

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)
)
 Complainants,)
)
 v.)
)
 MIDWEST GENERATION, LLC,)
)
 Respondents)

PCB No-2013-015
(Enforcement – Water)

NOTICE OF ELECTRONIC FILING

To: Attached Service List

PLEASE TAKE NOTICE that on May 29, 2015, I electronically filed with the Clerk of the Illinois Pollution Control Board: **COMPLAINANTS’ REPLY TO RESPONDENT’S DEFENSES TO SECOND COMPLAINT**, a copy of which is served on you along with this notice.

Respectfully submitted,

Jennifer L. Cassel
Staff Attorney
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
jcassel@elpc.org
ph (312) 795-3726

Dated: May 29, 2014

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SIERRA CLUB, ENVIRONMENTAL)	
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Respondents)	

COMPLAINANTS’ REPLY TO RESPONDENT’S DEFENSES TO SECOND COMPLAINT

Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (Collectively, “Complainants”) hereby respond to the defenses pleaded by Respondent Midwest Generation, LLC in its Answer and Defenses to Second Complaint (“Answer”) filed on April 20, 2015, and state as follows:

1. In its Answer and Defenses, Respondent pleads defenses which it separately styles as “defenses” and “affirmative defenses.”
2. Section 101.100(b) of the Board’s procedural rules states that the provisions of Illinois’ Code of Civil Procedure “do not expressly apply to proceedings before the Board;” however, the Board “may look to the Code of Civil procedure...for guidance when the Board’s procedural rules are silent.”
3. The Board’s procedural rules provide for the filing of affirmative defenses, Section 103.204(d) (“Any facts constituting an affirmative defense must be plainly set forth before hearing in the answer or in a supplemental answer, unless the affirmative defense could

not have been known before hearing”); however, they are silent as to the filing of responses or replies to affirmative defenses. Therefore, to aid the Board, Complainants herein bring to the Board’s attention relevant provisions of the Illinois Code of Civil Procedure as well as pertinent appellate opinions concerning affirmative defenses.

4. Illinois courts interpreting the Illinois Code of Civil Procedure have held that the “failure to answer an affirmative defense constitutes an admission of the allegations contained in it.” *Ness v. Ness*, 2013 Ill. App. (2d) 121177-U, *P14 (Ill. App. Ct. 2d Dist. June 11, 2013) (citing *Filliung v. Adams*, 387 Ill. App. 3d 40, 56 (Ill. App. Ct. 1st Dist. 2008)). However, affirmative defenses are not deemed admitted, notwithstanding the failure to answer those defenses, if “the existing complaint already negates them” or if they constitute legal conclusions. *Id.*; *Filliung*, 387 Ill. App. 3d at 57; *Florsheim v. Travelers Indemnity Co. of Illinois*, 75 Ill. App. 3d 298, 309 (Ill. App. Ct. 1st Dist. 1979).

5. The burden of proving an affirmative defense falls on the party asserting that affirmative defense. *In re Marriage of Jorzak*, 315 Ill. App. 3d 954, 957 (Ill. App. Ct. 4th Dist. 2000).

Respondent’s First Defense:

6. “The ash ponds at the Joliet 29 Station, the Powerton Station, the Waukegan Station, and the Will County Station (collectively ‘the Stations’) are surface impoundments and operate as a part of each Stations’ wastewater treatment plants pursuant to the Stations’ respective NPDES permits.” Answer, para. 62.

ANSWER: Complainants admit that there are ash ponds in operation at the Joliet 29 Station, the Powerton Station, the Waukegan Station and the Will County Station. The remainder of the allegations in paragraph 62 of the Answer constitutes legal conclusions to which no

response is required. To the extent one is required, Complainants are without sufficient information to admit or deny those allegations and therefore deny same.

7. “The active ash ponds at the Stations are lined with HDPE liners, a synthetic liner designed to prevent releases to the soil and groundwater.” Answer, para. 63.

ANSWER: The Second Complaint filed in this case negates the allegations in paragraph 63 of the Answer and therefore no response to those allegations is required. To the extent one is required, Complainants are without sufficient information to admit or deny those allegations and therefore deny same.

8. “MWG routinely removes the ash from the ash ponds.” Answer, para. 64.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 64 of the Answer and therefore deny same.

9. “Because the ash ponds are classified as surface impoundments, which are permitted and regulated as water pollution treatment units, and because MWG routinely removes the ash from the ponds, the ash ponds are not disposal sites.” Answer, para. 65.

ANSWER: The allegation in paragraph 65 of the Answer that the ash ponds are not disposal sites is both a legal conclusion and negated in the Second Complaint, and therefore no response is required. To the extent one is required, Complainants deny same. Complainants are without sufficient information to admit or deny the remainder of the allegations in paragraph 65 of the Answer and therefore deny same.

10. “Complainants also allege other ‘landfills’ and ‘coal ash and coal combustion waste repositories’ may contain coal ash at the Stations.” Answer, para. 66

ANSWER: Complainants deny that “Complainants also allege other ‘landfills’ and ‘coal ash and coal combustion waste repositories’ may contain coal ash at the Stations” as it is an inaccurate characterization of the Second Complaint. Complainants admit that Complainants also allege other “landfills” and/or “coal ash and coal combustion waste repositories” contain coal ash at the Stations.

11. “Any other locations at the Stations that may contain historical coal ash combustion debris were not created by MWG, nor used or filled with any coal combustion material, or any other material, by MWG.” Answer, para. 67.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 67 of the Answer and therefore deny same.

12. “MWG did not cause or allow open dumping because the ash ponds are not disposal sites and the historical areas were not created, filled, or used by MWG for any storage or disposal or any coal combustion material, or any other material.” Answer, para. 68.

ANSWER: The allegation in paragraph 68 that MWG did not cause or allow open dumping because the ash ponds are not disposal sites constitutes a legal conclusion to which no response is required. To the extent one is required, Complainants deny same. Complainants are without sufficient information to admit or deny the remainder of the allegations in paragraph 68 of the Answer and therefore deny same.

Respondents' Second Defense:

13. "Paragraphs 62-68 are realleged and incorporated herein by reference." Answer, para. 69

ANSWER: Complainants incorporate herein, as if restated, their answers to paragraphs 62-68 of the Answer, which answers are set out in paragraphs 6-12 of this Reply.

14. "In 2010, MWG voluntarily agreed to the Illinois Environmental Protection Agency's ('Illinois EPA's') request to perform a hydrogeological assessment around the ash ponds at the Stations." Answer, para. 70.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 70 of the Answer and therefore deny same.

15. "On June 11, 2012, Illinois EPA issued Violation Notices ('VNs') to MWG alleging violations of groundwater quality standards purportedly caused by the ash ponds at the Stations." Answer, para. 71.

ANSWER: Complainants admit that on June 11, 2012, the Illinois EPA issued Violation Notices to Respondent alleging violations of Section 12 of the Illinois Environmental Protection Act and Groundwater Quality regulations at the Stations.

16. "In response to the hydrogeological assessments and the VNs, MWG evaluated the distribution of the sample results as it relates to the ash ponds at each Station." Answer, para. 72.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 72 of the Answer and therefore deny same.

17. “The alleged exceedances in the groundwater underlying the Stations, including the ash ponds, are random, inconsistent, historic and do not show a connection to the MWG Stations or ash ponds.” Answer, para. 73.

ANSWER: Complainants deny the allegations in paragraph 73 of the Answer.

18. “Because there is no connection between the alleged groundwater exceedances and MWG Stations or the ash ponds, MWG has not caused or allowed the discharge of contaminants into the groundwater.” Answer, para. 74.

ANSWER: The allegations in paragraph 74 of the Answer constitute a legal conclusion to which no response is required. To the extent one is required, Complainants deny same.

Respondent’s Third Defense:

19. “Paragraphs 62-74 are realleged and incorporated herein by reference.” Answer, para. 75.

ANSWER: Complainants incorporate herein, as if restated, their answers to paragraphs 62-74 of the Answer, which answers are set out in paragraphs 6-18 of this Reply.

20. “Complainants request that the Board order MWG to ‘...modify its coal ash disposal practices so as to avoid future groundwater contamination and remediate the contaminated groundwater so that it meets applicable Illinois groundwater standards.’” Answer, para. 76.

ANSWER: Complainants deny that “Complainants request that the Board order MWG to ‘...modify its coal ash disposal practices so as to avoid future groundwater contamination and remediate the contaminated groundwater so that it meets applicable Illinois groundwater standards.’” as it is an inaccurate characterization of the Second Complaint. Complainants admit that, in addition to other relief sought in the Second Complaint, Complainants requested that the

Board order Respondent to “Modify its coal ash and coal combustion waste disposal and storage practices so as to avoid future groundwater contamination” and to “remediate the contaminated groundwater so that it meets applicable Illinois groundwater standards.”

21. “As a creature of statute, the Illinois Pollution Control Board may only operate within the bounds of its power set out by the statute by which it was created. *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill. 2d 546, 554, 723 N.E.2d 256, 262 (1999).” Answer, para. 77.

ANSWER: The allegations in paragraph 77 of the Answer constitute a legal conclusion to which no response is required. To the extent one is required, Complainants admit that the Illinois Pollution Control Board was created by statute, state that the statutes governing the Pollution Control Board speak for themselves, and deny the allegations to the extent that they are inconsistent with those statutes.

22. “Under Section 33(b) of the Illinois Environmental Protection Act, 415 ILCS 5/33(b), the Board is limited to:

...a direction to cease and desist from violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act.’ 415 ILCS 5/33(b).” Answer, para. 78.

ANSWER: The allegations in paragraph 78 of the Answer constitute a legal conclusion to which no response is required. To the extent one is required, Complainants admit that the Illinois Environmental Protection Act has a section 33(b), codified at 415 ILCS 5.33(b); state that the statutory provision speaks for itself; and deny the allegations to the extent that they are inconsistent with that provision.

23. “The Board has no enforcement power, *People of the State of Illinois v. NL Industries, et al*, 152 Ill.2d 82, 99, 604 N.E.2d 349, 356 (1992), and does not have the authority to grant injunctive relief. *Janson v. Illinois Pollution Control Bd.*, 69 Ill.App.3d 324, 328, 387 N.E.2d 404, 408 (3rd Dist., 1979), *Clean the Uniform Company-Highland v. Aramark Uniform & Career Apparel, Inc.*, PCB 03-21, Nov. 7, 2002 slip op. at 1 & 3.” Answer, para. 79.

ANSWER: The allegations in paragraph 79 of the Answer constitute legal conclusions to which no response is required. To the extent an answer is required, Complainants deny same.

24. “Complainants’ requests that the Board order MWG to ‘modify its coal ash disposal practice’ and to ‘remediate the contaminated groundwater so that it meets applicable Illinois groundwater standards’ are demands for mandatory injunctive relief.” Answer, para. 80.

ANSWER: The allegations in paragraph 80 of the Answer constitute legal conclusions to which no response is required. To the extent an answer is required, Complainants deny same.

25. “As the Board does not have the authority to order mandatory injunctive relief, Complainant’s [sic] request for such relief cannot be granted.” Answer, para. 81.

ANSWER: The allegations in paragraph 81 of the Answer constitute legal conclusions to which no response is required. To the extent an answer is required, Complainants deny same.

Respondent’s First Affirmative Defense:

26. “Paragraphs 62-81 are realleged and reincorporated herein by reference.” Answer, para. 82.

ANSWER: Complainants incorporate herein, as if restated, their answers to paragraphs 62-81 of the Answer, which answers are set out in paragraphs 6-25 of this Reply.

27. “On October 24, 2012, MWG resolved the violations alleged in the VNs by entering into a Compliance Commitment Agreement (‘CCA’) for the ash ponds at the Stations. (Illinois EPA CCAs for the Stations, attached as Exs. 1-4)” Answer, para. 83.

ANSWER: The allegations in paragraph 83 of the Answer constitute legal conclusions to which no response is required. To the extent one is required, Complainants admit that MWG entered into Compliance Commitment Agreements on October 24, 2012 which pertained to the violations alleged in the VNs issued by the Illinois EPA, and denies the remainder of the allegations.

28. “From the date the CCAs were issued, MWG executed and completed all the terms of the CCAs. In October 2013, MWG submitted Completion Statements for the Stations certifying that the corrective actions in the CCAs were completed. (Illinois EPA Compliance Statements for the Stations, attached as Exs. 5-8).” Answer, para. 84.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 84 of the Answer and therefore deny same.

29. “Pursuant to the CCAs, MWG established a Groundwater Management Zone (‘GMZ’) for the areas underneath the Joliet 29 Station, Powerton Station, and the Will County Station.” Answer, para. 85.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 85 of the Answer and therefore deny same.

30. “Upon establishment of a GMZ, the standards specified in 35 Ill. Adm. Code §§620.410, 620.420, 620.430, and 620.440 are not applicable. 35 Ill. Adm. Code 620.450(a)(3).” Answer, para. 86.

ANSWER: The allegations in paragraph 86 of the Answer constitute legal conclusions to which no response is required. To the extent one is required, Complainants admit that there are regulations codified at 35 Ill. Adm. Code §§620.410, 620.420, 620.430, 620.440, and 620.450(a)(3), state that those regulations speak for themselves, and deny the allegations to the extent that they are inconsistent with those regulations.

31. “Upon the establishment of the GMZs, the Joliet 29 Station, Powerton Station, and the Will County Station are not in violation of the groundwater standards alleged in the Complaint.” Answer, para. 87.

ANSWER: The allegations in paragraph 87 of the Answer constitute legal conclusions to which no response is required. To the extent an answer is required, Complainants deny same.

32. “As Respondent is not in violation of the groundwater standards, Respondent is not in violation of 35 Ill. Adm. Code 620.301(a) and 620.405.” Answer, para. 88.

ANSWER: The allegations in paragraph 88 of the Answer constitute legal conclusions to which no response is required. To the extent an answer is required, Complainants deny same.

Respondent’s Second Affirmative Defense:

33. “Paragraphs 62-88 are realleged and incorporated herein by reference.” Answer, para. 89.

ANSWER: Complainants incorporate herein, as if restated, their answers to paragraphs 62-88 of the Answer, which answers are set out in paragraphs 6-32 of this Reply.

34. “Pursuant to the CCAs, MWG entered into Environmental Land Use Controls (‘ELUCs’) for the areas of the Powerton Station, Waukegan Station, and the Will County Station.” Answer, para. 90.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 90 of the Answer and therefore deny same.

35. “MWG did not enter into an ELUC at the Joliet 29 Station because Illinois EPA determined that there were no potential groundwater receptors in the area.” Answer, para. 91.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 91 of the Answer and therefore deny same.

36. “An ELUC is an institutional control that is used to impose land use limitations, and prevent the use or consumption of the groundwater. 35 Ill. Adm. Code 742.1010.” Answer, para. 92.

ANSWER: Complainants admit that there are regulations codified at 35 Ill. Adm. Code §742.1010, state that those regulations speak for themselves, and deny the allegations to the extent that they are inconsistent with those regulations.

37. “By establishing an ELUC at the Stations and the absence of groundwater receptors, there is no risk to the public health.” Answer, para. 93.

ANSWER: Complainants deny the allegations in paragraph 93 of the Answer.

38. “Pursuant to the CCAs, MWG has instituted corrective actions that address any alleged environmental harms.” Answer, para. 94.

ANSWER: Complainants deny the allegations in paragraph 94 of the Answer.

39. “In addition to the previously stated corrective actions taken, including lining the ash ponds with HDPE liners..., establishing GMZs..., and establishing ELUCs..., MWG is conducting ongoing groundwater monitoring at the ash ponds on a quarterly basis.” Answer, para. 95.

ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 95 of the Answer and therefore deny same.

40. “MWG did not fill or place coal ash in historic landfilled areas at or near the stations.” Answer, para. 96.

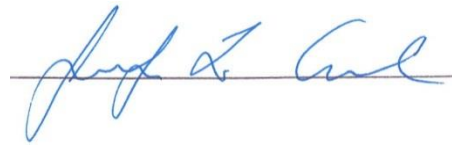
ANSWER: Complainants are without sufficient information to admit or deny the allegations in paragraph 96 of the Answer and therefore deny same.

41. “Based on the low levels of constituents in the groundwater and the absence of human and environmental receptors, there is no nuisance, harm or injury to public health, safety or welfare at or around the stations.” Answer, para. 97.

ANSWER: Complainants deny the allegations in paragraph 97 of the Answer.

WHEREFORE, Complainants hereby reply and object to the defenses and affirmative defenses included in Respondent’s Answer.

Respectfully submitted,



Jennifer L. Cassel
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
jcassel@elpc.org
ph (312) 795-3726

*Attorney for ELPC, Sierra Club and
Prairie Rivers Network*

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org
wferrell@environmentalintegrity.org
202-263-4453 (phone)
202-296-8822 (fax)

Attorney for Sierra Club

Faith Bugel
Attorney at Law
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
fbugel@gmail.com

Attorney for Sierra Club

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
kharley@kentlaw.iit.edu
312-726-2938 (phone)
312-726-5206 (fax)

Attorney for CARE

Dated: May 29, 2015

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **COMPLAINANTS' REPLY TO RESPONDENT'S DEFENSES TO SECOND COMPLAINT** was served to all parties of record listed below by United States Mail, postage prepaid, on May 29, 2015.

/s/ Robert M. Gelles
Robert M. Gelles
Legal Assistant
Environmental Law & Policy Center
35 E Wacker Drive, Suite 1600
Chicago, Illinois 60601
312-795-3718

PCB 2013-015 SERVICE LIST:

Jennifer T. Nijman
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph St
Suite 11-500
Chicago, IL 60601

CT Corporation Systems
Midwest Generation, LLC
208 South LaSalle Street Suite 814
Chicago, IL 60604