BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent, Midwest Generation LLC's Sur-Reply in Opposition to Complainants' Motion for Partial Summary Judgment, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: October 3, 2016

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Respondent, Midwest Generation LLC's Sur-Reply in Opposition of Complainants' Motion for Partial Summary Judgment was filed electronically on October 3, 2016 with the following:

John Therriault, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
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and that true copies were mailed by First Class Mail, postage prepaid, on October 3, 2016 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S SUR-REPLY IN OPPOSITION TO COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to 35 Ill. Adm. Code 101.500, 101.516 and the Hearing Officer Order dated August 3, 2016, Respondent, Midwest Generation, LLC ("MWG") by its undersigned counsel, submits this Sur-Reply in opposition to Complainants' Motion for Partial Summary Judgment. Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and the Citizens Against Ruining the Environment (the "Complainants") attempt to portray their Motion for Partial Summary Judgment as simple, when it is anything but. In their Reply, Complainants gloss over the many issues of material fact MWG identified in MWG's Response to Complainants' Motion for Partial Summary Judgment ("MWG's Response") and assume facts not in evidence to build their argument. The Illinois Pollution Control Board ("Board") should deny the Motion for Partial Summary Judgment because Complainants have failed to answer the many genuine issues of material fact and issues of law.

I. Introduction

Complainants' efforts to brush over the many individual facts at the four distinctly different Stations do not negate the fundamental issues with their Motion that preclude a finding of summary judgment:

a. The partial motion for summary judgment would not further the case nor simplify any hearing because it does not resolve a single count or even a paragraph of their Second Amended Complaint.

b. Because Complainants have no evidence to establish that the "Historic Coal Ash" ("HCA") is a source of groundwater impact, Complainants brazenly suggest that MWG must somehow shoulder Complainants' burden and prove that historic coal ash areas are *not* the source of groundwater impact. It is Complainants' burden to prove their case, and certainly to prove their own Motion for Summary Judgment. Complainants cannot make unsupported accusations and then demand that MWG present evidence it does not have to refute those accusations.

c. Complainants skip a critical factor in evaluating whether a party has violated the Illinois Environmental Protection Act ("the Act") – whether the constituents in the groundwater are <u>from</u> the HCA. Instead, Complainants simply assume that the HCA is a source without evidentiary support. There is no evidence that the HCA is actually a source of the constituents in the groundwater, and the only evidence in the record shows that the HCA is not a source.

d. Complainants attempt to create an issue about MWG's expert, John Seymour, in a weak effort to cast doubt on his unrefuted opinion that the Historic Coal Ash is not a source. Mr. Seymour states in both his Expert Report and again in his deposition that the constituents in the groundwater are not from the HCA located at the Stations. He also states that the Stations are very old, and any constituents in the groundwater occurred years ago before MWG purchased the Stations. Regardless, any alleged inconsistences between an expert's report and their deposition testimony are issues of fact that cannot be decided in a summary judgment.

e. Complainants have not crested the high bar for a summary judgment. In order to grant a summary judgment, the moving party must show that all of the pleadings depositions, admissions, affidavits and all permissible inferences analyzed in the light most favorable to the non-movant so clearly favor the movant that no fair-minded person could dispute the movant's right to judgment in his favor. *Thompson v. Platt*, 116 Ill. App. 3d 662, 664 (1983). Here, there remain numerous genuine issues of material facts and issues of law that prevent the Board from granting summary judgment.

II. Partial Summary Judgment is Not Proper Because No Major Issues Will Be Resolved.

Complainants do not, and cannot, dispute that Complainants' Motion for Partial Summary Judgment ("Complainants' Motion") will not resolve a single count nor even a paragraph in their Complaint. Considering that partial summary judgments are generally reserved to resolve a major issue and no major issues are resolved here, Complainants' Motion fails on its face.

The Board cases Complainants rely upon in support of a partial summary judgment are entirely different from the partial summary judgment they are proposing. In those cases, the Board resolved *full counts or portions* of a complaint. In *W.R. Meadows, Inc. v. IEPA*, PCB No. 97-195, (May 7, 1998), the Board granted summary judgment because it resolved one of the four claims made by the petitioner in petitioner's Permit Appeal. Similarly, in *People of the State of Illinois v. Stringini*, PCB 01-43, (Oct. 16, 2003), the Board resolved nine of the eleven counts in the complaint, which the Board clearly listed in its introduction in the Order. *Id* at 1. Here, undisputed by Complainants, neither "Historic Coal Ash" nor "Historic Ash Areas" are terms used in their Complaint. Instead, Complainants are asking the Board to craft a resolution of their Complaint without any ability to determine what part of the Complaint could be resolved.

Complainants' notion that the Board can rule on some of the HCA areas and not others would utterly confuse this matter in any future hearing. *See* Complainants' Reply, p. 7. In *People v. D'Angelo Enterprises, Inc.*, PCB 97-66, 1998 WL 820932, (Nov. 19, 1998), the Board was delineating different types of hazardous wastes generated and stored at the respondent's facility. The wastes were clearly identifiable and separate from each other. *Id* at 4. Here, as established in Section IV.a of MWG's Response, and summarized below, the HCA areas are inconsistent and undefined. MWG Response, pp. 8-15 and *infra*, Sec. VI.a. As the HCA areas are scattered and disconnected over four separate facilities, it is impossible (and without basis) for the Board to

make a piecemeal selection, and it will further confuse any subsequent hearing as witnesses attempt to delineate which undefined area of each Station the Board had ruled on and the areas the Board had not.

Complainants' Motion would not shorten any future hearing. Without any support in the record or otherwise, Complainants assert that any future hearing may be shorter because the testimony of the witnesses may be shorter. Even if Complainants had some evidence in that regard, witness testimony is not the only element of a hearing. Complainants do not dispute that the voluminous record required for any future hearing will not decrease in size. As shown in MWG's Response, almost all of the documents attached to Complainants' Motion speak to all areas of the Stations, thus all of the records required for any future hearing would remain the same. *See* MWG Response, p. 6.

Regardless, the suggestion that the testimony would shorten is entirely speculative and without support. The HCA areas are undefined and scattershot throughout the four separate Stations, without any consistency. *See* MWG Response, Sec. 8-15, and *infra*, Sec. VI.a. Complainants have defined the HCA areas by exclusion – stating that they do not include the ash ponds, they do not include certain historic ash areas, but are generally "everything else". *See Complainants' Motion,* FN 3. It is simply impossible to hold a hearing on that basis. Attempting to parse out witness testimony for "everything else" would be confusing and unmanageable as the witnesses will be required to specifically identify the areas about which they are testifying. The deposition testimony and report of Complainants' expert, James Kunkel, highlights this point. Mr. Kunkel repeatedly states in his deposition, that he does *not* know the source of the constituents in the groundwater and that "*there is no way to know*." *See* MWG Response Ex. 11, Tr. 140:15-141:1, 188:5-18, Tr. 115:16-21. His report was equally obtuse, opining only that the source could be

anything on each of the Stations. *See* MWG Response Ex. 10, pp. 14, 20, 28, 34. Aside from the fact that Complainants' own expert does not support their argument concerning the HCA as a source, Mr. Kunkel cannot divvy up his own opinion and other witnesses will be similarly unable to do so.

Complainants' Motion will not resolve a single part of Complainants' Complaint, will not shorten any subsequent hearing, and will confuse the issues of this already complicated case. For these reasons alone, the Board should deny Complainants' Motion.

III. Complainants Have The Burden To Prove Their Allegations.

It is Complainants' burden to prove the violations of the Act by a preponderance of the evidence. *Rodney B. Nelson, M.D. v. Kane County Forest Preserve, et al.* PCB 94-244, 1996 WL 419472 (July 18, 1996), slip op at 5. Complainants' burden is even higher for a summary judgment where all averments must be analyzed in the light most favorable to MWG. *Thompson v. Platt*, 116 Ill. App. 3d 662, *see also People of the State of Illinois v. General Waste Services, Inc.* PCB 07-45, 2008 WL 4559540, September 30, 2008, *slip op at* 1. ("The summary judgment determination is made on the basis of an examination of all materials submitted in the light most favorable to the party opposing the motion for summary judgment.") In this case, Complainants assert, without support, that certain unknown Historic Ash Areas must be a source of groundwater impact simply because ash-related constituents have been found in groundwater in *other* areas of the Stations. Complaints now argue that their bald assertion is enough and MWG should have to prove the HCA is *not* the source. The argument is pure sophistry and turns the law and the legal system on its head.

Complainants' repeated attempts to improperly thrust the burden of their case onto MWG by claiming that Complainants need not prove a negative averment is inapplicable and unsupported.

See Complainants Statement of Facts ("SOF") 12, 13, 69, 71, 72, 82-85, 93-96, 98, 106, 107, 109, 111; Complainants' Reply pp. 10-11, 21.[1] Complainants cite to merely two inapposite cases that are easily distinguished. The burden shifting allowed in the cases relied upon by Complainants is only allowed when a movant shows that the means of proving their claim "is in the exclusive possession" of respondent. *In re Storment*, 203 Ill. 2d 378, 395, 786 N.E.2d 963, 972 (2002) *citing Belding v. Belding*, 358 Ill. 216, 220-221 (1934). In fact, the Court in *Snyder v. Ambrose*, quoting *Belding*, found that it was the plaintiff's burden to establish that the plaintiff had mitigated the damages in a breach of lease agreement because the plaintiff was best suited to present those facts. *Snyder v. Ambrose*, 266 Ill. App. 3d 163, 166 (2nd Dist. 1994).

Similarly, in *In re Storment*, the Illinois Supreme Court held that only when it is shown that a party alone possesses information concerning a disputed fact, and it is shown that the information *can be* produced by only that party, then the presumption arises in favor of the adversary's claim. *In re Storment* at 395. In *Storment*, the ARDC alleged that the respondent improperly divided legal fees even though the ARDC had not established the specific hours worked by the respondent. *Id.* The ARDC argued that it was respondent's burden to present the total number of hours worked as it was within respondent's own knowledge and he would have the time records. The Supreme Court disagreed, finding that the ARDC elicited testimony from respondent and other witnesses and there was no indication that the time records existed. Moreover, the Supreme Court found that if the ARDC desired such records, the opportunity existed to make the appropriate inquiries during the discovery process. *Id* at 395-396. Thus, the Supreme Court held that the burden of going forward with the evidence of time spent had not shifted but remained with the ARDC. *Id* at 396.

[1] MWG incorporates by reference the multiple objections made to Complainants' statements of fact that failed to include any citation to the record. *Seegers Grain Co. v. Kansas City Millwright Co.*, 230 Ill. App.3d 565, 569 (1992) (Allegations of fact must be supported by the record); *Malec v. Sanford*, 191 F.R.D. 581, 583 (N.D.Ill. 2000) ("Factual allegations not properly supported by citation to the record are nullities.")

Here, Complainants argue that MWG should shoulder the burden of showing that some undefined Historic Ash Areas are not a source of groundwater impact. Yet, Complainants have not shown, because they cannot show, that MWG is able to produce any such information. MWG *cannot* produce the information related to Complainants' claims because it is not in possession of such information. The only information in MWG's possession is that the HCA is not a source. MWG has produced sample results from three different areas of historic ash showing that the historic ash is *not* a source, a fact which Complainants conveniently exclude from their motion by defining the historic ash areas to avoid those sample results. *See* Complainants' Motion, FN 3, ¶¶2-4. MWG has also produced an expert opinion concluding that the historic ash is not a current source. *See* Complainants' Ex. G, pp. 46-48, 52.

In the course of discovery, MWG has disclosed almost 60,000 pages of documents and has presented ten witnesses for depositions related to all of the Stations. As the Illinois Supreme Court held in the *Storment* case, Complainants have had every opportunity during the discovery to make the appropriate inquiries and all of the requested information related to the HCA areas at the Stations has been revealed. Complainants cannot now be allowed to state that because there is no information to disprove their allegations about select ash areas – even though there is sampling evidence from other historic ash areas -- that they have shouldered their burden of proof. If so, all litigation would be turned on its head and a complainant would be able to make blind factual statements without any proof or support and demand the respondent present proof to deny the alleged fact. Because Complainants have not presented evidence in support of their Motion, Complainants' Motion must be denied. *United National Ins. Co. v. Fasteel, Inc.*, 550 F.Supp.2d 814, 823 (N.D.Ill. 2008) (Court denied motion for summary judgment in part because movant provided no facts in support).

IV. Complainants Cannot Establish the HCA as a Source of Groundwater Constituents.

In their Motion and Reply, Complainants skip a critical step in their analysis – whether the HCA is a source of the constituents in the groundwater. Instead, Complainants conclude, based solely on the fact that MWG owns and/or operates the Stations and that there is historic coal ash at various undefined locations at the Stations,[2] that therefore the Board must find that the historic coal ash has caused water pollution in violation of the Act. *See* Complainants' Reply, p. 11. Complainants are effectively saying that it does not matter where the constituents in the groundwater are coming from, the fact that the constituents exist in the groundwater means there is a violation relating to the HCA. That is not the law in Illinois. The Board has held that the Act does not operate under a theory of strict liability. *People of the State of Illinois v. William Charles*, PCB 10-108, 2011 WL 1049280, March 17, 2011 at 8, *citing People v. A.J. Davinory Contractors*, 249 Ill. App. 3d 788, 793 (5th Dist. 1993). Rather, Complainants must show whether the constituents in the groundwater are actually from the "Historic Coal Ash" as alleged in their Motion. *Lonza, Inc. v. Illinois Pollution Control Board*, 21 Ill. App.3d 468, 475 (3rd Dist. 1974) (Court vacated Board order because the evidence was insufficient to identify the source), *Harold Craig and Robert Craig v. The Pollution Control Board*, 59 Ill.App.3d 65, 69 (4th Dist. 1978) (Court reversed Board finding because no expert could identify the source).

No expert has concluded that the HCA is a source of the constituents and there is no data to support that conclusion. To the contrary, undisputed analysis of the results of the coal ash samples at the Stations, together with an expert opinion, shows that historic coal ash is not a source of the constituents in the groundwater.

[2] MWG disputes many of the alleged locations of HCA at the Stations, *See* MWG Response, App. A, MWG's Responses to SOF No. 4-11.

a. There is No Data to Support that the HCA is a Source.

As explained in Sec. VI.b. of MWG's Response, Complainants' argument that unknown and undefined areas of historic ash that have not been sampled must be a source because there is no analysis to show otherwise, is utterly backwards and without support. Simply assuming that the HCA is the source is insufficient. *See* MWG Response, pp. 32-35. The Board addressed the same situation in *Rodney B. Nelson, M.D. v. Kane County Forest Preserve*, PCB 94-244, 1996 WL 419472, (July 18, 1996). There, the complainant alleged that variations in iron levels in the groundwater were due to the leachate from the Midway/Settlers' Hill Landfill. The Board found the variation in iron could be due to multiple sources including natural variations, variations in groundwater flow under the landfill, or sources other than the landfill. *Id* at 6. However, there was nothing to indicate that the landfill was causing the contamination. *Id.*

Similarly, in this case there is nothing to indicate that the untested HCA is causing contamination. In fact, the sample results evaluated by MWG's expert, Mr. John Seymour, show that the coal ash outside the ponds is not causing impact to groundwater. *See* MWG Response, p. 15-16. Complainants' own expert, Mr. Kunkel, states that he cannot conclude where the constituents in the groundwater are coming from. *See* MWG Response, p. 17. According to Complainants' expert, the constituents in the groundwater could be coming from the ash ponds, the coal ash outside of the ponds, changes in the groundwater elevations due to neighboring surface waters, or other natural sources, "…there is no way to know." *See* MWG Response, p. 17, and MWG Ex. 11, Tr. 141:1.[3] In other words, according to Complainants' own expert, the HCA may

[3] Complainants attach a single page from Mr. Kunkel's deposition in an attempt to rebut his repeated assertions that he does not know the source of the contamination at the Stations. While Mr. Kunkel's repeated statements that the source could be any or all of the potential sources are clear and unequivocal, at the very least, Complainants' assertion that Mr. Kunkel's testimony is inconsistent further supports that there are genuine issues of material fact. *See* Sec. V.b. of this Sur-Reply and *Corroon & Black of Illinois, Inc. v. Manger*, 145 Ill.App.3d 151, 164 (1st Dist. 1986)(Court found summary judgment inappropriate because of conflicting deposition testimony).

be contributing to the constituents in the groundwater *or it may not be at all*. Certainly, a motion for summary judgment cannot be granted when the movant's own expert cannot state that the claimed substance is actually a source. *Harold Craig and Robert Craig v. The Pollution Control Board,* 59 Ill.App.3d at 69. This disputed issue of material fact is the very heart of Complainants' motion and precludes a finding of summary judgment.

b. The Only Evidence in the Record Establishes That Areas of HCA are NOT Causing or Allowing Groundwater Contamination.

Even assuming all of the HCA areas as defined by Complainants actually have coal ash -- a disputed issue of fact -- the evidence shows that the historic coal ash is not causing groundwater contamination. Mr. Seymour analyzed data from ash outside the ash ponds, and based upon that data concluded that the historic ash in the fill materials was not adversely impacting the groundwater. *See* MWG Response, pp. 15-17, *citing* Complainants' Ex. G, pp. 46-48, 52. Further, contrary to Complainants' protestations, Mr. Seymour reiterated in his deposition that HCA is not a source for the constituents in the groundwater, and a source could be some other "historic" use. MWG Response, p. 16, *citing* Ex. E5, Tr. p. 41:2-5; see also Section V, below. The fact that HCA areas are not a source can be seen in the groundwater downgradient from the Former Ash Basin, an area of known historic coal ash. As shown Complainants' Exhibit D18, the groundwater results from the monitoring wells downgradient of the Former Ash Basin show that all of the constituents identified by the experts as coal ash indicators are below the Class I standard, indicating that the historic coal ash in the Former Ash Basin is not a source. *See* Complainants' Ex. D18, at MWG_56201, 56211-56214.

c. Complainants Fail to Establish Groundwater Impacts Near or Related to Historic Ash Areas.

For numerous HCA areas, there are no groundwater samples or analysis to establish that the groundwater is even impacted, or that the HCA areas are a source. As established in MWG's

Response, and undisputed by Complainants, there are no groundwater wells near most of the alleged HCA areas, *See* MWG Response, pp. 32-35. As there are no sample results of the groundwater in areas near the alleged historic ash, there is no actual evidence that the groundwater is even impacted in those areas, or that any impact relates to the HCA. Without proof that the groundwater is contaminated, Complainants cannot establish that there is a violation. Facts alleged without support cannot stand and the Board must deny Complainants' Motion. *Seegers Grain Co. v. Kansas City Millwright Co.*, 230 Ill. App.3d 565, 569; *Fuller v. United States*, 2012 WL 2031979 (S.D.Il. 2012) (Motion for summary judgment without relevant or credible evidence in support denied); *United National Ins. Co. v. Fasteel, Inc.*, 550 F.Supp.2d 814, 823 (N.D.Ill. 2008) (Court denied motion for summary judgment in part because movant provided no facts in support).

MWG has identified and produced the analysis from the Stations which shows that the historic coal ash outside of the ash ponds is not impacting groundwater at the Stations. See MWG Response, pp. 15-17, 32-35, Complainants' Ex. G, pp. 45-48, 52. Thus, MWG has surpassed its burden in denying that the coal ash outside the ash ponds is a source. Regardless, that MWG has conflicting evidence disputing the Complainants' conclusory assertions shows that there are genuine issues of material fact and law, precluding any finding of summary judgment. *People of the State of Illinois v. Skokie Valley Asphalt, Inc.*, PCB 96-98, 2001 WL 505193, (May 3, 2001) at *1 ("Summary judgment is a drastic means of disposing of litigation, and therefore it should be granted only when the movant's right to the relief, is clear and free from doubt.")

V. MWG's Expert Consistently Opines that HCA is Not a Source.

Complainants either do not understand or purposefully misrepresent the opinions of MWG's expert, John Seymour, in an obvious attempt to discredit undisputed evidence in the record about HCA – that it is not a source. Complainants first try to avoid dealing with the sample

results from three different areas of historic ash, which show that the historic ash is not a "source", by opportunely defining "Historic Coal Ash Areas" to exclude those sampled areas. Complainants then attempt to cast doubt on Mr. Seymour's expert opinion that analyzes the historic ash areas by creating an alleged inconsistency that does not exist. Mr. Seymour's report and depositions are consistent and state that the historic coal ash at the Stations is not a source of constituents in the groundwater. Regardless, any alleged inconsistencies between an expert's report and his deposition testimony are a factual issue that should be evaluated by the Board at a hearing and not for summary judgment. Complaints' baseless notion that Mr. Seymour's Expert Report somehow constitutes a "sham affidavit" is inapplicable here not only because the report was written and submitted *before* the deposition, unlike a "sham affidavit", but also because there are no inconsistencies. In any case, and even though not applicable here, Complainants misrepresent Illinois law on this issue. In Illinois, an expert is entitled to submit an affidavit to clarify his statements during the deposition, and that is not considered a "sham."

a. Mr. Seymour's Report and Deposition Testimony are Consistent.

Mr. Seymour's testimony in his deposition is consistent with his opinions in his Expert Report. Mr. Seymour clearly states that the coal ash outside the ponds is not a source. He bases his opinion on sample results from historic ash areas which clearly show that the ash located outside of the ponds is not leaching any constituents to groundwater and is not a source.

Complainants selective questioning of Mr. Seymour in his deposition cannot be used to avoid the opinions from his Expert Report. Importantly, Complainants did not ask Mr. Seymour to explain his opinion about historic coal ash in his report. *See* Complainants' Ex. E5, Tr. 174:23-24 (Complainants' counsel: "I'm not asking necessarily about opinions in your report, I'm asking about your opinions today."). In particular, Complainants did not ask Mr. Seymour about his

opinions clearly stated on pages 46-48 and 52 of his report and did not ask how he defined "historic." Nevertheless, Mr. Seymour explained in his deposition that he considers "historic" uses at the Stations to be 50 years old, or even 60 or 100 years old, which is long before MWG owned or operated the Stations. Complainants' Ex. E5, Tr. 38:1-4, 48:3-20. Thus, the coal ash placed decades ago may have caused the constituents that are in the groundwater, but the "horse left the barn" long ago. As established by sample results, the constituents that arguably may have been in the coal ash more than 50 years ago are no longer present, and the coal ash that is still there is not a source. *See* Complainants' Ex. G, pp. 46-48, 52.[4]

It is not surprising that Complainants are struggling to avoid the historic ash samples and Mr. Seymour's opinion, because the issue is essential to whether MWG has "caused or allowed" a violation of the Act. As the historic coal ash areas at the Stations are not a source (even assuming they once were more than 50 years ago), MWG cannot be "causing" or "allowing" any groundwater pollution since it began operating the Stations. MWG does not have control of the source of any alleged contamination because the source is gone. It is insufficient to simply show that historic coal ash is present and that MWG owns the properties. Complainants must also show that the coal ash is a source and MWG caused or allowed that source to result in groundwater contamination, which Complainants have failed to do here. *See also* MWG Response, pp. 36-44, and *supra* Sec. IV.c.

[4] Complainants show in footnote 8, on page 27 of their Reply that they disagree with MWG's interpretation of Mr. Seymour's deposition testimony. However, by the very nature of disagreeing over the interpretation of the testimony of a key witness relied upon by both parties, Complainants' motion for summary judgment is anything but free from doubt. *People of the State of Illinois v. Skokie Valley Asphalt, Inc.*, PCB 96-98 (May 3, 2001) 2001 WL 505193, at *1 ("Summary judgment is a drastic means of disposing of litigation, and therefore it should be granted only when the movant's right to the relief, is clear and free from doubt.")

b. Inconsistencies Between an Expert Report and Expert Testimony are Not a Matter for Summary Judgment.

Even if the Board accepts Complainants' strained reading that Mr. Seymour's testimony and Expert Report are inconsistent, the result is the denial of Complainants' Motion for partial summary judgment. Inconsistencies between the expert report and a deposition are credibility determinations and not a matter for summary judgment. *Freeland v. Enodis Corp.*, 540 F.3d 721, 738 (7th Cir. 2008); *See also Saad v. Shimano American Corp.*, 2000 WL 1036253 (N.D. Ill. 2000) *7 (Alleged inconsistencies between an expert report and deposition testimony are a factual determination for the trier of fact). Considering that a court may not make credibility determinations or weigh evidence in a summary judgment, any apparent inconsistency between Mr. Seymour's report and his deposition testimony simply raises an issue of material fact that goes to the weight of the evidence, and the Board may not grant Complainants' motion. *Irvington Elevator Co. v. Heser*, 2012 IL App (5th) 110184, ¶ 10, 982 N.E.2d 824, 827-28 (5th Dist. 2012), *citing AYH Holdings, Inc. v. Avreco, Inc.*, 357 Ill.App.3d 17, 31, 292 Ill.Dec. 675, 826 N.E.2d 1111, 1124 (1st Dist. 2005).

c. Complainants' Theory of "Sham Affidavit" is Inapplicable and Misstates Illinois Law.

Complainants' use of a "sham affidavit" argument to discredit Mr. Seymour's Expert Report is unfounded. The purpose of the sham affidavit theory is to prevent a party from creating issues of credibility by allowing one of its witnesses to contradict his own prior testimony. *Adelman-Tremblay v. Jewel Companies, Inc*., 859 F.2d 517, 520-521 (7th Cir. 1988). Thus, a witness would make a contradictory statement in an affidavit *after* making a first statement in a deposition, to "clarify" the earlier statement. In fact, that is how the court in *Adelman-Tremblay v. Jewel Companies, Inc*. defined it, by stating that "an affidavit that conflicts with its *earlier* deposition testimony," and "affidavits that contradict *prior depositions*" is the sham affidavit. *Id.*

at 520-521. Moreover, it was important to the judge in *Adelman-Tremblay* that that the original testimony was a "model of clarity." Thus, the subsequent affidavit, which directly contradicted his very clear testimony, was disregarded as a sham. *Id* at 521.

Here, Complainants allege that the "sham" is Mr. Seymour's original opinion in his Expert Report, apparently because the Report is "unsworn." Complainants' Reply, p. 23. There is no support for Complainants' fabricated theory. An expert report, required under the Parties' agreed schedule and under Illinois Civil Procedural Rule 213, cannot be called a "sham" and be disregarded simply because Complainants claim there are inconsistencies between the report and the deposition testimony. Otherwise, every expert report submitted by any party in any case - including the report of Complainants' own expert - would be of no value and completely suspect. Mr. Seymour specifically states in his Expert Report that "each of my opinions is supported by a reasonable degree of scientific certainty" Complainants' Ex. G, p. 2, section 1.2, which is the appropriate standard for expert testimony.

Regardless, Mr. Seymour's Expert Report and his deposition testimony are not contradictory. *See supra* Section V.a. In order to resolve any argument that MWG has the burden of presenting sworn testimony in order to raise a disputed issue of material fact, Mr. Seymour has signed a sworn affidavit affirming the statements and conclusions he made in his Expert Report. *See* Affidavit of John Seymour attached as Ex. A.

d. An Expert Witness May Clarify Deposition Testimony With An Affidavit.

Even if the Board concludes that Mr. Seymour's report and deposition testimony are somehow inconsistent, and that the issue does not result in denial of Complainants' Motion, the Board should also reject Complainants' unique "sham affidavit" theory because in Illinois expert witnesses are allowed to submit an affidavit after a deposition to clarify an ambiguity. *Schmall v. Village of Addison*, 171 Ill.App.3d 344 (2nd Dist. 1988).

In *Schmall*, after the deposition, and in support of a response to a motion for summary judgment, the non-movant submitted an affidavit by its expert explaining statements the expert made during the deposition. *Id* at 348. The court found that where a deponent "has not made deliberate, repeated and unequivocal statements, it is possible, for purposes of a motion for summary judgment, *to controvert the claimed admissions made in those statements*." *Schmall* at 348, *citing Young v. Pease*, 114 Ill.App.3d 120, 124, 69 Ill.Dec. 868, 448 N.E.2d 586 (1st Dist. 1983). Thus, the court first considered the expert's *entire deposition*, and not just isolated portions, to evaluate whether the statements made in his deposition were "so unequivocal and deliberate as to preclude explanation or contraction by way of an affidavit." *Id* at 348. In looking at the expert deposition, the court noted that the expert's testimony was not unequivocal as to preclude explanation by an affidavit, and also noted that the expert was not questioned about certain requirements at issue in the motion. The court concluded that the affidavit did not contradict the deposition, but merely set forth the expert's understanding of the questions asked. *Id*. In other words, "a deponent may controvert earlier statements that that are not deliberate, repeated and unequivocal." *Thompson by Thompson v. Heydemann*, 231 Ill.App.3d 578, 583 (1992).[5]

Even accepting Complainants fabricated theory that an Expert Report prepared before a deposition could be a "sham," the Board must first look to the *entire* deposition of Mr. Seymour and not simply view the portion cited by Complainants in their Reply. A review of the entire deposition shows that Mr. Seymour was not inconsistent in his opinion, but clearly stated that the "historical" uses of ash at the Stations were from approximately 50 years ago, and are not a source. A specific and clear example of comparing the entire deposition with the excised portion can be

[5] One of the cases relied upon by Complainants, *Tongate v. Wyeth Labs*, 580 N.E.2d 1220, 1227-1228 (1st Dist. 1991), also concluded that inconsistencies in the deposition testimonies of the reviewing doctor were not so clear and unequivocal that the second deposition would be considered contradictory such that it would be disregarded.

seen on page 38 of Mr. Seymour's deposition. Complainants cite to that page of his deposition to support their notion that historic coal ash is currently causing the constituents in the groundwater. Complainants' Reply, p. 19 *citing* Complainants' Ex. E5, Tr. 38:13-15. Yet, on that same page, Mr. Seymour distinctly states that "the Power Plant is over 50 years old and there are many historic uses at the site that may have caused the impacts…" Complainants' Ex. E5, Tr. 38:1-2; see also MWG Response, p. 16. Similarly, on page 48 of his deposition, Mr. Seymour states: "*Historically, the way power plants operated 50, 60, 100 years ago* is the waste was not contained as it is now. So there's uncontained waste that historically caused some impacts, but what we've sampled recently does not appear to be contributing." (*emphasis added*) *See* Complainants' Ex. E5, Tr. 48: 16-20. Simply looking at Mr. Seymour's deposition shows that Mr. Seymour's testimony was fully consistent with his Expert Report.

VI. MWG Raises Genuine Issues of Material Fact and Law that Preclude Summary Judgment.

MWG disputes 94 of the 138 Statements of Facts alleged in Complainants Motion. *See* MWG's Response, App. A. The disputes of fact are both broad, such as the actual locations of the "Historic Coal Ash" areas as defined by Complainants, and narrow, such as whether the actions taken pursuant to the Compliance Commitment Agreements ("CCAs") were corrective actions.[6] On a motion for summary judgment, the trial court has a duty to construe the record strictly against the movant and liberally in favor of the nonmoving party. *Williams v. Manchester*, 228 Ill.2d 404, 417, 320 Ill.Dec. 784, 888 N.E.2d 1 (2008). As a result, the Illinois Supreme Court has stated that "summary judgment is not appropriate: (1) if there is a dispute as to a material fact…; (2) if

[6] In footnote 2 of Complainants' Reply, Complainants state, without any support, that they disagree that the actions taken pursuant to the CCAs were corrective actions. Considering that Complainants are claiming in their motion that there are no issues of material fact, Complainants appear to have created yet another material issue.

reasonable persons could draw divergent inferences from the undisputed material facts…; or (3) if reasonable persons could differ on the weight to be given the relevant factors" of a legal standard …." *Seymour v. Collins*, 2015 IL 118432, ¶ 42, 39 N.E.3d 961, 975 (2015) (*citations omitted).*

For the Board to grant a motion for summary judgment, "the Board must find that there is no genuine issue of material fact and that the undisputed facts show that complainant's right to the relief requested is 'clear and free from doubt.'" *People of the State of Illinois v. Skokie Valley Asphalt, Inc.*, PCB 96-98 (May 3, 2001) 2001 WL 505193, at *2. In this Motion, the disputes of material fact are so numerous and complicated, that it is full of doubt and cannot be resolved at this stage.

a. Complainants' Definition of HCA is Convoluted and Unworkable.

As described in MWG's Response and reaffirmed here, the "HCA areas" that are the subject of Complainants' Motion are ill-defined, inconsistent and vague. Complainants' Reply does not present any clarity and simply adds to the confusion. Complainants rely upon their previously filed Response to MWG's Motion for Extension in an attempt to explain the location of the HCA areas. Interestingly, in that Response Complainants repeatedly admit that describing the HCA areas is "complicated" and full of complexities. Citizen's Response, June 17, 2016, p. 5-6. The confusion over the HCA areas is three-fold: (1) all of the areas are under a heading entitled "Historic Coal Ash"; (2) the definition of "corrective actions"; (3) absence of evidence of coal ash.

i. <u>Complainants Include Statements of Fact 4 Through 13 Under the Heading "There is Historic Coal Ash at All Four Plants".</u>

The confusion begins on page 4 of Complainants' Motion which has the heading "There is Historic Coal Ash at All Four Plants." Complainants' SOF 4 through 13 are under that heading. Thus, as explained in MWG's Response, the areas described in SOF 4 through 13 must be "Historic Coal Ash," otherwise Complainants would not have written it that way. Complainants now asset

that the areas defined in SOF 6, 8 and 11 are not actually HCA. Reply, p. 4. Complainants do not explain how the Board (or MWG) can decipher that the areas of the Stations described in paragraphs under the heading "Historic Coal Ash" are not actually "Historic Coal Ash." Moreover, Complainants do not explain the purpose of including the areas described in SOF 6, 8, and 11 in their Motion, if they are now so insistent that the areas are not a part of their HCA definition. By including the areas in the Motion, yet later insisting that the areas are not a part of the Motion, Complainants force the Board to make a factual determination as to which areas at each of the Stations are actually a part of Complainants' Motion, which the Board may not do. *Irvington Elevator,* 982 N.2d 827-28. By this confusion, Complainants' have created a material issue of fact that precludes summary judgment.

ii. The Definition of "Corrective Actions" Is In Dispute.

Complainants also dispute whether actions taken by MWG pursuant to the CCAs are "corrective actions." Complainants explicitly exclude from their definition of HCA the repositories that were subject to corrective action under the CCAs. *See* Complainants' Motion, FN 3, ¶6. As all of the Stations were subject to corrective actions pursuant to the CCAs, MWG concluded that almost all of the Station areas were excluded from Complainants' Motion. *See* MWG Response, pp. 8-15. In their Reply, Complainants "disagree" that the ELUCs and GMZs are corrective actions, yet they present no reason why the responsive actions taken pursuant to the CCAs are not corrective actions. Instead, Complainants vaguely state that they excluded "certain coal ash repositories that were subject to corrective action under the CCAs." *See* Complainants' Reply, p. 4. Complainants do not identify which "certain" areas they are excluding, nor do they define which actions taken pursuant to the CCAs were "corrective actions" and which were not.

The GMZs and ELUCs are actions taken pursuant to the CCAs and correct the alleged violations. They can only be "corrective actions" taken pursuant to the CCAs. At the very least, the Board must make a factual determination as to whether the corrective actions taken by MWG pursuant to the CCAs, including the ELUCs and GMZs, are a part of Complainants' HCA areas, which it may not do. *Irvington Elevator*, 982 N.E.2d at 827-28.

iii. Absence of Evidence of Coal Ash.

The Parties particularly dispute whether certain areas of the Stations actually contain coal ash. *See* MWG's Response, App. A, Responses to SOF Nos. 4, 5 and 7. Complainants rely on a map pulled from old, unsworn and unsubstantiated reports, prepared for another company, with no sample results, to "prove" the presence of coal ash. These reports are contradicted by MWG's testimonial evidence in which MWG employees state they are unaware of coal ash in those areas. In particular, as shown in MWG's Response to Complainants' SOFs, there are multiple disputes as to whether the locations identified by Complainants actually contain coal ash at all. *See* MWG Response, App. A, Responses to SOF 4, 5, 7. As there is conflicting evidence whether there is historic coal ash in the locations included in Complainants' Motion, there is a material issue that again precludes a finding of summary judgment.

1. "Former Slag/Fly Ash Storage Area" at Waukegan

There is conflicting evidence concerning whether the "Former Slag/Fly Ash Storage Area" at Waukegan actually contains ash. Both parties rely upon statements and testimonies of Mr. Frendt, Ms. Race and Mr. Veenbaas to support their position. (Reply, p. 12; SOF Nos. 4, ¶1, 63, 65 and MWG's Response, App. A, Response to Nos. 4, ¶, 63, 65). MWG cites to testimony from Station employees in a position to know, that they had no knowledge of ash in the area. In their Reply, Complainants cite to testimony from those same individuals, but the testimony only

concerns limited points of reference and a boring location, to support Complainants' claim there is ash in the entire area. *Id*. Although MWG disputes whether testimony about specific borings presents sufficient evidence to establish ash in an entire area, by the very nature of having conflicting deposition testimony, there is a genuine issue of material fact as to whether this area actually contains coal ash. (*Corroon & Black of Illinois, Inc. v. Manger*, 145 Ill.App.3d 151, 164 (1st Dist. 1986)(Court found summary judgment inappropriate because of conflicting deposition testimony), *Aetna Ins. Co. v. California Union Ins. Co*., 136 Ill.App.3d 288, 292 (1st Dist. 1985) (Resolution of issues in case are not appropriate on a motion for summary judgment as the deposition testimony is conflicting).

Complainants' reliance on *Steiner Elec. Co. v. NuLine Techs.* to argue that a lack of knowledge does not create a question, is in applicable. *Steiner Elec. Co. v. NuLine Techs*, 364 Ill.App.3d 876, 847 N.E.2d 656 (1st Dist. 2006); Reply, p. 13. In that case, the court did not hold that lack of knowledge, especially by persons in a position to know, could not be used to create a question of fact. Rather, the court found that the defendant's witness testified in her deposition that she had no knowledge of any fact related to the lawsuit, including the defendant's claims or credits. Her subsequent affidavit contradicting her deposition and stating conclusions on the claims and credits was stricken because of the clear conflicting testimony. *Steiner Elec. Co. v. NuLine Techs*, 364 Ill.App.3d 876, 847 N.E.2d 656 (1st Dist. 2006).

Here, unlike the witness in *Steiner Elec. Co. v. NuLine Techs.*, who had no knowledge of any of the relevant facts, Ms. Race and Mr. Frendt are quite knowledgeable about the Stations. They have participated in numerous investigations and visits and their positions at MWG put them in a position of knowledge. *See* Complainants' Ex. E4, Tr. 8:6-23 and Complainants' Ex. E7, Tr. 7:18-10:3. Thus, their deposition testimony that they have no knowledge that the "Former Slag/Fly

Ash" area actually contains ash comes from a place of knowledge as opposed to a place of ignorance.

Complainants also rely upon a map in an old Phase II report prepared for the prior owner of the Station in 1998. *See* Complainants Reply, p. 12. However, the 1998 Phase II report has no sample analysis of the area and the report gives no basis for a label on a map showing an ash area. Complainants' Ex. A2. It is possible that the labels on the 1998 Phase II maps are "mere speculation," as they were prepared by a consultant, for the prior owner, unsworn and without any citations to how the consultant concluded that this area may contain ash. Complainants are asking the Board to *infer*, based upon an eighteen year old report prepared for the prior owner of the Station and without any actual analysis or sampling, that the entire area contains coal ash. Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *North Community Bank v. 17011 South Park Ave., LLC*, 390 Ill. Dec. 695, 29 N.E.3d 627 (1st Dist. 2015). As explained in MWG's Response to SOF No. 4, ¶1, there is no sampling of the area or other information to support a conclusion that there is actually ash in that area. Moreover, no one testified that the area contains coal ash. Of course, this dispute simply means that the Board must weigh the disputed evidence presented by the Parties, which is not appropriate for a summary judgment. *Irvington Elevator Co.*, 982 N.E.2d at 827-28.

2. The "NE Landfill" and "SE Landfill" at Joliet 29

There is also conflicting evidence regarding the "NE Landfill" and "SW Landfill" at Joliet 29. Again, Complainants rely upon two reports that contain no sample results of the areas, and MWG relies upon the deposition testimony of two employees with experience at the Station.

Complainants are dismissive of the testimony of James DiCola and Ms. Race, who both state they have no knowledge that the areas were landfilled.[7] Again, both Ms. Race and Mr. DiCola have extensive knowledge of the Joliet 29 plant due to their roles at the Stations. *See* Complainants' Ex. E4, Tr. 8:6-23 and J. DiCola Dep, Tr. 10:3-13:24 attached as Ex. B of this Sur-Reply. Neither of the witnesses are speculating, but speaking from a position of knowledge about the Stations.

Further, Complainants' reliance upon a map in a 1998 Phase II report, which does not have any actual analysis or sampling of either area, is as problematic as their reliance on the Waukegan 1998 Phase II Report. Similar to the Waukegan 1998 Phase II, considering that there is no citation on the map or in the Phase II to the basis for labelling the two "landfills," it is possible that the consultant was simply speculating as to the content of the area. *See infra* Sec. VI.a.iii.1.

Complainants also rely upon a 2009 KPRG report prepared by Rich Gnat of KPRG. The 2009 KPRG Report does not have samples taken from the NE Landfill area, instead it only describes the surface. Hence, it is not sufficient evidence to show that the subsurface is full of ash. Moreover, unlike the consultant who prepared the 1998 Phase II, Complainants had the opportunity to depose Mr. Gnat; yet, Complainants did not ask Mr. Gnat about the 2009 report in his deposition. *See* Complainants' Ex. E3. Nevertheless, Mr. Gnat stated in his deposition while discussing the Joliet 29 station that he was "not aware of any disposal areas." Complainants' Ex. E3, Tr. 49:20. He also stated that he had not performed any borings through the area east of the ash ponds. Complainants' Ex. E3, Tr. 48:3-8.

[7] Complainants improperly cite to and rely upon *U.S.Bank v. Blachaniec*, 2016 IL App.(1st) 150175-U (Ill. App. Ct. 1st March 21, 2016) on page 14 of their Reply. This opinion has no weight and cannot be relied upon because the Court ordered it to be published under Supreme Court Rule 23, which specifically states that an opinion entered under this Rule may not be cited as precedent by any party except under limited circumstances, none of which apply here. Ill. S. Ct. R. 23(e)(1). A party's citation to an opinion published under Rule 23 to support any claim or argument is "strictly prohibited." *Voris v. Voris*, IL App (1st) 103814, 17, 961 N.E.2d 475, 479, 356 Ill.Dec. 379 (1st Dist., 2011).

Regardless, there are no groundwater sample results reflecting the groundwater under or near either of these areas at the Joliet 29 Station, so there cannot be any conclusion that these areas are actually causing or allowing water pollution. The material and disputed issues of fact and law bar a finding of summary judgment. See MWG's Response, pp. 34-35 and *supra* Sec. IV.c.

3. The "Spent Slurry Pond," "South Area Runoff Basin" and the "Slag and Bottom Ash Dumping Area" at Will County

The evidence related to the "Spent Slurry Pond," "South Area Runoff Basin" and the "Slag and Bottom Ash Dumping Area" at the Will County Station is also conflicting and creates a disputed issue of material fact. As described in MWG's response to SOF 5, two witnesses, Mr. Veenbaas and Rebecca Maddux, testified that they had never known of any ash in the areas described as the "Spent Slurry Pond," "South Area Runoff Basin" and the "Slag and Bottom Ash Dumping Area." *See* MWG Response, App. A, Response to SOF No. 5, *citing* Complainants Ex. E2, Tr: 27:21-28:6, 28:12-15, 45:14-46:24, and Complainants' Ex. E6, Tr. 20:22-21:4, 37:19-39-23. Complainants only rely upon two questionable reports, the U.S.EPA Questionnaire Response and the Will County 1998 Phase II, even though notably, there are no sample results or analysis showing whether these areas contain any ash. *See* MWG Response, App. A, Response to SOF 5 and *supra* Sec. VI.a.iii.1. Again, when there is a dispute as to a material fact, such as the actual presence of coal ash at certain locations that form the basis of Complainants' Motion, then summary judgment is not appropriate. *Seymour v. Collins*, 39 N.E.3d 961, 975, 396 Ill. Dec. 135, 149 (2015).

b. Whether "Coal Ash Constituents" Exist in Groundwater at Each of the Stations is a Material Issue of Disputed Fact.

Complainants' use of the term "coal ash constituents" presents a material issue because the term remains undefined and in dispute. As established in MWG's Response, the parties' experts disagree on the constituents that indicate coal ash and whether they are present in groundwater.

See MWG Response, pp. 18-19. Complainants' Reply does not resolve that disagreement nor present a definition of "coal ash constituents." Complainants are forced to avoid the issue because not all of the Stations have boron, sulfate and manganese, three indicators of coal ash, above the Class I standard. As stated in MWG's Response, the groundwater exceedances at Joliet 29 are primarily chloride, which has never been considered a "coal ash constituent."[8] *See* Complainants' Ex. C11, pp. MWG13-15_56349-56359, 56407-56434. Despite that fact, Complainants Motion lumps HCA at Joliet 29 in with HCA at the other Stations, claiming there is groundwater impact from historic ash. Similarly, the groundwater downgradient from the Former Ash Basin at the Powerton Station has not shown exceedances of any of the constituents identified by either of the experts in this matter. *See* Complainants' Ex. D18, at MWG_56201, 56211-56214.

By keeping the term "coal ash constituents" vague, Complainants improperly attempt to make the Board review all of the groundwater analysis reports to try to decipher which "coal ash constituents" are present, where they are present, whether they have exceeded the Class I standards, and whether they relate to "Historic Ash Areas". Especially at summary judgement, it is not the Board's role to sift through the countless groundwater reports for each Station to find the support for Complainants' claims. *Stevens v. Village of Oak Brook*, 2013 IL App (2d) 120456, ¶ 30, 990 N.E.2d 802, 812 (2nd Dist., 2013) ("It is not the court's role to search the record and develop arguments on a party's behalf"). Nor may the Board weigh evidence in deciding a summary judgment, including weighing which constituents are actually "coal ash constituents." *Irvington Elevator Co.* 982 N.E.2d 827-28. Because the constituents Complainants allege are in violation of the standards is in dispute, the Board may not grant summary judgment for those constituents.

[8] Mr. Seymour concluded in his Expert Report that based upon the chloride levels in the groundwater "the groundwater conditions at Joliet 29 are impacted by upgradient off-site sources…" *See* Complainants' Ex. G, p. 15.

c. Complainants Fail to Meet their Burden to Establish Exceedances of the Class I Groundwater Standard.

In their effort to establish groundwater violations, Complainants repeatedly state that coal ash constituents were "detected" or "found" in groundwater (Complainants' Reply, pp 2, 7, & 9). Simply detecting a constituent, however, is not a violation of the groundwater standards. Complainants allege in their Second Amended Complaint that there are violations of the Class I standard. *See* Complainants' Second Amended Complaint, ¶¶ 51, 52, 54, 55, 57, 58, 60, & 61. Thus, it is Complainants' burden to show that the groundwater constituents are in violation of the Class I standard. At the Joliet 29 Station, boron may have been detected in the groundwater, but it has not exceeded the Class I groundwater standard. *See* Complainants' C11, pp. MWG13-15_56349-56359, 56407-56434. This is equally true for the Former Ash at the Powerton Station which has not shown exceedances of any of the constituents identified by either of the experts in this matter. *See* Complainants' Ex. D18, at MWG_56201, 56211-56214. Thus, it is a material issue of law whether the "detections" of the "coal ash constituents" show a violation of the Act.[9]

d. Complainants Create an Issue Through Their Unsupported Challenge of the Coal Ash Leach Tests.

Complainants have created their own material dispute by attempting to question, without support, the validity of samples taken from historic ash areas. Mr. Seymour based his opinions concerning the historic ash on analysis from three distinct ash areas at three different Stations. Complainants baldly reject his conclusions without presenting any contrary evidence. *See* MWG Response pp. 15-16, Complainants' Ex. G, pp. 46-48, 52, Complainants' Ex. E5, Tr. 41:2-5, 45:6-20, 65:9-11. Complainants state that they "question the validity of the leach tests" without any basis for the questioning. Complainants' Reply, footnotes 1 and 5. To the extent Complainants'

[9] Further discussion of the absence of proof of water pollution is in MWG Response, pp. 29-35.

unsupported challenge has any validity, Complainants have simply created a disputed issue of fact concerning the leach tests and MWG's expert's opinions of those tests.

e. The Mere Presence of Historic Coal Ash Areas Does Not Create a Duty.

Complainants again attempt to shift the burden of proof in this case by asserting, without basis, that MWG had a duty take some action at the contested locations of Historic Coal Ash. Complainants' Reply, p. 24. Unsupported assumptions are not allowed on a motion for summary judgment. *Venus v. O'Hara*, 127 Ill.App.3d 19, 29 (1st Dist. 1984) ("The moving party in the first instance must present facts which *clearly* and *without a doubt* establish its right to judgment."). The Board has rejected a motion for summary judgment which relied upon facts and a series of assumptions, most or all of which had to be true to validate the conclusion reached by the complainant. *Rodney B. Nelson v. Kane County Forest Preserve, et al*. PCB 94-244, 1995 WL 25873 (Jan. 11, 1995).

Complainants have not put forth, because they cannot, any regulatory or statutory standard requiring that MWG conduct any further investigations or take any additional actions at the Stations, even if they had actual notice of the presence of coal ash.[10] Coal ash was and remains a useful material used for fill and structural support. 415 ILCS 5/3.135 and 40 CFR 257.53. When MWG purchased the Stations, there were no regulatory or statutory obligations to further investigate its Stations, regardless of the knowledge of the potential presence of coal ash.

[10] There is no support for Complainants' assertion that "MWG was aware of leachable waste that can cause groundwater contamination," and Complainants' reliance on *Wasteland* is inapposite. *Wasteland, Inc. v. Pollution Control Board*, 118 Ill.App.3d 1041 (3rd Dist. 1983). In *Wasteland,* it was important to the appellate court that the landfill was permitted by the IEPA for non-putrescible and non-combustible wastes, and it was against the permit and Act to place garbage and other unpermitted materials into the landfill. The court found that "given the presence of unpermitted material, likely to create leachate problems, and the lack of natural or required safeguards against water pollution," the Board's finding that the landfill constituted a threat was supported by the record. *Id*. at 1049. That is not the case here. The coal ash is not garbage that is likely to create a leachate problem. As testified by Mr. Seymour, coal ash leaches less over time. MWG ash sample results from 2004, 2005 and 2015 established that the coal ash outside the ponds is not leaching.

Complainants' Ex. A2, B4, C3, and D3. It is absurd to posit that simple knowledge of the presence of a material used for construction with a chemical composition similar to rocks requires extensive investigation and removal. *See* MWG's Response Ex. 27, p. 4. Complainants are suggesting that any party, with knowledge that it has an inert substance on its property, (i.e. – coal ash or clean construction debris), and without any knowledge of contamination or harm to the environment from that material, must still react to that knowledge by removing the substance, regardless of the harm to the environment or the business. *See* Complainants' Ex. G, pp. 63-69. This is simply not the law, is not feasible and has no basis.

Nevertheless, MWG did take action to assess areas of historic coal ash. MWG sampled historic ash areas in 2004, 2005 and 2015 and found that the coal ash outside the ponds is not leaching. This was confirmed by MWG's expert. *See* Complainants' Ex. G, p 46. Further, after performing voluntary groundwater sampling in 2010, MWG took additional action. It is undisputed that MWG agreed to the corrective actions in the CCAs, including establishing ELUCs and/or GMZs at the Stations, despite MWG's disagreement that the Stations were a source. *See* MWG Response, pp. 26-27.

f. Complainants Cannot Assume the Coal Ash Is A "Waste" to Support Their Allegation of Open Dumping.

As clearly explained in Section V.a. of MWG's Response, the coal ash in various parts of the Stations was used at least 50 years ago or more as fill to support construction, which was permitted under the applicable regulations. *See* MWG Response, pp. 20-26, 46. There is no evidence that the coal ash was abandoned, cast aside, or treated as discarded material, thus there is no evidence that the coal ash is "waste."

i. Complainants Cannot Retro-Actively Apply the State Regulations.

Historic coal ash at the Stations was used for construction and was not discarded. Because the ash is not a waste, MWG cannot have caused or allowed open dumping. *See also* MWG Response, pp. 45-47. In reply to MWG's statement that 50-plus year old ash was used for construction at the Stations, Complainants incorrectly suggest that MWG must show that it complied with the current coal combustion by-products definition and in particular with the ASTM Standard established in that definition. MWG cannot be held to a standard that was not applicable over 50 years ago. The coal combustion by-product ("CCB") definition was passed long after ash at the Stations was used for construction and the CCB definition does not have retroactive effect. 415 ILCS 5/3.135. The Illinois Supreme Court has held that the general principle is that a statute will be prospective and not retroactive. *Allegis Realty Investors, et al v. Novak*, 223 Ill.2d 318, 320-321 (2006). A statute only has retroactive effect if the General Assembly has expressly proscribed that the statute is retroactive. *Id* at 320. If the retroactivity is not expressly provided in the statute, then under Section 4 of the Statute of Statutes, an amendment to a statute that is procedural may be applied retroactively, but those that are substantial may not. *Id* at 321, *citing* 5 ILCS 70/4. *See also Voge Tyre Rubber Co. v. Illinois EPA*, PCB 96-10, 2004 WL 2434479 (Oct. 21, 2004), *8 (Statutes silent on retroactive application must be read using Section 4 of the Statute of Statutes, thus only those procedural amendments may be applied retroactively, and not substantively).

Section 3.135 of the Act, which provides the definition of CCB, was first enacted in 1995.[11] 1995 Ill. Legis. Serv. P.A. 89-93 (S.B. 327) (WEST). The definition did not have an express provision of retroactivity. Moreover, because it created an entirely new definition of a substance,

[11] The original definition was in Section 3.94 of the Act. 415 ILCS5/3.94. The General Assembly renumbered this Section and others in 2002. 2002 Ill. Legis. Serv. P.A. 92-574 (H.B. 5557) (WEST).

it was not procedural in nature, and so it was not retroactively applicable. *Id*. Since 1995, the Illinois General Assembly has amended Section 3.135 several times. In fact, the requirement to comply with the ASTM standard E2277-03 was only recently added to the definition in 2011. 2011 Ill. Legis. Serv. P.A. 97-510 (H.B. 3620) (WEST). Again, there is no express provision that compliance with the ASTM standard is retroactive and the amendment was not procedural, so it did not have a retroactive effect.

Because the requirements established under 415 ILCS 5/3.135 do not have a retroactive effect, historic coal ash at the Stations may continue to be considered as having been used and not discarded. The ash is not a "waste" and MWG cannot have caused or allowed open dumping. *See also* MWG Response, pp. 45-47.

ii. Complainants Incorrectly Claim that the Board Has Concluded the Coal Ash Is a Waste.

Complainants present an incorrect and misleading interpretation of the Board's Oct. 3, 2013 Order concerning MWG's Motion to Dismiss Complainants' complaint. Contrary to Complainants' assertions, a simple review of the October 3rd Order reveals that the Board did *not* evaluate whether the historic coal ash was a waste, and did *not* evaluate whether the ash was a discarded material. *Sierra Club et. al. v. Midwest Generation, LLC*, PCB 13-15 (Oct. 3, 2013). The only decision the Board made related to the coal ash was finding that Complainants' Complaint *as alleged* was neither frivolous nor duplicative and allowed Complainants' complaint to go forward. *Sierra Club et. al. v. Midwest Generation, LLC*, PCB 13-15 (Oct. 3, 2013), *slip op at* 27. The Board certainly did not make any conclusions as to whether Complainants had met their burden of proof on any of the elements of their Complaint.

g. Complainants Incorrectly Assume the Coal Ash is a "Leachable Waste."

For the first time in this behemoth of a motion exchange, Complainants call the coal ash "leachable waste" on page 29 of their Reply. Complainants do not provide a definition for "leachable waste." Presumably, Complainants intend that the "leachable waste" means HCA although Complainants do not make that clear.[12] Instead, Complainants assume that the coal ash is "leachable waste," without any evidence nor support. This term presumes two things: that the coal ash was "waste" and that the coal ash was "leachable." Neither of these presumptions are proven, and Complainants put forth no evidence to support it. The only evidence in the record about the Historic Coal Ash establishes that the coal ash is not a source of groundwater constituents. *See* MWG's Response, pp. 15-17, and *supra* Sec. IV.b. Moreover, MWG demonstrated in its Response that the coal ash is not a waste. *See* MWG Response, pp. 45-47 and *supra* VI.f. Again, the Board may not weigh evidence or draw inferences in deciding a summary judgment. *Irvington Elevator Co.; see also McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 949, 627 N.E.2d 202, 208 (1993) (All reasonable inferences must be drawn in favor of the nonmoving party).

VII. The Undisputed Fact that Groundwater Conditions Do Not Pose a Risk Precludes Summary Judgment as a Matter of Law.

Complainants do not dispute the evidence in the record that the groundwater conditions at the Stations do not pose a risk to water receptors in the neighboring surface waters. As the waters have not been rendered harmful, detrimental, or injurious to public health or the environment, there is no water pollution as defined under Section 3.545 of the Act. 415 ILCS 5/3.545. Without any

[12] If the parties are keeping track, "leachable waste" is the fourth term used by Complainants to describe coal ash. This term was also not used in the Complaint.

water pollution, there cannot be a violation of the Section 12(a) of the Act. 415 ILCS 5/12(a). *See also* MWG Response, pp. 27-28 and 40-42.

MWG's expert conducted a risk analysis and found that there was no potential for risk to any of the receptor water bodies at any of the four Stations. *See* Complainant's Ex. G. This risk analysis is undisputed. Additionally, the established GMZs at the Stations means that there is no violation of law in those GMZs, and the established ELUCs prevent any access to any potentially impacted groundwater located at or beneath the Stations. *See* Complainants' Exs. A7, A8, B7-B9, C7, C8, D13-D15, D23. There is no dispute that that the concentrations in the groundwater are not rendering the waters harmful or creating a nuisance. There is at the very least an issue of law whether MWG has violated the Act, negating any finding of summary judgment.

VIII. Conclusion

Due to the complexity of this matter involving numerous disputes of fact and law, as well as the absence of evidence that MWG has caused or allowed water pollution or open dumping concerning historic ash areas, MWG respectfully requests that the Board deny Complainants' Motion for Partial Summary Judgment.

Respectfully submitted,

MIDWEST GENERATION, LLC.

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

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***SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC* PCB 13-15**

SUR-REPLY IN OPPOSITION TO COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT A

AFFIDAVIT OF JOHN SEYMOUR

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

AFFIDAVIT OF JOHN SEYMOUR

I swear and affirm that the statements, conclusions and opinions made in my Expert Report, dated November 2, 2015 and supplemented on February 29, 2016 are my true and correct statements, conclusions and opinions and that I will testify to such opinions at any future hearing.

I have personal knowledge of the facts stated herein.

I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

FURTHER AFFIANT SAYETH NOT.

John Seymour

Sworn and subscribed before me
this 28th day of September, 2016

Notary Public

OFFICIAL SEAL
SARA GREEN
Notary Public - State of Illinois
My Commission Expires Dec 12, 2017

***SIERRA CLUB, ET AL. V. MIDWEST GENERATION, LLC* PCB 13-15**

SUR-REPLY IN OPPOSITION TO COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

EXHIBIT B

RELEVANT PAGES OF THE DEPOSITION OF JAMES DICOLA

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

The discovery deposition of JAMES DiCOLA, taken under oath on the 14th day of January 2015, at Suite 3600, 10 South LaSalle Street, Chicago, Illinois, pursuant to the Rules of the Supreme Court of Illinois and the Code of Civil Procedure, before Tracy L. Overocker, a notary public in and for the County of Will and State of Illinois, pursuant to notice.

of your CV?

A To the best of my knowledge, yes.

Q Okay. What is your current position?

A Currently, I'm environmental manager.

Q How long have you been in that position?

A 2013 spring is when I came over to the Corporate Office in Bolingbrook.

Q Okay. Spring of 2013?

A Right.

Q Do you remember the month or the date?

A I think it was officially April 22nd, I believe.

Q Okay. My birthday.

A Okay.

Q And then you -- and then you switched jobs at the Corporate Office at some time; correct?

A It's essentially the same position. When NRG purchased us is -- that's where there's the extra description on top there.

Q Okay.

A It's essentially the same position.

Q Okay. So what are your job responsibilities?

A Kind of coming up through the business.

I'm an air guy in terms of my history. Currently, I do air permitting-type work; title 5 work; there is some involvement when stations have questions on water and land-type issues, but I'm not per se the go-to or expert person for that. I'm more of an air person like I said.

Q Okay.

A So it's all environmental, but with an emphasis strongly on air.

Q What are the water and air -- I forget if you said "connections," but you said there's some water and air issues that you worked on?

MS. NIJMAN: Objection. It's water and land.

BY MR. ZAHAROFF:

Q I'm sorry. I misheard you then. You said water and land issues.

What specifically are those issues that you work on?

A If a plant has a question on something that I can assist in answering, I try to answer, try to help them.

Q Okay.

A The role is a support role for the stations.

Q Okay. So does anyone report to you?
A No.
Q Okay. And do you report to anyone?
A Yes.
Q And what -- I'm sorry. Who do you report to?
A I report to Keith Schmidt.
Q And what's his -- do you know what his title is?
A Environmental director, I believe, East Region.
Q Okay. And you said people will come to you if they have questions that you -- let me scratch that and rephrase it.

What types of questions do people come to you with in your current job?
A If we have any type of event, you know, issue at the facility that, you know, may require notification of an agency type of thing, they'll ask for suggestions, support; if there is air permitting-type work that they are looking at possibly needing to go obtain in the future, they'll come and ask --
Q Okay.

A -- come and ask me.

Q What types of -- what types of issues exactly would they be coming to you with?

A An example, I guess, could be if there's -- if they've got a certain type of sampling they need to do, you know, NPDES permitting-related, you know, they may have a question within their permits, they may ask me. There's a water resource contact in the company that's, you know, qualified to do that as well -- that's more qualified than I am; but on occasion, I could be asked a question about a permit requirement.

Q Okay.

A If, you know, a certain type of waste has to be disposed of or recycled, you know, just generally speaking, those are the types of things that come up.

Q Okay. Do you have -- what types of waste are you talking about?

A It could -- there could be oily waste. There could be lead debris, typical waste that we have profiled in the plants that are typical waste stream, they may have a question on that. It's infrequent, but it could happen.