feasible," then the plaintiffs would have had an easier claim. *Id.* at 13-14. Instead, because the phrase modified the on-site infiltration requirement such that it was not absolutely required. *Id*. Expert opinion concluded that the urban environment prevented the use of infiltration as a means of stormwater management, and other best management practices to manage and control stormwater runoff would be employed. *Id*. at 19-21. The court concluded that the defendant complied with the ordinance, because the plan employed infiltration to the maximum extent feasible and used alternative management practices that effectuated the ultimate goals of the ordinances. *Id.*

Just like in the *78 Olive St.*, section 257.102(d) of the Federal CCR Rule does not mandate absolute control, minimization, or elimination of infiltration of groundwater into the Quarry and releases into the groundwater. Instead, the rule requires control, minimization, or elimination *to the maximum extent feasible*, which means to the maximum extent that MWGen can control and minimize the connection to the groundwater in consideration of the physical possibility and the economic reasonableness of the operation of the Quarry. That is exactly how MWGen is operating the Quarry. Through the extensive water management system and a groundwater extraction system, MWGen controls to the maximum extent feasible infiltration of groundwater into the Quarry, and also controls and minimizes to the maximum extent feasible any Quarry water from leaving the Quarry. Petition at 4-6, Ex. 2 at ¶¶4-6. As explained in the 1996 Petition, the Quarry employs a water management system that reduces the Quarry water level to below the natural water table, assuring that the Main Quarry acts predominantly as a groundwater discharge zone and not a source. Petition, Ex. 5 at 6. Additionally, MWGen installed a groundwater extraction system at the Quarry which restored an inward gradient on the south perimeter of the Quarry. Petition, Ex. 2 at ¶6. MWGen's extensive water management and groundwater extraction system controls and minimizes the infiltration of the groundwater and the release of Quarry water to the maximum extent possible based on the physical location and the economic reasonableness of the operation. Accordingly, MWGen's closure of the Quarry is in compliance with the Federal CCR Rule.

Additionally, the Indiana Department of Environmental Management ("IDEM") comments to Duke Energy (Comments at Ex. 4) do not state, as the Environmental Groups suggest, that the landfill may not be closed in place because of the level of the groundwater. IDEM requested Duke Energy provide a "description of how the plan controls, minimizes, or eliminates post-closure

infiltration and releases 'to the maximum extent feasible.'" *See* Environmental Groups' Ex. 4, p. 1. IDEM was merely requesting that Duke Energy explain in its closure plan how it will address those requirements to the maximum extent feasible for closing the landfill by leaving the material in place. IDEM did not conclude that Duke Energy's closure plan failed to satisfy the section 257.102(d) requirements.

The Environmental Groups also rely upon an unrelated part of the Federal CCR Rule preamble to mistakenly claim that the Federal CCR Rule prohibits closure in place at the Quarry. Comments at 5. The cited preamble sections are related to the location restriction requirements for new landfills and impoundments in 40 CFR. 257.60(a).[4] U.S.EPA was explaining why it required at least a distance of five feet between the base of the impoundment and the uppermost aquifer. 80 Fed. Reg. at 21361-21363. In fact, as U.S.EPA established in the rule, any impoundment less than five feet from groundwater is required to close pursuant to Sections 257.60(c)(4), 257.101(b)(1), 257.102. 40 C.F.R. 257.60(c)(4), 257.101(b)(1), 257.102; 80 Fed. Reg. 21362. But there is no restriction on the method of closure of an impoundment based upon its location or distance from groundwater. *Id.* Accordingly, if an impoundment is less than five feet from the groundwater, then it must close pursuant to Sections 257.101 and 257.102, which allow for closure in place of CCR unit, and the owner must control or minimize to the maximum extent possible, infiltration of groundwater and release of leachate. 40 C.F.R 257.102(d).

Because the Environmental Groups' Comments fail to demonstrate that MWGen's closure plan for the Quarry is inconsistent with the Federal CCR Rule, the Comments do not provide a lawful basis for widening the scope of the review of MWGen's Petition beyond the limited request to modify Condition 7(c) of the 1996 Adjusted Standard for the final cover system.

[4] The location restriction requirements in section 257.60(a) do not apply to existing landfills. 40 C.F.R. 257.60(a)

V. Closure In Place at the Quarry Does Not Violate the Illinois Environmental Protection Act

The Environmental Groups' contention that closure in place would violate the Illinois Environmental Protection Act is contrary to the relevant facts and applicable law. To show that the Quarry's operation has not caused any such violation, a brief review of the relevant facts concerning the Quarry's operations are presented here. From 1976, when the Quarry was first permitted by the Illinois EPA, to the present, Illinois EPA has consistently regulated and monitored the Quarry through its landfill permit program. Petition, Ex. 5 at 3. Pursuant to the Quarry's permit requirements and as part of the permit renewal process, MWGen has conducted numerous investigations and water management operations to address the unique subsurface geology and hydrogeology beneath the Quarry. To address the special challenges related to operation of the Quarry and in consideration of its location, MWGen has established a groundwater management zone ("GMZ"), and instituted corrective actions pursuant to 35 Ill. Adm. Code 620.250 and with the review and approval of the Illinois EPA. The corrective actions include installation and monitoring of an extensive groundwater network, a comprehensive groundwater impact assessment, and installation of a groundwater extraction system for the purpose of maintaining the inward hydraulic gradient in the groundwater.[5]

The Environmental Groups' claim that closure in place would violate the Illinois Environmental Protection Act ("Act") is inaccurate. For decades, the Illinois EPA has overseen the permitting of the Quarry, including reviewing and evaluating the Quarry operating permit renewals, which includes the Quarry's closure plan. The Illinois EPA is the regulatory agency

[5] Environmental Groups are mistaken that there has been an increase in infiltration of the groundwater into Quarry, because they incorrectly compared the volume of leachate captured by the drainage system and the volume of groundwater captured by the system. Comment at 2. The 1996 Adjusted Standard stated all but 101,400 gallons of *leachate* is captured by the drainage system whereas the KPRG Annual Groundwater Flow Evaluation addresses the capture of the groundwater entering the Quarry. Pet. Ex. 1, at 4; Comments, Ex. 1, at 4. The capture rate of the groundwater in the Quarry is unchanged since the 1996 Adjusted Standard was granted. *See* Pet. Ex. 5, at 31.

tasked with carrying out the purposes of the Act, including investigating alleged violations of the Act, and should be afforded deference to its interpretation of the Act. 415 ILCS 5/4. *Twp. of Harlem v. EPA*, 265 Ill. App. 3d 41, 44, 202 Ill. Dec. 516, 518, 637 N.E.2d 1252, 1254 (1994) (a reviewing court "should afford substantial deference to the agency's interpretation of a statute which the agency administers and enforces."); *See also Illini Envtl., Inc. v. EPA*, 2014 IL App (5th) 130244, ¶ 50, 385 Ill. Dec. 355, 364, 18 N.E.3d 900, 909 ("Courts must give substantial deference to the agency's reasonable interpretation of its own regulations and associated statutes.") Each time MWGen submitted an application for the renewal of the Quarry's permit, it included detailed technical information regarding the geology and hydrogeology at the Quarry, a description of the comprehensive water management system that controls the water in the Quarry and the groundwater that reaches the Quarry, and a detailed plan for the closure of the Quarry. The closure plan described in each application was in compliance with the design and technologies approved by the Board in the 1996 adjusted standard. Based on the technical information and operations, Illinois EPA has consistently renewed the Quarry's permit finding that the operations at the Quarry did not violate the Act.

Additionally, through the requirements under the Agency-approved GMZ, including regular reporting of groundwater monitoring results at the Quarry, the Illinois EPA is well informed of the groundwater conditions and the corrective action taken by MWGen. The purpose of a GMZ and the requisite corrective actions "is remediation, *if practicable*, of the groundwater to the level of the standards applicable to that class of groundwater. *In the Matter of: Groundwater Quality Standards (35 Ill. Adm. Code 620)*, PCB R89-14(B), Final Order, at *14 (November 7, 1991) (*emphasis added*). Thus, the Board's rule regarding GMZs recognizes the practicalities involved in conducting remediation and that achieving applicable Part 620 groundwater standards may not

always be possible. Importantly, following review and approval by the Illinois EPA, the Quarry corrective actions have been implemented to minimize any potential harm to the environment and, where practicable, to remediate the groundwater to the level of the applicable standards pursuant to its GMZ.

Altogether, the operation of the Quarry, including its future closure plans, are not in violation of the Act, but rather are consistent with the Act's and underlying regulations' purpose to limit harm to the public health and the environment while also recognizing the practical and technical feasibility of conducting corrective actions. The Environmental Groups' Comments fail to demonstrate that MWGen's closure plan for the Quarry is in violation of the Act, and do not present a sufficient basis to broaden the Board's review of MWGen's Petition to modify Condition 7(c) of the 1996 Adjusted Standard.

VI. Conclusion

The Board should deny the Environmental Groups' request for a public hearing because the request is untimely, unnecessary and will needlessly delay the Board's decision on the Petition, causing prejudice to MWGen's right to commence closure of the Quarry and delay closure of the Quarry. The Environmental Groups' comments are almost exclusively related to issues that are not before the Board for decision. Within the scope of the Petition's requested relief, the only comment is that the ClosureTurf technology is not a two-stage system, and that comment is simply wrong, and as a result, there are no valid comments that conclude the final cover system should not be approved. The other comments are a collateral challenge to MWGen's right to pursue closure in place under either the Federal CCR Rule or the Act. Although the Board has previously found that it lacks authority to hear claims under the Federal CCR Rule, even if it were to consider the Environmental Groups' argument, it would find that closure in place is not prohibited by those

rules. Similarly, the Environmental Groups' argument that closure in place violates the Act is also incorrect. The Quarry's operation and its planned closure in place are authorized by the existing permit issued by the Illinois EPA and is consistent with the closure requirements set forth in the adjusted standard relief previously authorized by the Board. For these reasons, MWGen requests that the Board follow the Illinois EPA's recommendation and grant MWGen's Petition.

Respectfully submitted,
Midwest Generation, LLC

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