

**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: Don Brown  
Clerk of the Board  
Illinois Pollution Control Board  
100 W. Randolph Street, Suite 11-500  
Chicago, Illinois 60601  
**(VIA ELECTRONIC MAIL)**

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601  
**(VIA ELECTRONIC MAIL)**

**(SEE PERSONS ON ATTACHED SERVICE LIST)**

PLEASE TAKE NOTICE that I have today filed with the Office of the Clerk of the Illinois Pollution Control Board the **ENTRY OF APPEARANCE OF JENNIFER M. MARTIN, ENTRY OF APPEARANCE OF MELISSA S. BROWN, ENTRY OF APPEARANCE OF BRIAN DODDS, ENTRY OF APPEARANCE OF JAMES M. MORPHEW, MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY**

**THE INTERIM ORDER; and *AMICUS CURIAE* BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER;** a copy of which is herewith served upon you.

Respectfully submitted,

**ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP, ILLINOIS COAL  
ASSOCIATION, and CHEMICAL  
INDUSTRY COUNCIL OF ILLINOIS**

By:     /s/ Melissa S. Brown      
One of Its Attorneys

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**ILLINOIS CHAPTER OF THE  
NATIONAL WASTE & RECYCLING  
ASSOCIATION**

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One of Its Attorneys

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**CERTIFICATE OF SERVICE**

I, Melissa S. Brown the undersigned, on oath state the following:

That I have served the attached **ENTRY OF APPEARANCE OF JENNIFER M. MARTIN, ENTRY OF APPEARANCE OF MELISSA S. BROWN, ENTRY OF APPEARANCE OF BRIAN DODDS, ENTRY OF APPEARANCE OF JAMES M. MORPHEW, MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER;** and ***AMICUS CURIAE* BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER** via electronic mail upon:

Don Brown  
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Illinois Pollution Control Board  
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Chicago, Illinois 60601  
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That my email address is [Melissa.Brown@heplerbroom.com](mailto:Melissa.Brown@heplerbroom.com).

That the number of pages in the email transmission is 30 pages

That the email transmission took place before 5:00 p.m. on the date of October 14, 2019.

Date: October 14, 2019

/s/           Melissa S. Brown            
Melissa S. Brown



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<b>CITIZENS AGAINST RUINING THE</b>	)	
<b>ENVIRONMENT,</b>	)	
	)	<b>PCB 2013-015</b>
<b>Complainants,</b>	)	<b>(Enforcement – Water)</b>
	)	
<b>v.</b>	)	
	)	
<b>MIDWEST GENERATION, LLC,</b>	)	
	)	
<b>Respondent.</b>	)	

**APPEARANCE**

I, Melissa S. Brown, hereby file my appearance in this proceeding on behalf of the ILLINOIS ENVIRONMENTAL REGULATORY GROUP, ILLINOIS COAL ASSOCIATION, and CHEMICAL INDUSTRY COUNCIL OF ILLINOIS.

Respectfully submitted,

ILLINOIS ENVIRONMENTAL REGULATORY GROUP, ILLINOIS COAL ASSOCIATION, and CHEMICAL INDUSTRY COUNCIL OF ILLINOIS

Dated: October 14, 2019

By:           /s/  Melissa S. Brown            
One of Their Attorneys

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<b>MIDWEST GENERATION, LLC,</b>	)	
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**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF  
MIDWEST GENERATION, LLC’S MOTION TO RECONSIDER  
AND CLARIFY THE INTERIM ORDER**

The Illinois Environmental Regulatory Group, the Illinois Coal Association, the Chemical Industry Council of Illinois, and the Illinois Chapter of the National Waste & Recycling Association (collectively, “the Associations”), pursuant to 35 Ill. Adm. Code 101.110(c), respectfully request leave to file, *instanter*, the attached *amicus curiae* brief in support of Respondent Midwest Generation, LLC’s (“MWG”) Motion to Reconsider and Clarify the Interim Order. In support of this Motion, the Associations state as follows:

1. The Illinois Environmental Regulatory Group (“IERG”) is an Illinois non-profit corporation affiliated with the Illinois Chamber of Commerce and is comprised of forty-five (45) member companies that are regulated by governmental agencies that promulgate, enforce, or administer environmental laws, rules, regulations, or other policies. MWG is a member company of IERG. IERG advocates on behalf of its member companies before governmental agencies as they promulgate, administer, and implement environmental laws, regulations, and

policies. IERG is committed to the principle that environmental regulation and policy be grounded on sound science and produce demonstrated environmental improvements commensurate with the costs involved for compliance. IERG has a direct and substantial interest in this proceeding as numerous IERG member companies have and continue to utilize groundwater management zones (“GMZs”). IERG was an active participant in the Board’s rulemaking proceeding that ultimately adopted the regulations governing GMZs due to the potential applicability to and effect on IERG’s member companies.

2. The Illinois Coal Association (“ICA”) is a professional trade organization created in 1878 responsible for the promotion of the Illinois coal industry. To carry out its mission, the ICA represents the coal industry in government affairs, public relations and related matters. In 2018, ICA members were responsible for 96% of the coal produced in Illinois, contributing over \$1.5 billion to the state’s economy. The ICA has a direct and substantial interest in this proceeding as ICA members have utilized and continue to utilize GMZs for sites requiring mitigation.

3. The Chemical Industry Council of Illinois (“CICI”) is a statewide business trade group that represents the interests of the chemical industry in the state of Illinois. CICI has 210 members representing over 683 facilities in Illinois. At \$39.1 billion, the chemical industry is the second largest industry in the state of Illinois and Illinois is the fourth largest chemical producing state. The Council consists of regular members, affiliate members and associate members. Regular members are companies which are engaged in the manufacture, blending, distribution and sale of beneficial chemicals. Trade Associations are also regular members. Affiliate members are those companies which provide transportation, equipment or supplies to the chemical industry. Associate members provide legal, environmental consulting and

engineering services. CICI members have a strong interest in the proper interpretation of Illinois regulations for corrective action, including the regulations governing GMZs.

4. The National Waste & Recycling Association (“NWRA”) is a trade association representing private sector U.S. waste and recycling companies. The mission of NWRA is to provide leadership, advocacy, research, education and safety expertise to the waste and recycling industries, allowing its member companies to provide safe, economically sustainable and environmentally sound services. NWRA’s members operate in all 50 states and the District of Columbia. The Illinois Chapter of NWRA consists of large publicly-traded entities, as well as small and large privately-owned companies. NWRA has a strong interest in public policy that affects landfill regulation, including the interpretation of Illinois Pollution Control Board rules regarding GMZs.

5. A GMZ is a useful tool for corrective action utilized by a variety of entities throughout Illinois. Numerous member companies of the Associations utilize GMZs or may plan to utilize GMZs in the future. A GMZ allows entities time to clean up the groundwater while providing protection from enforcement of the ordinarily applicable groundwater standards. *See* 35 Ill. Adm. Code 620.450(a)(3).

6. In its June 20, 2019 Interim Opinion and Order (“Interim Order”), the Illinois Pollution Control Board (“Board”) held that MWG’s GMZs expired upon completion of active corrective action work (i.e., lining of the ash ponds). Interim Order at 81-83. The Board held that continuous groundwater monitoring was not a corrective action, and failed to address the benefits of natural attenuation of groundwater over a period of time. Interim Order at 82.

7. The Board’s ruling, if it remains in effect, indicates that all GMZs are limited to the time period that active corrective action work is being performed. The likely precedential

value of such ruling could be that a GMZ is no longer in effect if the only corrective action work occurring is natural attenuation of the groundwater and continuous monitoring. In so ruling, the Board ignored monitored natural attenuation as an effective corrective action tool. Construing GMZs as remaining in effect only while active corrective action is conducted needlessly constricts the time for the groundwater to be cleaned and, as such, renders GMZs much less valuable to entities that establish them.

8. If not reconsidered, the Board's Interim Order may have drastic adverse consequences for all entities that have a GMZ in Illinois, in that it may severely limit the protections afforded when establishing a GMZ and for already established GMZs. The collateral effects of the Board's Interim Order may include hesitation to enter into Compliance Commitment Agreements or remediation agreements with the Illinois Environmental Protection Agency ("Illinois EPA") where continuous monitoring and natural attenuation are being contemplated as part of the corrective action process. As such, the Board's Interim Order will directly affect the numerous member companies of the Associations that utilize GMZs or plan to utilize GMZs in the future.

9. Section 101.110(c) of the Board's regulations, 35 Ill. Adm. Code 101.110(c), allows for the filing of *amicus curiae* briefs in any adjudicatory proceeding by any interested person if permission is granted by the Board. The Board has previously allowed the filing of *amicus curiae* briefs by interested persons in Board proceedings. *See Mahomet Valley Water Authority, et al. v. Clinton Landfill, Inc.*, PCB 13-22, slip op. at 4 (Ill.Pol.Control.Bd. Sep. 19, 2013); *Waste Management of Illinois, Inc. v. County Board of Kankakee County*, PCB 04-186 (Ill.Pol.Control.Bd. June 6, 2005); *Clinton County Oil Co., Inc., et al. v. Illinois Environmental Protection Agency*, PCB 91-163 (Ill.Pol.Control.Bd. Jan. 9, 1992).

10. Certain findings in the Board's Interim Order have widespread impacts that are not limited to the Respondent and are of vital importance to the member companies of the Associations and industry throughout the State. Allowing the Associations to file the attached *amicus curiae* brief in support of MWG's Motion to Reconsider and Clarify the Interim Order will assist the Board in understanding the far-reaching impacts of the Board's ruling on industry in Illinois, as well as highlight how the Board's ruling goes against historical Illinois EPA practice regarding expiration of GMZs.

WHEREFORE, for the above reasons, the Illinois Environmental Regulatory Group, the Illinois Coal Association, the Chemical Industry Council of Illinois, and the Illinois Chapter of the National Waste & Recycling Association respectfully request that the Illinois Pollution Control Board grant them leave to file, *instanter*, the attached *amicus curiae* brief in support of Midwest Generation, LLC's Motion to Reconsider and Clarify the Interim Order.

Date: October 14, 2019

Respectfully submitted,

**ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP, ILLINOIS COAL  
ASSOCIATION, and CHEMICAL  
INDUSTRY COUNCIL OF ILLINOIS**

**ILLINOIS CHAPTER OF THE  
NATIONAL WASTE & RECYCLING  
ASSOCIATION**

By: /s/ Melissa S. Brown  
One of Its Attorneys

By: /s/ James M. Morphew  
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**AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC’S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER**

The Illinois Environmental Regulatory Group, the Illinois Coal Association, the Chemical Industry Council of Illinois, and the Illinois Chapter of the National Waste & Recycling Association (collectively, “the Associations”), as *amicus curiae*, pursuant to 35 Ill. Adm. Code 101.110(c), respectfully submit this brief in support of Midwest Generation, LLC’s (“MWG”) Motion to Reconsider and Clarify the Interim Order. If not reconsidered, the Illinois Pollution Control Board’s recent interpretation of its rules regarding groundwater management zones (“GMZs”) may have a significant and widespread detrimental impact to industries throughout the State.

**STATEMENT OF INTEREST**

The Illinois Environmental Regulatory Group (“IERG”) is an Illinois non-profit corporation affiliated with the Illinois Chamber of Commerce. IERG is comprised of forty-five (45) member companies that are regulated by governmental agencies that promulgate, enforce, or administer environmental laws, rules, regulations, or other policies. IERG has a direct and

substantial interest in this proceeding as IERG members have utilized and continue to utilize GMZs. IERG was an active participant in the Board's rulemaking proceeding that ultimately adopted the regulations governing GMZs due to the potential applicability to and effect on IERG's member companies. Pre-filed Testimony of Sidney M. Marder, Executive Director, Illinois Environmental Regulatory Group, *In the Matter of: Groundwater Quality Standards (35 Ill. Adm. Code 620)*, PCB R89-14(B) (Ill.Pol.Control.Bd. May 15, 1991). If not reconsidered, the Board's Interim Order may have drastic adverse consequences for IERG member companies with GMZs, in that it may severely limit the protections afforded when establishing a GMZ and for already established GMZs.

The Illinois Coal Association ("ICA") is a professional trade organization created in 1878 responsible for the promotion of the Illinois coal industry. To carry out its mission, the ICA represents the coal industry in government affairs, public relations and related matters. In 2018, ICA members were responsible for 96% of the coal produced in Illinois, contributing over \$1.5 billion to the state's economy. The ICA has a direct and substantial interest in this proceeding as ICA members have utilized and continue to utilize GMZs for sites requiring mitigation. The GMZ process encourages mitigation of environmental issues while allowing the business to continue operating. This provides environmental certainty for the State of Illinois, Illinois businesses and investors. Without this certainty, some businesses may be less inclined to enter into Compliance Commitment Agreements ("CCAs") to clean up an impacted site.

The Chemical Industry Council of Illinois ("CICI") is a statewide business trade group that represents the interests of the chemical industry in the state of Illinois. CICI was first founded in 1951 as the Drug and Chemical Industries Activities Committee ("DACIAC") formed by 16 companies with the main objective to promote excellence in education. Today, CICI has

210 members representing over 683 facilities in Illinois. CICI members employ 46,206 people in Illinois with an average annual wage of \$114,083. At \$39.1 billion, the chemical industry is the second largest industry in the state of Illinois, and Illinois is the fourth largest chemical producing state. The Council consists of regular members, affiliate members and associate members. Regular members are companies which are engaged in the manufacture, blending, distribution and sale of beneficial chemicals. Trade Associations are also regular members. Affiliate members are those companies which provide transportation, equipment or supplies to the chemical industry. Associate members provide legal, environmental consulting and engineering services. CICI members have a strong interest in the proper interpretation of Illinois regulations for corrective action, including the regulations governing GMZs.

The National Waste & Recycling Association (“NWRA”) is a trade association representing private sector U.S. waste and recycling companies. The mission of NWRA is to provide leadership, advocacy, research, education and safety expertise to the waste and recycling industries, allowing its member companies to provide safe, economically sustainable and environmentally sound services. NWRA’s members operate in all 50 states and the District of Columbia. The Illinois Chapter of NWRA consists of large publicly-traded entities, as well as small and large privately-owned companies. NWRA has a strong interest in public policy that affects landfill regulation, including the interpretation of Illinois Pollution Control Board rules regarding GMZs.

For the reasons stated below, the Associations are concerned with the potential precedent established by the Illinois Pollution Control Board’s (“Board”) June 20, 2019 Interim Order and Opinion (“Interim Order”) as it relates to the Board’s rulings regarding the establishment, maintenance, and expiration of GMZs. As such, the Associations support MWG’s Motion to



Reconsider and Clarify the Interim Order (“Motion to Reconsider”) and Memorandum in Support that was filed on September 9, 2019 (“Memorandum”),<sup>1</sup> and respectfully urge the Board to reconsider and clarify its Interim Order.

### ARGUMENT

GMZs have been utilized in Illinois for groundwater corrective action since the early 1990s, with the Board’s adoption in 1991 of groundwater quality standards in *In the Matter of: Groundwater Quality Standards (35 Ill. Adm. Code 620)*, PCB R89-14(B) (Ill.Pol.Control.Bd. Nov. 7, 1991). As noted by the Board in its Final Order in R89-14(B):

Section 620.250 provides for establishment of a management zone within each class of groundwater. A management zone is identified by the Agency for groundwaters that have become impaired due to contamination. In any management zone the goal is remediation, if practicable, of the groundwater to the level of the standards applicable to that class of groundwater . . . As an alternative to a separate remedial class, the Agency turned to the groundwater management zone (Id.). Moreover, the management zone concept also provides a better coupling with RCRA and CERCLA regulations.

Final Order, PCB R89-14(B), slip op. at 14-15.

As noted above, the purpose of Section 620.250 is to provide the Illinois Environmental Protection Agency (“Illinois EPA”) with an alternative option for addressing groundwater contamination. A GMZ can be established only with the concurrence of Illinois EPA. 35 Ill. Adm. Code 620.250(b). Additionally, per Section 620.250(a)(1), a GMZ may be established at a site that is subject to a corrective action process approved by Illinois EPA. *Id.* at § 620.250(a)((1). “Corrective action process” is defined by the applicable Board regulation as “those procedures and practices that may be imposed by a regulatory agency when a determination has been made that contamination of groundwater has taken place, and are

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<sup>1</sup> This brief is limited to the Board’s findings in the Interim Order regarding expiration of GMZs. The fact that the Associations are not addressing, at this time, the remaining findings in the Interim Order should not be construed as the Associations’ agreement with such findings.

necessary to address a potential or existing violation of the standards set forth in Subpart D.” *Id.* at § 620.110. The expiration of a GMZ is also subject to the Illinois EPA’s discretion, following the Illinois EPA’s receipt of documentation required by 35 Ill. Adm. Code 620.250(c) and a determination of the applicable groundwater quality standard (“GQS”) after the expiration of the GMZ under Section 620.450. Neither Section 620.250 nor Section 620.450 contemplate that the Board has a role in the process of establishing or terminating a GMZ.

The Board’s *sua sponte* rulings regarding expiration of MWG’s GMZs are contrary to the explicit language of the applicable regulations and conflict with the historical practice of Illinois EPA. The impact of the Board’s rulings regarding GMZs is broader than this proceeding. If the Board’s Interim Order is not reconsidered, the protections afforded by GMZs to entities throughout the State may be drastically reduced.

**A. The Board Erred in its Application of the Law.**

1. The Board erred in its interpretation and application of 35 Ill. Adm. Code 620.250(a)(1) and (2).

Under Section 620.250 of the Board’s rules, a GMZ may be established at a site “(1) [t]hat is subject to a corrective action process approved by the Agency; **or** (2) [f]or which the owner or operator undertakes an adequate corrective action in a timely and appropriate manner and provides a written confirmation to the Agency. . . .” 35 Ill. Adm. Code 620.250(a)(1)-(2) (emphasis added). MWG’s GMZs were established pursuant to subsection (a)(1), as opposed to subsection (a)(2), because MWG entered into a corrective action process approved by Illinois EPA when entering into CCAs and establishing the GMZs, all of which were approved by Illinois EPA. Memorandum at 9.

In concluding that a GMZ must be undertaken in a timely and appropriate manner and that the continuous monitoring conducted by MWG is not a timely nor appropriate remedy, the

Board muddled the requirements of Section 620.250(a). *See* Interim Order at 83. Instead of construing Sections 620.250(a)(1) and (2) independently, the Board conflated the subsections by reading the “timely and appropriate” requirement into both subsections. “Administrative regulations have the force and effect of law, and the same rules of construction used in the construction of statutes apply when construing administrative regulations;” “[t]herefore, the language of a regulation should be given its plain and ordinary meaning.” *People v. Clairmont*, 2011 IL App (2d) 100924, ¶ 17 (citing *People v. Bonutti*, 212 Ill.2d 182, 188 (2004)); *see Van Zelst Landscape Compost Facility v. Illinois Environmental Protection Agency*, PCB 11-7, slip op. at 12 (Ill.Pol.Control.Bd. Aug. 4, 2011) (recognizing that statutory language must be given its plain and ordinary meaning). Instead of reading a new requirement into subsection (a)(1), the Board should have given the unambiguous language its clear and plain meaning.

Furthermore, nowhere in the definition of “corrective action process” does it state, as the Board maintains, that the corrective action process is limited to the period when active corrective action work is being performed. *See* Interim Order at 83; 35 Ill. Adm. Code 620.110. Nor do the regulations state that natural attenuation (i.e., the breakdown of contaminants by naturally occurring microbes in the soil or by other natural processes) and continuous groundwater monitoring cannot be approved by Illinois EPA as components of the corrective action process. The definition of “corrective action process” is broad and includes any “procedures and practices that may be imposed by” Illinois EPA. *See* 35 Ill. Adm. Code 620.110. The corrective actions taken by MWG, including monitored natural attenuation (which was outlined in the GMZ applications and approved by Illinois EPA), squarely fall within this definition. *See* Memorandum at 9. MWG’s corrective action process is ongoing, as MWG continues to monitor groundwater during the natural attenuation process. Memorandum at 9.

As the Board recognized in its 1991 Final Order adopting the Illinois groundwater quality standards, the GMZ as a concept “also provides a better coupling with RCRA and CERCLA regulations.” Final Order, PCB R89-14(B), slip op. at 15. The United States Environmental Protection Agency has long recognized that monitored natural attenuation may be an appropriate cleanup remedy for Superfund sites and Resource Conservation and Recovery Act (“RCRA”) corrective action sites.<sup>2</sup>

2. The Board failed to properly apply 35 Ill. Adm. Code 620.250(c).

Section 620.250(c) of the Board’s rules require that GMZs expire only after completion of corrective action and attainment of applicable groundwater standards. 35 Ill. Adm. Code 620.250(c). In its Interim Order, however, the Board ignored the second requirement of Section 620.250(c) (attainment of applicable groundwater standards) and thus erroneously concluded that MWG’s GMZs had expired merely because it concluded that corrective action was complete, without more.

Section 620.250(c) provides that “[a] groundwater management zone expires upon the Agency’s receipt of appropriate documentation which confirms the completion of the action taken pursuant to subsection (a) **and** which confirms the attainment of applicable standards as set forth in Subpart D.” *Id.* at § 620.250(c) (emphasis added). If these two conditions are not met, the GMZ remains in effect.

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<sup>2</sup> See Technical Protocol for Evaluating Natural Attenuation of Chlorinated Solvents in Groundwater, September 1998, EPA 600-R-98-128: <https://semspub.epa.gov/work/HQ/10000022.pdf>; Use of Monitored Natural Attenuation at Superfund, RCRA Corrective Action, and Underground Storage Tank Sites, April 1999, OSWER Directive 9200.4-17P, EPA 540/R-99/009: <https://semspub.epa.gov/work/HQ/159152.pdf>; Performance Monitoring of MNA Remedies for VOCs in Groundwater, September 2003, OSWER 9355.4-25, EPA 540-R-03-004: <https://semspub.epa.gov/work/HQ/189717.pdf>; Use of Monitored Natural Attenuation for Inorganic Constituents in Groundwater at Superfund Sites, August 2015, OSWER Directive 9283.1-36: <https://semspub.epa.gov/work/HQ/177087.pdf>.

The Board correctly concluded that GMZs had been established at the three MWG Stations, but then erroneously found that the GMZs expired after the first regulatory condition of Section 620.250(c) was, in the Board's view, met. That is, the Board addressed the first element of GMZ expiration under Section 620.250(c) – completion of corrective action – but did not address, much less cite evidence to support, the second element. Under the plain and ordinary meaning of Section 620.250(c), both elements must be met. *See Van Zelst Landscape Compost Facility*, PCB 11-7, slip op. at 12. By failing to address the requirement that the applicable standards be attained, the Board failed to properly apply the entirety of the one regulatory provision that explicitly deals with expiration of GMZs.

Rather than applying the second requirement of Section 620.250(c), the Board misapplied the inapplicable “timely and appropriate” language from Section 620.250(a)(2), suggesting that MWG's GMZs expired upon completion of the active corrective action work, i.e., relinings. Specifically, the Board held that:

A GMZ is established ‘for a period of time’ necessary to ‘mitigate impairment caused by the release of contaminants’ and the owner or operator must undertake ‘an adequate corrective action in a timely and appropriate manner.’ *See* 35 Ill. Adm. Code 620.250(a)(2), (b); 620.450(a)(3); *see* 35 Ill. Adm. Code 620.250(a). Section 620.250(c) provides that a GMZ ‘*expires* upon the Agency’s receipt of appropriate documentation which confirms the completion of the action taken pursuant to subsection (A) and which confirms the attainment of applicable standards as set forth in Subpart D.’ 35 Ill. Adm. Code 620.250(c) (emphasis added). . . .

Continuing the GMZ in the absence of pending corrective action appears to be contrary to the purpose of Part 620 and, in particular, Section 620.250(a).

Interim Order at 83.

Additionally, the Board's findings go against the historical practice of Illinois EPA in addressing the issue of GMZ expiration. For example, in 2009, Illinois EPA determined that a GMZ at Hennepin (a site referenced in MWG's pleading) had not expired precisely because

monitoring data failed to show compliance with Subpart D. Letter from William E. Buscher, Illinois EPA, to Rick Diericx, Dynegy Midwest Region Operations (Oct. 8, 2009), attached hereto as **Attachment 1**.<sup>3</sup> When responding to a question regarding the status of the GMZ, Illinois EPA stated:

A GMZ expires upon the Illinois EPA's receipt of appropriate documentation which confirms the completion of the Illinois EPA approved corrective action taken pursuant to subsection (a) and which confirms the attainment of applicable standards as set forth in Subpart D.

Or

The Illinois EPA establishes alternative groundwater standards pursuant to 35 IAC 620.450(a)(4)(B).

Based on the most recent monitoring data dated August 17, 2009, some of the monitoring wells within the GMZ have not achieved compliance with the groundwater standards of Subpart D. Therefore, the Pond 2 and 4 GMZ is still in effect. As such, groundwater monitoring and annual reporting must continue. The Illinois EPA notes that the CWP Annual Reports contain data that indicates improving groundwater quality down gradient of Pond 2. Should a reversal of these improving trends outside those predicted by Dynegy be noted subsequent to the installation of the proposed landfill, a remedial investigation and/or response, as needed, will be required.

*Id.* at 2 (emphasis added). Illinois EPA clearly states that attainment of the applicable GQS in Subpart D must be achieved before a GMZ can expire.

Assuming, *arguendo*, that the corrective action process has been completed,<sup>4</sup> the applicable GQS are those in Section 620.450(a)(4), which provides the standard applicable “[a]fter completion of a corrective action.” 35 Ill. Adm. Code 620.250(a)(4). To determine what standard in Section 620.250(a)(4) is applicable, an analysis of subsections (a)(4)(A) and (B)

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<sup>3</sup> The Board has explained that a “motion to reconsider may be brought ‘to bring to the [Board’s] attention newly discovered evidence which was not available at the time of the hearing, changes in the law or errors in the [Board’s] previous application of existing law.’” *People v. Packing Personified, Inc.*, PCB 04-16, Order, 2012 WL 707433, \*8 (quoting *Citizens Against Reg. Landfill v. County Board of Whiteside*, PCP 92-156, Order at 2 (Mar. 11, 1993)).

<sup>4</sup> As stated above, the corrective action process is ongoing as MWG continues to monitor groundwater during the natural attenuation process.

would be required. *See id.*<sup>5</sup> Instead of undertaking that analysis, the Board failed to continue its analysis to the next logical point, which would be to analyze the applicable regulations to determine what GQS apply under Section 620.450(a)(4).

To the Associations' knowledge, the record does not reflect the documentation required by Section 620.250(c) of attainment of the appropriate groundwater standard under Section 620.450(a)(4) for any of the MWG Stations at issue.<sup>6</sup> The GMZs at issue cannot be said to have terminated in the absence of such documentation. Even if documentation existed in the record to satisfy the second element of GMZ termination under Section 620.250(c), the Board erred in not considering and applying that second element. Therefore, under the plain language of the regulations at issue and the facts of this case, MWG's GMZs have not expired and the Board's Interim Order should be reconsidered.

**B. The Board's Ruling May Have Widespread, Detrimental Impacts to Industry in Illinois.**

GMZs have been utilized by Illinois EPA and parties performing corrective action in Illinois since the early 1990s. One of the main benefits of establishing a GMZ to parties performing corrective action is that the GQS in Sections 620.410 through 620.440 are not applicable during the term of the GMZ. 35 Ill. Adm. Code 620.450(a)(3). Therefore, any alleged exceedance of the Class I - IV GQS during the course of a GMZ is not a violation of the Act or Board's regulations. However, GMZs also provide a benefit to Illinois EPA by ensuring

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<sup>5</sup> Section 620.450(a)(4) requires that Illinois EPA establish the "applicable" post-corrective action standard as either: (A) the normal groundwater standard for that class of groundwater if monitoring data shows attainment of that standard or (B) an alternative standard if the normal groundwater standards are exceeded and specific determinations have been made showing the exceedances have been minimized, beneficial use has returned, and any threat has been minimized. 35 Ill. Adm. Code 620.450(a)(4).

<sup>6</sup> The Board erred in finding that the CCA compliance statements signed by MWG constitute the appropriate documentation confirming the completion of the corrective action as required by Section 620.250(c). *See* Interim Order at 82. In addition to not confirming that the corrective action processes were completed, the compliance statements also do not confirm attainment of the appropriate GQS.

that monitoring and evaluation of groundwater continues at GMZ sites. A GMZ allows entities time to clean up the groundwater while providing protection from enforcement of the ordinarily applicable GQS.

The potential precedential effect of the Board's *sua sponte* ruling would be that all GMZs are limited to the time period that active corrective action work is being performed. In so ruling, the Board has ignored monitored natural attenuation as an effective corrective action tool that is used by industry, subject to the approval of Illinois EPA. Numerous member companies of the Associations currently have established GMZs, which utilize continuous groundwater monitoring and natural attenuation as part of the corrective action process approved by Illinois EPA. The Board's ruling undermines Illinois EPA's historical practice of approving GMZs with the express understanding that the GMZ will be in place for the time needed for natural attenuation to effectively occur.

If not reconsidered, the Interim Order may have drastic adverse consequences for entities that have a GMZ in Illinois. The direct impacts may include subjecting these entities, including industry throughout the State, to significant risk and uncertainty regarding the duration of GMZs. It could effectively preclude the use of monitored natural attenuation as part of a corrective action process. Natural attenuation is often paired with other corrective action work as part of an economically reasonable corrective action process at sites with significant groundwater impacts. The Board's findings would not allow the time necessary for natural attenuation to effectively occur and for the applicable GQS to be obtained prior to the expiration of the GMZ.

The collateral effects of the Board's Interim Order may include hesitation to enter into CCAs or remediation agreements with Illinois EPA where continuous monitoring and natural attenuation are being contemplated as part of the corrective action process. CCAs are useful and



efficient mechanisms that save both parties – the alleged violator and Illinois EPA – significant time and money in resolving alleged violations and allow for expeditious implementation of environmental clean-ups without haggling over the threat of litigation delaying action. The potential collateral effect of the Board's ruling on the future utilization of CCAs runs counter to the Illinois General Assembly's preference for this pre-litigation mechanism. *See e.g.* 2011 Ill. Legis. Serv. P.A. 97-519 (S.B. 1357) (amending to add section 31(a)(7.6) of the Act and incentivizing CCA compliance efforts by factoring such efforts into Illinois Attorney General's determination of whether to file later enforcement complaint). The Board's Interim Order, if not reconsidered, may have widespread, detrimental effects on the Associations' member companies and industry and entities throughout the State that currently utilize GMZs or plan to utilize GMZs in the future. The Associations therefore support MWG's Motion to Reconsider the Interim Order.

**C. The Board Failed to Provide Parties and Interested Persons an Opportunity to Address the Issue of Expiration of GMZs Prior to the Board's Ruling.**

The Board's findings concerning the expiration of MWG's GMZs were made *sua sponte*. At no time in this proceeding have Petitioners contended that MWG's GMZs had expired. In fact, Petitioners took the opposite approach and agreed that any exceedances after the GMZs were established were not violations of the Act or Board regulations. Memorandum at 5 (citing 10/26/17 Afternoon Tr. P. 87:22-89:4). The Board ignored the stipulation among the parties and developed its own argument on this issue, which was raised for the first time in its Interim Order.

The Board's *sua sponte* ruling deprived the parties and other interested persons an opportunity to present evidence or arguments on the issue. A *sua sponte* ruling deprives parties of notice and an opportunity to raise arguments and objections. *Niles Twp. High Sch. Dist. 219 v. Ill. Educ. Labor Rels. Bd.*, 369 Ill. App. 3d 128, 136 (1st Dist. 2006); *Oak Grove Jubilee*

*Center, Inc. v. City of Genoa*, 347 Ill. App. 3d 973, 978-79 (2d Dist. 2004) (finding that the trial court erred in dismissing plaintiff's complaint *sua sponte*). MWG contends that if it had prior notice of this issue, it would have presented evidence that the GMZs have not expired.

Memorandum at 6. Indeed, if the Associations had prior notice of this issue, they could have intervened in the hearing process to illustrate the effects of this issue on their member companies and industry throughout Illinois.

**D. The Board's Ruling Interfered with Illinois EPA's Proper Role in GMZ Expiration.**

Additionally, the Board's interpretation of GMZ expiration runs contrary to the role expressly assigned to Illinois EPA in this area. "[A]dministrative agencies are limited to the powers vested in them by statute. . . ." *A.E. Staley Mfg. Co. v. Env'tl. Prot. Agency*, 8 Ill. App. 3d 1018, 1022 (1972). The Part 620 regulations provide Illinois EPA with discretion to approve or disapprove GMZs, including the authority to decide whether monitored natural attenuation is an appropriate corrective action process for a particular site. While the Board has authority to interpret regulations and evaluate Illinois EPA's implementation of those regulations, it falls to the Illinois EPA to make the determination as to whether monitored natural attenuation, or other corrective actions, are bringing the site into compliance with the applicable standards. In ruling that the GMZs expired with the conclusion of active corrective action, the Board encroached on Illinois EPA's authority to make such determinations. The Associations therefore support MWG's request for the Board to reconsider its opinion regarding the expiration of GMZs or, at the very least, to allow the parties and interested persons a fair opportunity to raise objections and present evidence on the GMZ issues.

**CONCLUSION**

*Amicus Curiae* Illinois Environmental Regulatory Group, the Illinois Coal Association, the Chemical Industry Council of Illinois, and the Illinois Chapter of the National Waste &

Recycling Association respectfully submit this brief in support of Midwest Generation, LLC, and request that the Illinois Pollution Control Board enter an Order granting Midwest Generation, LLC's Motion to Reconsider and Clarify the Interim Order.

Date: October 14, 2019

Respectfully submitted,

**ILLINOIS ENVIRONMENTAL  
REGULATORY GROUP, ILLINOIS COAL  
ASSOCIATION, and CHEMICAL  
INDUSTRY COUNCIL OF ILLINOIS**

**ILLINOIS CHAPTER OF THE  
NATIONAL WASTE & RECYCLING  
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# ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

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PAT QUINN, GOVERNOR

DOUGLAS P. SCOTT, DIRECTOR

## Attachment 1

October 8, 2009

Mr. Rick Diericx  
Senior Director, Operations Environmental Compliance  
Dynergy Midwest Region Operations  
604 Pierce Boulevard  
O'Fallon, Illinois 62269

Dear Mr. Diericx:

This letter is in response to Dynergy's correspondence dated April 30, 2009, regarding the Closure Work Plan (CWP) for the Hennepin East Ash Pond System's (Ponds 2 and 4) groundwater management zone (GMZ) established in 1996, relative to a landfill for ash disposal proposed in the same geographic area as ash pond number 2.

Specifically, Dynergy requests clarification from the Illinois Environmental Protection Agency (Illinois EPA) about three issues:

- 1) Currently approved CWP;
- 2) Prohibition against the placement of new fly ash or bottom ash into Pond 2; and
- 3) Status of the GMZ around the east ash pond system.

1) Currently approved CWP

Response:

The CWP requires that Pond 2 and 4 be taken out of service, but may be left uncovered to facilitate ash mining, as a means of source removal. Dynergy is required by the letter establishing the GMZ, dated November 8, 1996, to notify the Illinois EPA if ash mining ceases. The Illinois EPA will accept the progressive covering of Pond 2 with the engineered liner that will be installed below the proposed landfill as an adequate means to close Pond 2. See Recommendations Section.

2) Prohibition against the placement of new fly ash or bottom ash into Pond 2

Response:

The Illinois EPA concurs with Dynergy's assessment that construction of a landfill on top of Pond 2 does not constitute disposal of ash in Pond 2. The liner below the landfill serves as a physical barrier between the landfill and Pond 2. Therefore, the landfill is not part of Pond 2.

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Champaign • 2125 S. First St., Champaign, IL 61820 • (217) 278-5800

Marion • 2309 W. Main St., Suite 116, Marion, IL 62959 • (618) 993-7200

3) Status of the GMZ around the east ash pond system

Response:

Pursuant to 35 IAC 620.250(c):

A GMZ expires upon the Illinois EPA's receipt of appropriate documentation which confirms the completion of the Illinois EPA approved corrective action taken pursuant to subsection (a) and which confirms the attainment of applicable standards as set forth in Subpart D.

Or

The Illinois EPA establishes alternative groundwater standards pursuant to 35 IAC 620.450(a)(4)(B).

Based on the most recent monitoring data dated August 17, 2009, some of the monitoring wells within the GMZ have not achieved compliance with the groundwater standards of Subpart D. Therefore, the Pond 2 and 4 GMZ is still in effect. As such, groundwater monitoring and annual reporting must continue. The Illinois EPA notes that the CWP Annual Reports contain data that indicates improving groundwater quality down gradient of Pond 2. Should a reversal of these improving trends outside those predicted by Dynegy be noted subsequent to the installation of the proposed landfill, a remedial investigation and/or response, as needed, will be required.

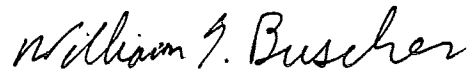
Recommendations:

Dynegy should submit a request for a CWP modification of the Pond 2 and 4 GMZ for Illinois EPA approval. The modification should discuss:

- The timeframe for cessation of ash mining;
- Any modifications that may be made to Pond 2 in preparation for liner placement (e.g. grading);
- Any anticipated impacts those modifications may have on groundwater quality;
- Approximate schedule for the progressive placement of the liner over Pond 2; and
- Revised groundwater quality predictions for GMZ monitoring wells, if impacts are anticipated due to hydrogeologic changes caused by landfill installation (e.g. reduced water levels, altered flow directions, etc.)

I trust this responds to your needs. If you have further questions or concerns please contact Lynn Dunaway of my staff or me at (217) 785-4787.

Sincerely,

A handwritten signature in cursive script that reads "William E. Buscher".

William E. Buscher, P.G.  
Supervisor, Hydrogeology and Compliance Unit  
Groundwater Section  
Division of Public Water Supplies  
Bureau of Water

CC: Al Keller, BOW Permits  
Connie Tonsor, DLC  
Mike Garretson, CAS  
Lynn Dunaway