

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	Attached Service List
Illinois Pollution Control Board	
James R. Thompson Center	
100 West Randolph Street, Suite 11-500	
Chicago, IL 60601	

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

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 19, 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 Response to Complainants' Motion for Partial Summary Judgment was filed electronically on July 19, 2016 with the following:

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

and that true copies were mailed by First Class Mail, postage prepaid, on July 19, 2016 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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NETWORK, and CITIZENS AGAINST)	
RUINING THE ENVIRONMENT)	
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MIDWEST GENERATION, LLC’S RESPONSE TO COMPLAINANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT

Pursuant to 35 Ill. Adm. Code 101.500 and 101.516, Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits this Response to Complainants’ Motion for Partial Summary Judgment. MWG requests that the Illinois Pollution Control Board (“Board”) deny the Motion for Partial Summary Judgment filed by the Sierra Club, Natural Resources Defense Council, Prairie Rivers Network, and the Environmental Law & Policy Center (the “Complainants”), because there are multiple genuine issues of material fact and issues of law.

I. INTRODUCTION

It is undisputed that this a complex case with a voluminous record.¹ The case involves alleged groundwater contamination from coal ash at four electric generating Stations owned and/or operated by MWG: the Waukegan Station, in Waukegan, IL, the Joliet 29 Station in Joliet, IL, the Will Count Station, in Romeoville, IL and the Powerton Station, in Pekin, IL (collectively “the Stations”). Each Station is significantly different not only in the number of ash ponds and areas,

¹ See Hearing Officer Order, PCB 13-15, June 21, 2016 at *slip op.* p. 1 and Complainants’ Response to MWG’s Motion for Extension of Time to Respond to Complainants’ Motion for Partial Summary Judgment at p. 6.

but also in how ash was handled and historic practices at the Stations that predate MWG. In evaluating the Stations and the underlying groundwater, each Station is unique in its geology, hydro-geology, the constituents in the groundwater, and the surrounding land uses that potentially impact the groundwater. Despite the agreed complexity and the voluminous record, Complainants have moved for partial summary judgment relating only to specific, isolated portions of each Station for the “Historical Coal Ash,” as they have defined in their motion.² Complainants’ Motion must be denied because:

- 1) A partial summary judgment should further the case or shorten the hearing. Complainants’ complicated motion for partial summary judgment will do neither. It will not even eliminate a paragraph from Complainants’ Amended Complaint, let alone a full Count.
- 2) There are genuine issues of material fact applicable to all four Stations that prevent the Board from granting the partial summary judgment, including:
 - a. Complainants’ identification of the areas they define as “Historic Coal Ash” a/k/a “Historic Ash Areas” is so vague and broad that it is virtually impossible to identify the locations that are the subject of Complainants’ Motion, resulting in a genuine issue of material fact of the actual areas of “Historic Coal Ash.”
 - b. It is a genuine issue of material fact of whether the Historic Coal Ash is actually a source of contamination. In fact, sample results show that the Historical Coal Ash is not a source.
 - c. Complainants have not identified the constituents in groundwater they assert are related to coal ash, creating a genuine issue of material fact.
- 3) There are numerous material issues of genuine fact for each of the Stations, as described in MWG’s Responses to Complainants Statements of “Undisputed” Facts and summarized in this Response. *See* Appendix A attached to this Response.³
- 4) Complainants are not entitled to summary judgment as a matter of law because MWG has not caused or allowed groundwater pollution from Historic Coal Ash.
 - a. Historic Coal Ash was not placed or caused by MWG. When MGW began operating the Stations in 1999, the ash used as structural fill at the Stations had long been in place. Based on its investigations prior to owning or operating the Stations, MWG knew that

² “Historic Ash Areas” are areas that contain “Historic Coal Ash”. Complainants use the terms interchangeably. *See* Complainants’ Memorandum, FN 3.

³ Due to the sheer number of Complainants’ Statements of Fact, and their complexity in alleging many facts in each paragraph, MWG has restated each statement of fact, followed by MWG’s Response. The combined document is provided in App. A for ease of review.

groundwater contamination did not exist and no further investigation was recommended at that time.

- b. To claim that MWG “allowed” a discharge, there must be a source and Complainants have not established that the Historic Coal Ash is a source of constituents in the groundwater.
 - c. Complainants cannot establish as a matter of law that there are groundwater exceedances in the areas of the Historic Coal Ash. Complainants’ own definition of “Historic Coal Ash” excludes the areas where groundwater sampling has been conducted.
 - d. There is no water pollution because a risk analysis conducted by MWG establishes that the receiving waters at the Stations have not been rendered harmful, injurious or detrimental.
- 5) Complainants are not entitled to summary judgment as a matter of law for their claim of open dumping. As established by the Board’s Oct. 13, 2013 Order, an alleged violation of RCRA is not a violation of the Illinois Environmental Protection (“Act”), the historic coal ash is not a “waste” as defined by the Act, and MWG did not cause or allow open dumping of a waste.

II. STANDARD OF REVIEW FOR PARTIAL SUMMARY JUDGMENT

Complainant’s Motion does not resolve a substantial claim of Complainants’ Complaint or even a single Count. Complainants’ Motion should be denied because it fails to resolve a major issue, fails to further the lawsuit, and fails to simplify any future hearing.

a. Partial Summary Judgment is Allowed To Resolve Major Issues

A partial summary judgment must resolve a material or substantial claim or part of a claim, thereby conserving judicial resources and avoiding piecemeal decisions. Under the Illinois Rules of Civil Procedure, partial summary determinations are allowed to resolve major issues in a case. 735 ILCS 5/2-1005(d). A “major issue” is often held to be the essential elements of a cause of action or affirmative defense. *See Pirrello v. Maryville Acad., Inc.*, 2014 IL App (1st) 133964, ¶ 10, 19 N.E.3d 1261, 1263, (1st Dist. 2014) (affirming partial summary judgment for defendants on plaintiff’s claim under the Family Expense Act); *Peregrine Financial Group, Inc. v. TradeMaven, L.L.C.*, 391 Ill. App. 3d 309, 330 Ill. Dec. 815, 909 N.E.2d 837 (1st Dist. 2009),

appeal denied, 233 Ill. 2d 599, 335 Ill. Dec. 646, 919 N.E.2d 365 (2009) (finding that court can grant partial summary judgment on one or more major issues and the major issue in this case was an affirmative defense); *Heiden v. Cummings*, 337 Ill. App. 3d 584, 271 Ill. Dec. 982, 786 N.E.2d 240 (2d Dist. 2003) (affirming partial summary judgment for defendants in part because “the absence of a genuine issue as to negligence precludes recovery ...”).

The Federal Rules are instructive on why a partial summary judgment should be limited to “major issues.” Under the Federal Rules, “a motion for partial summary judgment that partitions a single claim for relief into constituent parts and then seeks partial summary judgment on some but not all of the constituent parts is not permitted.” *Rubin v. Islamic Republic of Iran*, 408 F. Supp. 2d 549, 552 (N.D. Ill. 2005), *aff'd*, 436 F. Supp. 2d 938 (N.D. Ill. 2006), *rev'd and remanded sub nom. Rubin v. The Islamic Republic of Iran*, 637 F.3d 783 (7th Cir. 2011), as corrected (Apr. 1, 2011). A partial summary judgment “serves the purpose of speeding up litigation by eliminating before trial matters wherein there is no genuine issue of fact.” F.Rule.Civ.Pro. 56(d)(Advisory Note). “This principle is grounded in the need to conserve judicial resources. If parties could bring piecemeal motions for summary judgment, the courts would be overwhelmed with constant requests to resolve factual issues.” *In re Neopharm, Inc. Sec. Litig.*, No. 02 C 2976, 2007 WL 625533, at *2 (N.D. Ill. Feb. 23, 2007). An Illinois Court has affirmed the Federal Rule that a partial summary judgment is permitted when it will serve to speed up the trial. *Davis v. Loftus*, 334 Ill.App. 3d 761, 768, 778 N.E. 2d 1144 (1st Dist. 2002).

b. Complainants’ Motion for Partial Summary Judgment Will Not Resolve a Major Issue in Complainants’ Complaint

Complainants ask that the Board grant a partial summary judgment on all Counts in their Second Amended Complaint but only for the limited areas that they describe as “Historic Coal Ash” or “Historic Ash Areas.” Complainants’ Memorandum, FN 3. Complainants do not use the

terms “Historic Coal Ash” or “Historic Ash “Areas” in their Second Amended Complaint. Instead, Complainants use the term “repositories” as part of their allegations in ¶¶1, 3, 5, 7, 42, 45, 48, 51, 54, 57 and 60. For instance in ¶1 of their Second Amended Complaint regarding the Joliet 29 Station, Complainants allege:

MWG has historically stored and disposed of coal ash and other coal combustion waste in repositories that include, but are not limited to, two or more landfills and three ash ponds (two HDPE-lined, one geocomposite-lined) on the same side of the river, and continues to dispose of coal ash and other coal combustion waste in these ponds or repositories (emphasis added).

Complainants similarly broadly define the “repositories” of coal ash at the other three Stations. Complainants’ Second Complaint, ¶¶3,5,7. Complainants then identify the “repositories” as a part of their allegations in Counts 1 through 7. Complainants’ Second Complaint, ¶¶, 42, 45, 48, 51, 54, 57, 60. Complainants thus use the term “repositories” to address all areas of coal ash at the Stations, including the ash ponds and all of the areas outside of the ponds that they allege also contain coal ash.

In their Motion, however, Complainants take select areas within the “repositories” and describe those areas with new terms: “Historic Coal Ash” and “Historic Ash Areas.” In a confusing footnote that extends a page in length, Complainants define “Historic Coal Ash” as coal ash in or on the ground or in unlined repositories at each Station *except* for the ash ponds and certain distinct areas. *See* Complainants’ Motion, FN 3, ¶¶1, 2, 3, 4. Complainants then continue to create exceptions from their definition by excluding coal ash repositories that were subject to corrective action under Compliance Commitment Agreements with Illinois EPA, as well as excluding any historic coal ash areas for which MWG’s expert cited leach test data. Complainants’ Motion, FN 3, ¶6. Thus, Complainants seek partial summary judgment for only a part of a term used in their

Second Amended Complaint.⁴ Assuming the Board could figure out the areas Complainants attempt to include, Complainants' Motion would not resolve a single paragraph of the Second Amended Complaint or even a single Count. Resolving a part of a term used in various paragraphs in all of the Counts is not a resolution of a "major issue" in a claim. For that reason, Complainants' motion for partial summary judgment must be denied.

Even if Complainants' "Historic Ash Areas" were resolved by their Motion, the length of the hearing would not be reduced. There are no witnesses that only testify to the areas Complainants identify as "Historical Ash Areas," and thus the witness list will not be reduced. Instead, MWG's witness will testify as to the entire Station. *See. e.g.* Depositions attached to Complainants' Motion, Ex. E1 – E7. Similarly, the length of witness testimony will not be reduced. Instead, witnesses will be required to attempt to understand and/or explain the allegedly distinct areas or impact of the Historic Ash Areas within each Station, resulting in testimony that is complex and unwieldy. Both Complainants' experts and MWG's experts will still testify and their opinions will be more complex as they try to piece together the areas at issue and how to divide their opinions. The voluminous record will still be voluminous. The vast majority of the documents in the record speak to both the ash ponds and areas excluded from Complainants' Motion, as well as the areas Complainants address in their Motion. This is exemplified by Complainants' own exhibits in which all but two of the 81 exhibits describe all the areas included and excluded from Complainants' Motion. *See* Complainants Ex. A1-A13, B1-15, C1-C11, C14-C15, D1-D23, E-M. Ultimately, Complainants' partial summary judgment will do nothing to further the case and will

⁴ Further discussion of the scattered and disconnected "Historic Ash Areas" at each of Stations as defined in Complainants' Motion is in Sec. IV.a. of this Response.

only confuse the issues as to what areas have and have not been resolved, likely lengthening any hearing.⁵

III. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

“[S]ummary judgment is appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *NRDC et al v. Dynegy Midwest Gen., Inc.*, PCB No. 13-17, (June 5, 2014), *slip op.* at 37 *citing Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998). However, “summary judgment is a harsh remedy which is to be avoided in favor of granting the parties an opportunity to present their evidence at trial unless all of the pleadings, depositions, admissions, affidavits, and all permissible inferences, analyzed in the light most favorable to the nonmovant, 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, 452 N.E.2d 733, 735 (1983). With a summary judgment motion, the trial court does not decide a question of fact, but rather determines whether a question of fact exists. *Irvington Elevator Co. v. Hesper*, 2012 IL App (5th) 110184, ¶ 10, 982 N.E.2d 824, 827-28 (5th Dist. 2012). Therefore, a court cannot make credibility determinations or weigh evidence in deciding a summary judgment motion. *Irvington Elevator Co. 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).

Importantly, all reasonable inferences must be drawn in favor of the nonmoving party. *McCullough v. Gallaher & Speck*, 254 Ill. App. 3d 941, 949, 627 N.E.2d 202, 208 (1993); and, 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.

⁵ This is all the more true because the areas Complainants identify as their “Historic Ash Areas” are conflicting and almost impossible to identify with any certainty. See *infra* Sec. IV.a of this Response.

695, 29 N.E.3d 627 (1st Dist. 2015). Moreover, summary judgment should be denied when there is a complicated factual situation that is best resolved by a jury or trier of fact. *Star Spa Servs. Inc. v. Robert G. Turano Ins. Agency, Inc.*, 595 F.Supp.2d 519, 529 (M.D. Pa. 2009) (“The court concludes that this complicated factual situation would be best resolved by a jury and will deny summary judgment on this point.”)

IV. GENUINE ISSUES OF MATERIAL FACTS

Complainants’ Motion reveals genuine issues of material fact that are so confusing it is virtually impossible for the Board to make a decision. By the very nature of the confusion created, there are genuine issues of material facts as to the areas Complainants purport to place at issue, the source of constituents in the groundwater, which contaminants Complainants allege are in violation, and the actual presence of Historic Coal Ash at the Stations.

a. It is Impossible to Identify the Locations Complainants Address in their Motion for Partial Summary Judgment

Complainants define Historic Coal Ash and Historic Ash Areas by exclusion, resulting in a piecemeal map of defined areas at each of the Stations. By poorly defining the areas, Complainants force the Board to decide the locations of the Historic Coal Ash and Historic Ash Areas. The Board may not grant a motion for summary judgment where the Board must decide the factual issues. *See Irvington Elevator Co.*, 982 N.E.2d 827-28.

i. Waukegan Station

Complainants first state that the “Historic Coal Ash at Waukegan” is all areas, except for the West Ash Pond and the East Ash Pond. Complainants’ Motion, FN 3, ¶1. Complainants then exclude from the definition the “repositories” that are subject to “corrective action” under the Compliance Commitment Agreements (“CCAs”). Complainants’ Motion, FN 3, ¶6. As noted above, Complainants define “repositories” to include all areas that contain ash. “Corrective

Actions” under the CCAs include Environmental Land Use Controls (“ELUC”). See Waukegan CCA, attached as Ex. 2.⁶ Thus, at Waukegan, the “Historic Coal Ash” does not include the areas covered by an ELUC established by the Waukegan CCA; nor does it include the ELUC established at the Griess-Pfleger Tannery,⁷ which was referenced and relied upon in the Waukegan CCA. See map of ELUC attached as Ex. 1, and the Waukegan CCA attached as Ex. 2 ¶ III.5.f. By excluding the repositories subject to corrective action under the CCAs, Complainants have excluded the “Former Slag/Fly Ash Storage Area,” the areas where MW-1 through MW-5 were installed, and the area around soil borings B-16 and B-22. Complainants’ Ex. A2 and A3.

However, under Complainants’ SOF No. 4, Complainants attempt to re-identify all of these areas (the Former Slag/Fly Ash, MW1- MW-5, borings B-16 and B-22) as “Historic Coal Ash.” The only area that is not excluded from Complainants’ definition of “Historic Coal Ash at Waukegan” is boring B-11, identified in SOF No. 4, ¶2, which MWG disputes is even on property owned by MWG. See App. A, MWG’s Response to Complainants’ SOF No. 4, ¶2. Moreover, in SOF No. 4, ¶4, Complainants identify the borings for MW-8 and MW-9, yet do not provide the Board with the location of the borings.⁸ There is no way for the Board to identify whether the soil borings for MW-8 and MW-9 are located on MWG property or whether they are within the excluded CCA area.

Additionally, in SOF No. 62, significantly later in Complainants’ list of Statement of Facts, Complainants identify a new location of coal ash that was not included in defining the alleged Historic Coal Ash areas in SOF No. 4. In SOF No. 62, Complainants identify coal ash “around the

⁶ MWG notes that Complainants have mislabeled their exhibits. Complainants’ Exhibit A6 is the Powerton CCA, and the Waukegan CCA appears to not be attached to Complainants’ motion. To assist the Board in its decision, MWG has attached the Waukegan CCA to this Response as Ex. 2

⁷ Further discussion of the plume from the Griess-Pfleger Tannery is in Section V.a.i of this Response.

⁸ That Respondent may be able to locate a map of the monitoring well locations in the voluminous record is inconsequential. It is not Respondent’s burden to support Complainants’ Motion.

Waukegan site” and cite to a KPRG report attached as Complainants’ Ex. I. Complainants do not state that coal ash identified in SOF No. 62 is “Historic Coal Ash at Waukegan” as defined in SOF No. 4 even though SOF No. 62 is under a heading which states “Historic Ash Areas at Waukegan.” Causing even greater confusion, Complainants do not identify the locations in their Ex. I that they allege show coal ash, again forcing the Board to identify which of the five soil borings actually contain coal ash, and to decipher where the soil borings are located, decisions the Board should not be required to make.

Even later in Complainants’ Statement of Facts, in SOF Nos. 114 and 115, under the heading “Historic Coal Ash at Waukegan,” Complainants appear to identify two entirely new locations of “Historic Coal Ash” at the Waukegan Station in boring logs in the 1998 Phase II. Again, as these new locations are within a section regarding “Historic Coal Ash,” Complainants must intend to include it as one of the locations for their Motion, but that is not clear because Complainants identify it at almost the end of their Statement of Facts, instead of in the early Sections describing the “Historic Coal Ash.”

ii. Will County Station

Complainants state that the “Historic Coal Ash at Will County” is all areas, except for the Ash Ponds 1-N, 1-S, 2-S or 3S. Complainants Motion, FN 3, ¶2. Complainants then state that the Historic Coal Ash “does not include coal ash in the boiler slag stockpile located near the retention basin depicted in Ex. B1.” Complainants Motion, FN 3, ¶2. Notably, neither of the maps included in Complainants’ Ex. B1 show a boiler slag stockpile, forcing the Board to identify the location. Just like Waukegan, Complainants next exclude from the “Historic Coal Ash” the repositories that were subject to corrective action under the CCAs, which are the areas covered by the ELUC and Groundwater Management Zone (“GMZ”) established by the Will County CCA. *See*

Complainants' Memorandum, FN 3, ¶6; Complainants' Ex. B6; maps of the Will County ELUC and GMZ attached as Ex.3 and 4. By excluding the repositories covered by corrective action in the CCAs, Complainants have excluded the area of the former boiler slag stockpile,⁹ the areas of MW-1 through MW-4 and MW-6, the "Slag Dumping Area" and the area around the 1998 Phase II borings B-5 through B-7.

However, on page 4 of their Motion, Complainants then attempt to identify all of the areas they excluded from the Historic Ash Areas at Will County, as "Historic Coal Ash," along with various other areas. *See* Complainants' SOF No. 5. As described in MWG's response to SOF No. 5, MWG disputes that certain areas Complainants have identified actually contain ash. *See* Appendix A, MWG Response to SOF No. 5. Additionally, Complainants' SOF No. 6, also under the "Historic Coal Ash" heading, describes the boiler slag stockpile. That area is explicitly excluded in the definition of "Historic Coal Ash at Will County," and is further excluded because it is an area from which the leach data is cited by MWG's expert and it is part of the CCA area. Complainants' Motion, FN 3, ¶¶2, 6, Complainants' Ex. G, p. 48, Exs. 3 and 4.¹⁰ There can be no other reason to include the boiler slag pile under the heading entitled "There is Historic Coal Ash at All Four Plants," but to attempt to include the boiler slag pile as a "Historic Ash Area," despite the explicit exclusion in FN3. At the very least, the conflicting identifications of Complainants' locations of "Historic Coal Ash at Will County" obligates the Board to find a material issue of fact.

To add to the confusion, later in Complainants' list of Statement of Facts, in SOF No. 17, ¶1 Complainants identify a new location of coal ash that was not included in SOF No. 5 or No. 6.

⁹ Per MWG's response to SOF No. 6, MWG disputes that there is a pile of boiler slag in this area. *See* App. A, MWG's response to SOF No. 6.

¹⁰ Complainants seek to exclude the leach test data because the data reveals that the historic coal ash is not leaching. *See* Seymour Expert Opinion, Complainants' Ex. G, pp. 45-48, 52

In SOF No. 17, ¶1, Complainants identify two areas of bottom ash at the Will County Station based upon soil borings in their Ex. I. As was the case regarding the Waukegan locations, Complainants do not state that coal ash identified in SOF No. 17 is “Historic Coal Ash at Waukegan” as defined in SOF Nos. 5 and 6. The SOF No. 17 is under the heading regarding the different types of coal ash between the plants but does not describe the ash as “Historic Coal Ash.” See Complainants’ Motion at 8. Thus, it is unclear whether the areas identified in SOF No. 17 are the “Historic Ash Areas at Will County” that Complainants are including in their motion, or merely using it as their basis that the coal ash varies between plants. Either way, the Board cannot be forced to make this determination in deciding a motion for summary judgment.

iii. Joliet 29 Station

Complainants first state that the “Historic Coal Ash at Joliet 29” is all areas, except for Ash Ponds 1, 2, and 3. *See* Complainants’ Motion, FN 3, ¶3. Additionally, Complainants exclude the “former ash placement area” on the western portion of the Site. Complainants’ Motion, FN 3, ¶¶3, 6. As Complainants also exclude the repositories that were subject to corrective action in the CCAs, the “Historic Coal Ash” does not include the repositories covered by the GMZ established by the Joliet 29 CCA. *See* Complainants’ Ex. C6; and map of Joliet 29 GMZ, attached as Ex. 5.

In Complainants’ SOFs, there are two paragraphs devoted to the Joliet 29 “Historic Coal Ash”, SOF Nos. 7 and 8. MWG disputes that certain of the areas Complainants have identified actually contain ash. *See* App. A, MWG’s Responses to SOF Nos. 7 and 8. In SOF No. 7, Complainants identify “ash in fill near the center of the Joliet Site” and cite to a KPRG 2005 report attached to Complainants’ Motion at Ex. I. SOF No. 7, ¶2. Complainants do not identify the soil boring(s) by which they claim there is coal ash. Nor does there appear to be a soil boring “near the

center of the Joliet Site.” It is truly impossible to identify the location Complainants are describing as “near the center of the Joliet Site” in paragraph 2 of SOF No. 7.

Regardless, all of the boring locations in Complainants’ Ex. I are within the area that was subject to corrective action under the CCAs with Illinois EPA. So, even if it was clear where the “ash in fill near the center of the Joliet Site” was located, that area would be excluded by Complainants’ own definition because all of the soil borings in Complainants’ Ex. I are within the CCA area. *See* Ex. 5.

Complainants’ SOF No. 8 describes the “former ash placement area” as an area of Historic Coal Ash even though that area is explicitly excluded in the definition of “Historic Coal Ash at Will County.” Complainants’ Motion, FN 3, ¶3. That area is also excluded because Mr. Seymour cited to the leach test data from this area, and Complainants exclude areas that contain leach data. Complainants’ Motion, FN 3, ¶6 and Complainants’ Ex. G, p. 46. As the former ash placement area is under the heading entitled “There is Historic Coal Ash All Four Plants,” Complainants appear to have intended it to be included as a “Historic Ash Area” despite the explicit exclusion in FN 3.

Adding to the confusion, significantly later in Complainants Statement of Facts, in SOF No. 87, under the heading “Historic Coal Ash at Joliet 29,” Complainants identify a completely new location of “Historic Coal Ash” at the Joliet 29 Station in boring logs in the 1998 Phase II. MWG disputes that there is any ash in these areas based on the cited boring logs.¹¹ By including this new location within their definition of “Historic Coal Ash,” Complainants again appear to

¹¹ The boring logs in Complainants Ex. C3 are not actually from the Joliet 29 Station. As shown in the caption for each of the logs, the boring logs are from another Station, which is not a part of this matter. Upon review of the Joliet 29 Phase II report, counsel for MWG discovered that the boring logs in the Joliet 29 Phase II were mistakenly switched by ENSR with the boring logs from an unrelated site (Joliet 9), which is across the Des Plaines River. Further research at Joliet 9 revealed the Joliet 29 boring logs in the Joliet 9 ENSR Phase II. There is no coal ash, ash, or otherwise similarly described substance in any of the Joliet 29 boring logs. *See* Ex. 6.

intend to include it as one of the locations for their Motion. This is a material issue of fact. If nothing else, the Board is forced to decide whether the former ash placement area and the boring log identified in SOF No. 87 are Historic Ash Areas in Complainants' Motion.

iv. Powerton

Powerton is the most confusing of all of the descriptions of "Historic Coal Ash." Complainants state that the "Historic Coal Ash at Powerton" is all coal ash in or on the ground or in unlined repositories, *except* for the Secondary Ash Settling Basin, the Ash Surge Basin, the Ash Bypass Basin, the East Yard Runoff Basin, the Metal Cleaning Basin, and the Limestone Runoff Basin. Complainants Motion, FN 3, ¶4. Because Complainants exclude from the definition of "Historic Coal Ash" the repositories that were subject to corrective action in the CCAs, the "Historic Coal Ash" also does not include the repositories covered by the ELUC and GMZ established by the Powerton CCA. *See* Complainants' Ex. D12; and maps of ELUC and GMZ, attached as Exs. 7 and 8. By excluding the areas covered by the CCAs, Complainants have excluded the area of the former ash basin, and most of the areas identified in SOF No. 10, ¶2, all of which are included in the GMZ and the ELUCs established at the Powerton Site. *See* Exs. 7-8.

Complainants' SOF No. 10, ¶2 adds its own confusion on the locations of Historic Coal Ash. Complainants identify 26 boring locations based upon six different reports in SOF No. 10, ¶2. Complainants do not identify the page numbers of the maps identifying the locations of the soil borings in the respective reports. The Board is forced to flip from the motion to each exhibit and then to the respective map to attempt to identify where each boring is located.

Upon executing the exercise of identifying each soil boring location that contains coal ash, it becomes evident that 21 of the 26 soil boring locations are within the area of the corrective action in the CCA. *See* Ex. 7-8. Thus, under Complainants' own definition by exclusion, 21 soil borings

are excluded from Complainants' definition of "Historic Coal Ash at Powerton." The only areas that remain are five soil borings from a Phase II report that are west of the ash ponds and side gradient to the monitoring well locations. Powerton Phase II ESA at Bates MWG13-15_3320-3324.

Moreover, as was the case in discussing Will County and Joliet 29, SOF No. 11, allegedly identifying "Historic Coal Ash," describes the Limestone Runoff Basin, which is a basin for which MWG expert, John Seymour, cited leach test data and is within the CCA areas. *See* Complainants' Ex. G, p. 47-48 and Exs. 7-8. Complainants have explicitly excluded the Limestone Runoff Basin, areas of corrective action undertaken pursuant to the CCAs and the "repositories for which MWG's expert cited leach test data." Complainants' Motion, FN 3, ¶¶4, 6.

The Board may not weigh the evidence or make factual determinations of the locations of Historic Ash Areas in deciding a Motion for Summary Judgment. *See Irvington Elevator, 982 N.2d 827-28.* The complexity and inconsistencies in the defined areas at each of the Stations are genuine issues of material fact that preclude partial summary judgment.

b. There is a Genuine Issue of Material Fact Whether Historic Ash in the Ground is a Source

No person nor document in this matter has identified the Historic Ash Areas as a source of alleged groundwater impact during the term MWG owned or operated the Stations. In fact, MWG's expert specifically opines that historic ash at the Stations is not a source. Ex. G., pp. 45-48, 52. This key dispute of a material fact requires the Board to deny partial summary judgment.

i. MWG's Expert Concluded the Coal Ash Is Not a Source

MWG's expert, John Seymour, clearly opined that "the current conditions of the existing weathered ash are not contributing to the groundwater exceedances at the four sites based on leaching analysis for actual ash fill at the sites." Complainants' Ex. G, pp. 45-46. Based upon his

analysis of the data from the historical ash at the Powerton, Joliet 29 and Will County Stations, any leachate from historical ash in fill materials is not adversely impacting the groundwater. Complainants' Ex. G, pp. 46-48. Mr. Seymour concluded that "*there is no evidence that historical ash in fill materials outside of the ash ponds is a source of groundwater impacts based on leaching analyses of the existing weathered ash in fill materials and observed groundwater concentrations.*" Complainants' Ex. G, p. 52. In addition, Mr. Seymour confirmed that there is not a groundwater plume at any of the Stations, other than a plume at the Waukegan Station originating off-site from the Griess-Pfleger tannery at Waukegan. Complainants' Ex. G, pp. 15, 18, 21, 23.¹²

As he explained in his deposition, Mr. Seymour relied upon leaching data from ash outside the ash ponds to form his opinion. The leaching data found nothing in the ash exceeded the groundwater quality criteria. Complainants' Ex. E5, Tr. 45:6-11. Based upon the data, he concluded that the "...existing ash outside of the ponds was not contributing to the groundwater, so it must be something other than those areas." Complainants' Ex. E5, Tr. 45:16-20. Mr. Seymour stated that old ash would have less and less impact over time. Complainants' Ex. E5, Tr. 63:9-11. Moreover, Mr. Seymour stated in his deposition that in looking at the groundwater results from the Stations, "there so far doesn't appear to be an active source. So it must be from some other *historic* use." Complainants' Ex. E5, Tr. p. 41:2-5. In a sentence dropped by Complainants in their Motion, Mr. Seymour noted that the Powerton power plant "is over 50 years old." Complainants' Ex. E5, Tr. 38: 1. By *historic* uses, Mr. Seymour was referring to the uses over 50 years ago. It is undisputed that MWG did not own or operate the Stations until 1999. *See* Ex. 9, C. Lux Dep. at 6:22-24.

¹² Disputed. Complainants' SOF Nos. 53-60.

ii. Complainants' Expert Cannot Identify the Historic Ash Areas as the Source of the Groundwater Constituents

Complainants have not presented any evidence to support their allegation that the Historic Ash Areas are a source of groundwater impacts either before or after 1999, when MWG owned and operated the Stations. Complainants own expert, Mr. Kunkel, could not opine whether the Historic Ash Areas are or are not a source, only opining the source could be anything on each of the Stations, including the ponds. *See* Kunkel Report attached as Ex. 10, pp. 28 (Waukegan), 34 (Will County), 14 (Joliet 29), and 20 (Powerton).¹³ In his deposition, Mr. Kunkel stated that various possible sources of groundwater concentrations could be “any and all at the same time or individually” *See* Kunkel deposition (Will County) relevant pages attached as Ex. 11, Tr. 188:5-18. Mr. Kunkel further explained his basis for having multiple reasons for the sources of constituents in the groundwater by stating that “to distinguish between the two is impossible,” *See* Ex. 11, (Joliet 29) at Tr. 115: 16-21, and the reasons were “not mutually exclusive. It is any or all of those three reasons... There is no way to know.” Ex. 11, (Powerton), Tr. 140:15-141:1.

Even assuming Mr. Kunkel's opinions that the source could be anything are sufficient to suggest the Historic Ash Areas are a source, Mr. Seymour's clear opinion to the contrary, relying on leaching data in support, creates a material issue of fact that precludes summary judgment. The Board must accept all permissible inferences in favor of MWG, *see McCullough v. Gallaher & Speck*, 254 Ill. App. 3d at 949, and deny Complainants' Motion.

¹³ Additionally, it remains a genuine issue of material fact whether the Griess-Pfleger tannery property is a source of groundwater impacts at the Waukegan Station. Mr. Kunkel maintains that the tannery is not a source, Ex. 10, p. 28, and Mr. Seymour concludes that it is a source. Complainants' Ex. G, p. 19-21.

c. Complainants Do Not Identify Constituents in Groundwater They Allege are Related to Coal Ash

Throughout the Motion, and in particular in SOF Nos. 53 through 56, Complainants state that there are “concentrations of coal ash constituents in the groundwater” at each of the Stations. Complainants then allege numerous exceedances of groundwater standards, yet Complainants do not identify which constituents they allege are present that relate to coal ash. It is a genuine issue of material fact which constituents are representative of coal ash contamination.

The Parties’ experts do not agree on the indicator constituents for coal ash. MWG’s expert, Mr. Seymour, developed a minimum and maximum set of constituent indicators for leachate from ash stored in the pond, based upon site-specific data and published data. One set is the minimum set of constituent indicators based upon the analysis of the bottom ash at the Stations and the second set is the maximum set of constituent indicators based upon published data. Complainants’ Ex. G, p. 42. Based upon that set of data, Mr. Seymour identified a minimum of three indicators of coal ash: barium, boron and sulfate; and, a maximum of fifteen indicators of coal ash: antimony, arsenic, barium, boron, cadmium, chromium, cobalt, copper, lead, manganese, mercury, nickel, selenium, sulfate, and zinc. Complainants’ Ex. G, p. 42. Neither of these lists match the indicator constituents that Complainants’ expert has identified. Mr. Kunkel limited his indicator constituents to boron, manganese and sulfate. Ex. 10, p. 7. Complainants do not explicitly limit their discussions of coal ash constituents to boron, manganese and sulfate. Thus, there is an issue of fact which “coal ash constituents” Complainants allege are present.

This issue is material because Complainants allege that Historic Coal Ash contaminated groundwater at the Stations, but then cite to exceedances of constituents that are not indicators of coal ash. For instance, at Joliet 29, Complainants cite to “more than one hundred” of exceedances of the Class I standards. Complainants’ SOF No. 55. However, those cited exceedances are

primarily for chloride, which neither party asserts is a coal ash constituent. *See* Complainants' C11, pp. MWG13-15_56349-56359, 56407-56434. Moreover, boron was only detected at Joliet 29 above the groundwater standard in one well in 2011, and never since. *See* Complainants' Ex. C11, MWG13-15_56411.¹⁴ Yet, Complainants allege in SOF No. 55, that "Concentrations of coal ash constituents in the groundwater at Joliet 29 have been detected at levels exceeding Class I standards." Without knowing what "coal ash constituents" Complainants are alleging that have been exceeded, it is impossible for the Board to identify what constituents Complainants believe are from the "Historic Coal Ash" in violation of 12(a) of the Act.

d. Absence of Proof of the Presence of Coal Ash

MWG disputes that many of the areas alleged by Complainants to contain coal ash actually contain coal ash. In particular, there is no evidence of ash at the "Former Slag/Fly Ash Storage Area" at Waukegan or the alleged two "landfills" at Joliet 29. *See* App. A, MWG's Response to Complainants' SOF Nos. 4, ¶1 and 7, ¶1. In fact, the evidence that exists consists of witness testimony stating that they did not know if the areas contained ash. *Id.* Similarly, MWG disputes that the "Slag and Bottom Ash Dumping Area" and the "Slag Dumping Area" at the Will County Station contain ash. Two witnesses testified that they had never known of any ash at either of the areas. *See* App. A, MWG's Response to Complainant's SOF No. 5, ¶2. This is also true for the "spent slurry pond" and the "south area runoff basin" in which the same two witnesses testified that they had never known either area to contain ash. *See* App. A, MWG's Response to Complainants' SOF No. 5, ¶4. Whether ash even exists in certain Historic Ash Areas as claimed by Complainants is a disputed issue of material fact that precludes summary judgment.

¹⁴ It is disingenuous of Complainants to state in their SOF No. 55 that boron has exceeded Class I standards at Joliet 29 "since 2010" considering the actual facts show two exceedances in one well in 2011 and none since.

V. STATEMENT OF FACTS

Even if the above genuine issues of material fact are not sufficient to support a denial of Complainants' Motion for Partial Summary Judgment, MWG disputes most of the significant Statements of "Undisputed" Facts proffered by Complainants. Complainants included 138 "Statements of Undisputed Facts," which do not fully encapsulate all of the facts in this matter.¹⁵ MWG has specifically responded to each of Complainants' 138 paragraphs in Appendix A attached to this Response, and further presents additional facts in support of this Response.¹⁶

a. Brief History of the MWG Stations

In 1999, MWG purchased the four Stations that are the subject of this matter. Ex. 9, Tr. 6:22-24. Before the 1999 purchase, each of the Stations operated as coal-fired power stations for a various number of years by other companies wholly unconnected to MWG.

i. Waukegan Station

Historical Information shows that the Waukegan Station was built at least by 1939 and has been a power plant ever since. ENSR Phase I, attached as Ex. 12. The area has historically been dominated by industries since at least the 1930s, including the Johns Manville Company to the north, the Griess-Pfleger Tannery (now owned by ComEd) and the U.S. Radiator Corp. to the west, and the North Shore Sanitary District to the south. Ex. 12, at MWG13-15_12016-12017.

The Griess-Pfleger Tannery Site has soil and groundwater contamination from its prior use as a tannery. ComEd is investigating the contamination at the tannery site in cooperation with the Illinois EPA as a part of the Site Remediation Program. Complainants' Ex. A2 at MWG13-15_45783-45784. As part of the investigation, ComEd investigated the chemical tanning process

¹⁵ Complainants did not number all of the paragraph of statements, but instead inserted bulleted sub-paragraphs. Additionally, there is one statement that is not numbered between statements No. 78 and No. 79 on p. 21 of Complainants' Motion.

¹⁶ MWG has attempted to note the facts that are in dispute based upon Complainants' motion.

used at the Griess-Pfleger Tannery and found that it used the chromium tanning process, which consisted of nine steps and involved numerous chemicals including borax. See Remedial Investigation Report, Phase I relevant pages attached as Ex. 13. Additionally, the site investigation revealed manganese in the groundwater throughout the Site. See Remedial Objections Report relevant pages attached as Ex. 14. MWG's expert found that certain inorganics including arsenic, boron, chromium, lead and mercury have migrated onto the Waukegan Site from the tannery site. Complainants' Ex. G, p. 19.

MWG's due diligence in 1998, before purchasing the Waukegan Station, showed that there was a plume of arsenic, lead, mercury and chromium that extended from the tannery onto the Station. Ex. 12, at MWG13-15_12035. The plume was confirmed in the Phase II investigation conducted prior to MWG's purchase. Complainants' Ex. A2 at MWG13-15_45783-45784. Notably, the Waukegan Phase II ESA included groundwater sampling. The groundwater sample results did not show any exceedances of the Illinois groundwater quality standards except for arsenic from the tannery plume. Complainants' Ex. A2 at MWG13-15_45811, 45817. The Phase II investigation concludes, "There is no requirement under Illinois environmental law to further investigate or remediate this property." Complainants' Ex. A2 at MWG13-15_45801. Upon purchase of the Waukegan Station, MWG was informed that it was unnecessary to further investigate or remediate the property. *Id.* The due diligence investigation also showed the East Ash Pond and West Ash Ponds, whose perimeters were later revealed to be partially built with coal ash as structural fill. *See* 415 ILCS 5/3.94 and Complainants' Ex. A3, MWG13-15_7152, 7164, 7167-7175.

MWG continued to use the ash ponds to collect the bottom ash from the Station following the purchase. Complainants' Ex. G, p. 19. The bottom ash is annually collected from an ash ponds

and transported off-site for beneficial reuse. *Id.* Since MWG's purchase, MWG has only stored and deposited bottom ash into the East Ash Pond or West Ash Pond. *Id.*¹⁷

ii. Will County Station

The Will county Station was built in 1955 and has been a power plant throughout that period. ENSR Phase I, attached as Ex. 15. The Station is bounded to the East by the Chicago Sanitary & Ship Canal and to the west by the Des Plaines River. Ex. 15, at MWG13-15_29509. There are additional industrial properties surrounding the Station including the Citgo Lemont Refinery to the northeast, Hanson Materials (f/k/a Material Service Corp.) to the south, and a ComEd switchyard to the west. Ex. 15, at MWG13-15_29509.

MWG performed due diligence before purchasing the Will County Station. *See* Ex. 15 and Complainants' Ex. B4. The Phase II conducted at the Site included groundwater sampling that showed no exceedances of the Illinois groundwater quality standards related to coal ash.¹⁸ Complainants' Ex. B4 at MWG13-15_5736. Additionally, the Phase II stated "There is no requirement under Illinois environmental law to further investigate or remediate this property." Ex. B4 at MWG13-15_5723. Upon purchase of the Will County Station, MWG was informed that it was unnecessary to further investigate or remediate the property. *Id.*

Additionally, the due diligence investigation showed Ash Ponds 1-N, 1-S, 2-S and 3-S, which are all contained by berms. Ex 15 and Complainants' Ex. B4. The soil borings taken from MW-1 through MW-4 and MW-6, as well as B-5 in the Phase II were taken on the berms (the perimeter) that surround the Will County ash basins. *See* 415 ILCS 5/3.94, Complainants' Ex. B3

¹⁷ Fly ash is collected using electrostatic precipitators and transported off-site for beneficial reuse. Ex. G, p. 19.

¹⁸ Although certain VOCs were detected, it is undisputed that volatile organic chemicals are not an indicator of coal ash. *See* Ex. G and Ex. 10.

at MWG13-15_7234, 7248, 7251-7254, 7256, and Ex. B4, MWG13-15_5742, 5751. The soil borings revealed that the berms were partially built with coal ash as structural fill. *Id.*

Following the purchase, MWG continued to use the four ash ponds to collect the bottom ash from the Station. Complainants' Ex. G, pp. 21-22. In 2010, MWG ceased using Ash Ponds 1N and 1S, and no additional ash was deposited into the ponds. *Id.* Currently, the Will County Station only uses ash ponds 2-S and 3-S. *Id.* The bottom ash in the two ash ponds is removed and transported off-site for beneficial reuse. *Id.* There was also a historic pile of boiler slag near the retention basin. Following analysis of the boiler slag to confirm that it was below the Class I groundwater standards, MWG removed approximately 1,800 tons of the material from the area in March and April 2015. *See* Complainants' Ex. B2 and Ex. 16.

iii. Joliet 29 Station

The Joliet 29 Station was built in 1964-1965 and has been a power plant throughout that period. *See* the Joliet 29 Phase I, attached as Ex. 17. The Station is in an industrial area. The former Caterpillar, Inc. manufacturing facility is adjacent to the west, and Channahon Road borders the Station to the north, beyond which are commercial and industrial facilities. Ex. G, p. 13. The Station is bordered to the South by the Des Plaines River. Ex. 17, at MWG13-15_25151.

MWG conducted due diligence before purchasing the Joliet 29 Station in 1999, including a Phase I and Phase II investigation. *See* Ex. 17, and Complainants' Ex. C3. The boring logs for the monitoring wells installed during the Phase II investigation showed no coal ash, ash or otherwise similarly described substance. *See* attached Ex. 6. Additionally, the Phase II conducted at the Site showed no exceedances of the Illinois groundwater quality standards related to coal ash. Complainants' Ex. C3 at MWG13-15_23336. Moreover, the Phase II concluded, "There is no requirement under Illinois environmental law to further investigate or remediate this property."

Complainants' Ex. C3 at MWG13-15_23324. Upon purchase of the Joliet 29 Station, MWG was informed that it was unnecessary to further investigate or remediate the property.

At the time of the purchase of the Station in 1999, and continuing until 2016,¹⁹ the vast majority of the coal ash was conveyed automatically by an enclosed pipe system across the Des Plaines River to a permitted landfill. Complainants Ex. G, p. 13. On the rare occasions when the enclosed pipe system was offline, a small fraction of the bottom ash (approximately 5 to 10 percent) was pumped to either Ash Pond 1 or Ash Pond 2. *Id.* Ash Pond 3 was used exclusively as a finishing pond and received a *de minimis* amount of ash. *Id.* Since MWG's purchase, MWG has stored and deposited bottom ash into Ash Ponds 1 or 2. *Id.*²⁰

iv. Powerton Station

The Powerton Station began operations in the late 1920s. *See* Phase I, attached as Ex. 18. The Station is in an industrial and agriculture area bounded by a cabinetry manufacturer, a railroad, and agricultural land. Complainants' Ex. G, p. 16. Additionally, the Station is bordered to the north by the Illinois River. Ex. 18, at MWG13-15_8517.

Prior to its purchase of the Powerton Station in 1999, MWG conducted due diligence, including a Phase I and Phase II investigation. *See* Ex. 18, and Complainants' Ex. D3. The Phase II included groundwater sampling and found that "there were no constituents of concern detected at concentrations above the IEPA cleanup objectives in the groundwater samples collected." Complainants' Ex. D3 at MWG13-15_3275 and represented in Table 5 at 3291. Additionally, the Phase II states "There is no requirement under Illinois environmental law to further investigate or

¹⁹ In 2016, Joliet 29 Station converted to natural gas and is no longer producing coal ash. All of the bottom ash in Ash Pond 1 was removed in 2015, and the bottom ash in Ash Pond 2 will be removed. *See* Complainants' Ex. G, pp. 30-31.

²⁰ Fly ash is collected using electrostatic precipitators and transported off-site for beneficial reuse. Ex. Complainants' G, p. 13.

remediate this property.” Ex. D3 at Bates MWG13-15_3277. Upon purchase of the Powerton Station, MWG was informed that it was unnecessary to further investigate or remediate the property. *Id.*

The due diligence investigation showed all of the various ponds and impoundments required for the operation of the power station. Complainants’ Ex. D3, MWG13-15_3295. All of the basins are contained by berms (the perimeter), and soil borings showed coal ash used as part of the berm construction. *See* 415 ILCS 5/3.94, Complainants Ex. D3, 3297, 3310, 3312 and Ex. D4, 7085, 7100, 7113-7119.

The Powerton Station also has a Limestone Basin, which had been used by the prior owners in the early 1980’s to treat material from an old scrubber, but has not been used for a process since. Complainants’ Ex. E1, Tr. 75:5-76:4. It had also been used for temporary storage of fly ash from cleaning out duct work in a boiler many years ago. Complainants’ Ex. E1, Tr. 75:5-76:4. The most recent time the Limestone Basin contained ash was in 2004, when MWG had the ash analyzed for its leachability. Complainants’ Ex. D7. The results of the analysis showed that the coal ash was below the Class I groundwater standards, for boron, barium, sulfate and manganese.²¹ Complainants’ Ex. D7. By the time MWG was responding to the USEPA ICR Questionnaire in 2010, the Limestone Basin was considered inactive. Complainants’ Ex. E1, Tr. 110:10-13. The Limestone Basin is not an ash pond and does not contain any ash.²² *Id.* and Complainants’ Ex. E4, T. 126:18-127:2.

There is an inactive ash basin on the north side of the property. Pursuant to the new Federal CCR Rules, MWG has posted a notice of its intent to close the Former Ash Basin. Complainants’

²¹ Boron, sulfate, and manganese are, according to Complainants’ Expert, indicator parameters for coal ash. Ex. 10, p. 7.

²² Complainants dispute this fact. See SOF No. 11.

Ex. D21. As established by the notice, MWG will close the area by moving all of the material north of the rail spur into the area south of the rail spur. *Id.* Following completion of moving the material, MWG will cover the material pursuant to the Federal CCR rules. *Id.* The rail spur itself, which is constructed of various materials including coal ash, will remain in place because the coal ash is considered structural fill as allowed under Federal and State law. *See Id* and 40 CFR 257.35 and 415 ILCS 5/3.135.²³ Since MWG's purchase in 1999, MWG has stored and deposited bottom ash into the Ash Surge Basin or Bypass Basin.²⁴ *See* Complainants' Ex. G, p. 16, 33.

b. MWG's Voluntary Hydrogeological Assessments and MWG's Compliance Commitment Agreement Actions

In 2010, MWG voluntarily agreed to Illinois EPA's request to perform a hydrogeological assessment around the ash ponds at each of its Stations. The hydrogeological assessments included installing groundwater monitoring wells around the ash ponds at the MWG Stations to sample the groundwater near and downgradient from the ash ponds. Complainants' Exs. A3, B3, C15, D4. Based upon the results of the hydrogeological assessments, Illinois EPA issued Violation Notices ("VNs") to MWG alleging violations of the groundwater quality standards purportedly caused by the ash ponds. Complainants' Ex. A5, B5, C5 and D11. MWG disagreed that the groundwater sample results showed any actual contamination from the ponds. *See* MWG Letters of Response to the VNs, attached as Exs. 19 through 22. Nevertheless, following a significant exchange of information, to resolve the VNs, Illinois EPA and MWG agreed to Compliance Commitment Agreements ("CCAs") for each MWG station. Complainants' Exs. B6, C6 and D12 and Ex. 2.

While many of the CCA provisions related to the ash ponds at the Stations, MWG also agreed to certain corrective measures that affect the surrounding areas. *Id.* In particular, MWG

²³ Disputed. See SOF No. 12.

²⁴ Fly ash is collected using electrostatic precipitators and transported off-site for beneficial reuse. Complainants' Ex. G, p. 16.

established a groundwater management zone (“GMZ”) pursuant to 35 Ill. Adm. Code 620.250 at Powerton, Will County and Joliet 29. Complainants’ Ex. B7, B8, C7, C8, D13, and D14. The GMZ areas cover large parts of the Stations, including the ash ponds and the surrounding areas. Exs. 4, 5, 7. MWG also established Environmental Land Use Controls (“ELUCs”) as corrective actions pursuant to 35 Ill. Adm. Code 742.1010 at Powerton, Will County, and Waukegan. Complainants’ Ex. A7, A8, B9, D15, and D23. The ELUC areas for Powerton and Will County are identical to the GMZs established at each of the Stations. *See* Ex. 1, 3, 6. Because the Waukegan Station already had an ELUC on part of its property due to the Griess-Pfleger Tannery plume, the area of the ELUC at Waukegan was placed directly adjacent to the tannery ELUC, such that the two ELUCs could work in concert. *See* Ex. 1, and Ex.2 ¶ III.5.f. The area of the more recent ELUC extended from the Griess-Pfleger Tannery ELUC and over the ash ponds and the surrounding areas. *See* Ex. 1.

c. Groundwater Conditions Do Not Pose a Risk

MWG’s expert, Mr. Seymour, established in his expert opinion that the groundwater conditions at the Stations do not pose a risk to water receptors in the neighboring surface waters.²⁵ *See* Complainants’ Ex. G, Appendix B. Complainants have put forth no evidence or expert opinion to dispute this analysis.

In his analysis, Mr. Seymour assessed the potential for human health and ecological risks for an assumed exposure to the constituents of interest in the groundwater that were associated with each Station. *Id* at p. 44. For each of the Stations, Mr. Seymour evaluated the groundwater concentrations for each of the constituents of interest at the Stations and compared those results to

²⁵ The GMZ and ELUC areas at the Stations, as established through the Illinois EPA-approved CCAs, prevent access to any potentially impacted groundwater located at or beneath the Stations. *See* Complainants’ Exs. A7-A8, B7-B9, C7-C8, and D13-D15, 23.

the Illinois Water Quality Standards (“WQS”) or the Water Quality Criteria (“WQC”) for surface waters. Complainants’ Ex. G, App. B, p. 2. Mr. Seymour chose these values because they are considered to be protective of human health and the environment for the values incorporate toxicological data, and the state determined acceptable risk level. *Id.* The evaluation was conservative because it assumed a complete exposure pathway, instead of including an evaluation of the effects of attenuation or dilution mechanisms, both of which would better reflect the actual hydrogeological environment. *Id.* For each of the Stations, Mr. Seymour found that the groundwater concentrations were not an unacceptable risk or there was an unlikely potential for risk based upon the comparisons of maximum detected concentrations at the Stations and the WQS/WQC. Complainants’ Ex. G, App. B.

VI. MWG HAS NOT CAUSED OR ALLOWED WATER POLLUTION AT THE STATIONS

In addition to the multiple genuine issues of material fact established above, there are legal issues that prevent a finding of summary judgment as a matter of law. Complainants cannot establish a breach of Section 12(a) of the Act because MWG has not caused or allowed water pollution at any of the Stations from the “Historic Coal Ash” a/k/a “Historic Ash Areas.” Primarily, Complainants have not established that the Historic Ash Areas are a source for the alleged groundwater contamination. Without a source, MWG cannot have caused or allowed water pollution. First, MWG’s expert concludes that the historic coal ash is not a source. Second, by excluding the areas subject to the corrective actions under the CCAs from the defined Historic Ash Areas, Complainants have also excluded the groundwater monitoring wells, and thus cannot rely upon the monitoring results to establish groundwater exceedances. Third, there are no groundwater sampling results in the alleged “Historic Ash” areas far from and hydrologically unrelated to the groundwater monitoring wells. Finally, when MWG purchased the Stations in 1999, MWG knew

groundwater contamination did not exist. Upon discovery of constituents in the groundwater in 2010, MWG responded reasonably and responsively to the satisfaction of the Illinois EPA.

a. **Complainants Cannot Establish the Historic Ash Areas are a Source of the Alleged Groundwater Contamination**

MWG's expert, Mr. Seymour, specifically opines, based on leaching data from historic ash, that historic ash areas at the Stations are not a source of the groundwater exceedances. *See* Complainant's Ex. G, pp. 45-48, 52. Complainants' expert, Mr. Kunkel, could only say the source of the alleged groundwater contamination at the Stations could be "any or all [sources] at the same time or individually." *See supra* Sec. IV.b.ii. Without the ability to identify any source, it is impossible to conclude that the "Historic Coal Ash", as defined by Complainants, is even a contributing source of the alleged groundwater contamination. The Board, taking all inferences in favor of MWG, cannot grant summary judgment as a matter of law when the alleged source, the Historic Ash Areas, is not established. *See McCullough v. Gallaher & Speck*, 254 Ill. App. 3d at 949.

When the source of a contaminant cannot be identified, the Board cannot find a violation. *Lonza, Inc. v. Illinois Pollution Control Board*, 21 Ill. App.3d 468 (3rd Dist. 1974). In *Lonza*, the Court vacated a Board opinion finding a violation of the Environmental Protection Act because none of the witnesses could identify the actual source of the odors near two chemical plants accused of air pollution. *Id.* Illinois EPA had alleged that two chemical companies, Lonza, Inc. and Ashland Chemical Company, were causing air pollution and odor contaminants in violation of the Environmental Protection Act.²⁶ At the Board hearing, Illinois EPA presented eight witnesses all of whom stated they could not identify the specific source of the odors in the vicinity

²⁶The two chemical companies moved to sever their cases from each other, however the Board denied that motion. *Lonza* at 470. The Court found that that was not reversible error, however the Court found that the Board still had a duty to find that each company was a source of the pollution. *Id* at 470.

of the chemical plants. *Lonza* at 473-474. Additionally, Illinois EPA presented two Agency witnesses, neither of which could specify the source of the pollution to either of the plants. *Id* at 474. The only witness to actually testify that there was an odor from the Lonza Plant was the Lonza Plant Manager who testified that two to three times in a year he could attribute an acrid odor to the Lonza plant due to the hydrochloric acid system malfunction. *Id* at 475. Although the Board found a violation of the Act, the Illinois Appellate Court vacated the Board's order, instead finding that there is no violation where the evidence is insufficient to identify the source. *Id* at 475.²⁷ In particular, the Court found that "the technical representatives of the Agency who had investigated the complaints and the circumstances existing in the plants and community were unable to report and corroborate either the existence of the odor or the source of its emission either directly or hypothetically..." *Id* at 475.

Similarly, the Board may not find a violation if the Board must infer whether an alleged release was the source of and caused the violation. *Harold Craig and Robert Craig v. The Pollution Control Board*, 59 Ill.App.3d 65 (4th Dist. 1978). In *Craig*, the Illinois EPA brought an enforcement action against the Craigs for a release of manure from a storage pit into a ditch. Illinois EPA alleged that the release killed a substantial number of fish further downgradient in the ditch. *Id* at 66. It was undisputed that manure stored in the storage pit on the Craig farm flowed into the ditch. *Id* at 66. It was also undisputed that dead fish were found downstream of the release and from collected samples. *Id* at 66-67. At the hearing, the State's fishery biologist testified that he could not form an opinion as to whether the manure from the Craig farm had caused the fish kill or whether it was caused by municipal sewage from Indianola. *Id* at 67. The Craigs' expert witness testified that the fecal bacteria in the water showed a majority of the bacteria at the point the manure

²⁷ The other company, Ashland Chemical Company, sought review of the Board Order under a separate action. *Id* at 469. A search of Westlaw did not reveal the Ashland Chemical separate appeal.

entered the water was from animal waste, but a majority of the fecal bacteria further downstream near the location of the dead fish was from human waste. *Id* at 68. Thus, the Craig's expert was also unable to form an opinion as to the cause of the fish kill from the information presented. *Id* at 68. The Board initially found a violation of the Act. Reversing the Board's decision, the Court found that the Board's conclusion was not supported by direct evidence or expert opinion. *Id* at 68. The Court concluded that the Board reached its conclusion by improperly inferring that the release caused the violation and the Board's inferences were not supported by the expert testimony. *Id* at 69.

The facts in the instant case are even stronger than in *Lonza* and *Craig*. Here, MWG's expert opined that historic ash is not a "source." Complainants' expert Mr. Kunkel stated, "it is any or all...there is no way to know." *See supra* Sec. IV.b.ii. None of the cases cited by the Complainants found of violation in the absence of a source. Instead, in the cases cited by the Complainants, there was a distinct source identified by the complainants and not disputed by the respondents.²⁸ As Complainants have not established that the Historic Coal Ash is actually a source of groundwater impacts, there is an issue of law precluding summary judgment.

²⁸ *Tri-County Landfill Co. v. IPCB*, 41 Ill. App. 3d 249 (leachate from a landfill was causing the water pollution); *People v. Stonehedge, Inc.* 288 Ill. App. 3d 318 (Court found a genuine issue of material fact whether de-icing salt stored on Defendant's property was causing groundwater pollution); *People v. John Chalmers*, PCB 96-111 (Board found releases of livestock waste into a stream causing water pollution); *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788 (The source of the water contamination was sewage due do an inoperable pump); *Perkinson v. Illinois Pollution Control Board*, 187 Ill. App. 3d 689 (3rd Dist. 1989) (Source of the water contamination was a release of liquid swine waste into a stream); *People v. Inverse Investments, Inc.*, PCB 11-79 (People identified soil samples that contained chlorinated volatile organic compounds that the People alleged were the source of the contaminated the groundwater); *Allaert Rendering, Inc. v. IPCB*, 91 Ill. App. 3d 153 (Sample results of wastewater showed that the lagoon threatening a river was "highly contaminated"); *People v. State Oil*, PCB 97-103, April 4, 2002, 2002 WL 560904 (Gasoline contained in USTs located on the Respondents' Site that was seeping into a creek was a source of water pollution).

b. Complainants' Cannot Ignore the Sampled Areas of Historic Ash

Interestingly, Complainants explicitly exclude from their Motion the areas where historic ash has been sampled. Complainants pick apart each Station in their definition of Historic Coal Ash in an obvious attempt to avoid addressing the areas of historic ash that have been sampled and are not leaching to groundwater. Ignoring the sampled ash areas, Complainants then argue that the areas that have not been sampled must be a source because there is no analysis to show that the unsampled areas are not a source. *See* Complainants' SOF No. 24-34. The analysis is utterly backwards and without support. In each of the cases cited by Complainants, the specific source of the alleged contamination was clearly identified. *See supra* FN 28 of this Response.

Here, there is analysis from three of the four Stations showing that areas of historic coal ash located outside the ash ponds is not impacting groundwater at the four Stations. Complainants' Ex. G, pp. 45-48. Based on that sampling, as well as his knowledge and experience, Mr. Seymour found no evidence to suggest that other aged areas of ash would be any different. *Id.* As established in Section IV.b.i. of this Response, Mr. Seymour confirmed that there is no evidence that historic coal ash is a source of groundwater impacts at any of the Stations. *See also*, Complainants' Ex. G, p. 52. As Complainants' have not established that the Historic Coal Ash are a source, there can be no finding of summary judgment as a matter of law.

c. Complainants Cannot Rely Upon the Groundwater Monitoring Results For The "Historic Ash Areas"

Using Complainants' own definition of "Historic Ash Areas," there is no evidence of groundwater contamination because Complainants have excluded the areas that have the groundwater monitoring wells. Complainants rely solely on groundwater monitoring results at the Stations to establish exceedances of Class I groundwater standards. Those groundwater results, however, are from monitoring wells installed around the ash ponds pursuant to the agreement with

the Illinois EPA. *See supra* Sec. V.b. These areas were an integral part of the corrective actions under the CCAs because the wells are within the respective GMZ and/or ELUC established at the Stations, and because the monitoring wells are specifically identified in each of the CCAs. *See supra* Sec. V.b., Exs 1, 3-5, 7-8, Complainants' Exs. B6, C6 and D12 and Ex. 2. Complainants have excluded from their definition of "Historic Ash Areas" the areas subject to the corrective actions in the CCAs. Complainants' Memorandum, FN 3, ¶6. By excluding the areas subject to corrective actions under the CCAs, Complainants have excluded the monitoring wells and have also excluded the results. Complainants cannot rely upon monitoring well results from areas they have excluded to support their Motion. Without the monitoring well results, Complainants have no actual evidence of any groundwater contamination.

Although there are a few other "Historic Ash Areas" outside the areas of CCA corrective actions that are not excluded by Complainants' definition, Complainants still do not have any evidence of groundwater contamination for those areas. There are no monitoring wells located near any of the "Historic Ash Areas" that are not near the ash ponds. Without any groundwater monitoring results, Complainants cannot establish any actual groundwater pollution or violations of the Act and are not entitled to summary judgment.

i. Waukegan Station

There are no monitoring wells at or near boring B-11 which Complainants allege is a "Historic Ash Area" causing groundwater contamination. See SOF No. 4, ¶2 and 58.²⁹ The location of B-11 is on the north side of the Station and north of the ash ponds and monitoring wells.³⁰ The groundwater flow at the Waukegan Station is to the east towards Lake Michigan. Complainants'

²⁹ To reduce confusion created by various identifications of "Historic Coal Ash" at the Stations, *see supra* IV.a, MWG is only addressing the "Historic Coal Ash" at each of the Stations identified in Complainants' SOF Nos. 4-11.

³⁰ MWG disputes that B-11 is on property owned by MWG. See MWG Response to Complainants' SOF No. 4, ¶2.

Ex. G, p. 21, and Fig. 4-4. Thus the groundwater sample results at the Waukegan Station do not show any impacts from the ash in B-11.

ii. Will County Station

Even if Complainants could establish that the “Slag and Bottom Ash Dumping Area” and the “Slag Dumping Area” at Will County actually contained ash, there are no monitoring wells near either of the locations to show any groundwater impacts. See SOF No. 5, ¶2. This is equally true for the “spent slurry pond” and the “south area runoff basin” which Complainants also incorrectly allege contain ash. SOF No. 5, ¶4.³¹ The groundwater flow at Will County generally flows west to the Des Plaines River on the west side of the Station, and east towards the Chicago Sanitary and Ship Canal on the east side of the Site. Complainants’ Ex. G, p. 23 and Ex. B11, Fig. 2 at MWG13-15_56530. Thus, all of the areas described by Complainants in SOF No. ¶¶2 and 5 are cross-gradient to the monitoring wells. As none of these “Historic Ash Areas” have any groundwater monitoring results, there cannot be a finding of any groundwater contamination or violation of the Act as alleged by the Complainants in SOF No. 58.

iii. Joliet 29 Station

There are no monitoring wells located near or around the area described as the “northeast landfill” or the “southwest landfill.”³² See Ex. 5 and Complainants’ Ex. C3, Fig. 2. Yet, Complainants have alleged that both areas are causing or allowing groundwater contamination. See SOF No. 7, ¶1 and 59. Moreover, the groundwater sampling results establish that the groundwater at the Joliet 29 Station flows south to the Des Plaines River, and would not reflect

³¹ MWG disputes that all of these basins actually contained ash. See MWG Response to Complainants’ SOF No. 5, ¶¶2, 4.

³² MWG disputes that either of these areas contain ash. See MWG Response to Complainants SOF No. 7, ¶1.

any groundwater from the areas northeast or southwest of the ash ponds. *See* Complainants' Ex. G, p. 15 and Complainants' Ex. C11, Fig. 2 at MWG13-15_56343.³³

iv. Powerton Station

Complainants allege in their SOF No. 10, ¶2 five soil borings from the ENSR Phase II, B-19 through B-23, are "Historic Ash Areas" and thus are causing groundwater contamination. Complainants' SOF No. 60. As shown in the ENSR Phase II, these five soil borings are west of the ash ponds. Complainants' Ex. D3, Fig. 5, at MWG13-15_3297. The groundwater flow at Powerton is complicated in that it has two groundwater units: 1) a sand unit that generally flows to the north towards the Illinois River and 2) a clay/silt unit that flows to the west towards Powerton Lake. Complainants Ex. G, p. 18 and Complainants' Ex. D18, Figs 2 and 3 at MWG13-15_56202-56203. The groundwater at or near the boring logs are downgradient and cross-gradient to the monitoring wells, thus the results could not show any groundwater contamination from those areas as alleged by the Complainants in SOF No. 60.

Ultimately, based on due diligence at the time of its purchase and subsequent sampling of three different areas of historic ash, there was no basis to suggest that historic ash areas at the Stations were a source. MWG investigated areas around active ponds and entered into CCAs to address those groundwater impacts. Complainants elected to exclude the groundwater samples from the areas addressed by the CCAs from their Motion for Partial Summary Judgment. As a result, Complainants have failed to establish groundwater impact relating to the Historic Ash Areas.

³³ Mr. Kunkel claims in his report that the groundwater flows from the NE landfill to the ash ponds, Ex. 10, p. 11, but he admitted in his deposition that he did not have any data to show this. Kunkel Dep. Ex. 11, Tr. p. 80:17-21 ("Actually, we have groundwater data from the site that doesn't even come close to showing that in any case, whether it is KPRG or whether it is Patrick...")

d. MWG has Not Caused or Allowed the Discharge of Contaminants so as to Cause Water Pollution

MWG has not caused or allowed a contaminant from Historic Coal Ash to enter the groundwater such that it has rendered the waters harmful, detrimental or injurious to public health, safety or the environment. Prior to MWG's purchase of the Stations in 1999, MWG did not have control of the Stations. Upon purchase of the Stations, MWG's due diligence showed that there were no contaminants in the groundwater. Additionally, when MWG performed its own investigation and had knowledge of groundwater impacts, MWG took extensive response measures. *See* Sec. V.b. Complainants are not entitled to summary judgment because Complainants cannot establish, as a matter of law, that MWG caused water pollution.

i. Water Pollution Standard

To find a violation of Section 12(a) of the Act, the Board must find that a respondent caused or allowed a discharge of a contaminant into the environment so as to cause or tend to cause water pollution. *People of the State of Illinois v. State Oil Company*, PCB 97-103, April 4, 2002, 2002 WL 560904 at *slip op* 10 citing 415 ILCS 5/12(a). "Water Pollution" is defined as:

Such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life. 415 ILCS 5/3.545

The Act is not a strict liability statute, instead the Court must find that a person has the capability of control over the pollution. *People v. A.J. Davinroy Contractors*, 249 Ill.App.3d 788 (1993).

ii. The Historic Coal Ash at the Stations is Not Causing or Allowing Contamination

There are two factors available for a complainant to show a respondent is in violation of Section 12(a) of the Act, either the person “caused” a discharge of a contaminant or they “allowed” a discharge of a contamination

1. MWG Did Not Cause A Discharge

There is no dispute that MWG did not place any of the historic coal ash outside of the ponds, thus MWG did not “cause” a discharge from the “Historic Ash Areas” as defined by the Complainants. To “cause” something, means “to bring about or effect.” Black’s Law Dictionary, 8th Edition, 2004. The term “cause” cannot be applied retroactively to actions that occurred prior to the effective date of the Act because it deals with a certain course of conduct. *Illinois EPA v. Rawe*, PCB AC92-5, 1992 WL 315780 (Oct. 16, 1992), *slip op* at 4 (Board held son who inherited property could not have “caused” the burial of cars placed as erosion controls by his father). Thus, the definition requires some positive action. As MWG has not placed any coal ash outside of the ponds, including in the areas defined by Complainants as the “Historic Ash Areas,” MWG did not “cause” a discharge from that coal ash.

2. MWG Is Not Allowing A Discharge

The second evaluation is whether MWG “allowed” a discharge from the Historic Ash Areas. To “allow” a discharge of a contaminant, there must be a source of contamination. Otherwise, a person has not allowed anything to occur. As established in Sections IV.b. and VI.a. of this Response, the historic coal ash at the Stations is not a source for the alleged groundwater constituents. As a result, MWG cannot have “allowed” the discharge of a contaminant and there is no basis for summary judgment.

In each of the cases cited by Complainants in their attempt to establish that MWG “allowed” a discharge, there was an established source of the contamination at the time of property ownership. In *Meadowlark*, the Court held that Meadowlark Farms violated 12(a) for allowing acid mine drainage from an iron pile to discharge into a creek. *Meadowlark Farms, Inc. v. Illinois Pollution Control Board*, 17 Ill.App.3d 851, 308 N.E.2d 829 (5th Dist. 1974). It was undisputed that the ongoing source of the pollution to the creek was the iron pyrite pile. *Id* at 861. Additionally, in *Perkinson v. Illinois Pollution Control Board*, 187 Ill.App.3d 689, 691 (3rd Dist. 1989), the source of the contamination was swine waste. The Board found that the respondent “allowed” a discharge because respondent had not taken reasonable precautions to prevent the vandalism that allowed a release from the known source. *Id* at 694-695. In *People v. A.J. Davinroy Contractors*, the source of the contaminants was raw sewage, which the defendant allowed to be discharged from the work site. *A.J. Davinroy Contractors*, at 796.³⁴ In *People v. Inverse Investments, Inc.*, the People included in their Complaint the soil samples which showed elevated levels of VOCs in the soil as the alleged source of a continuing groundwater impact. *People v. Inverse Investments*, PCB 11-79, Complaint, at ¶ 15. The Board denied Inverse’s motion to dismiss finding that the People’s complaint set forth contamination levels and alleged migration from a source at the site. *People v. Inverse Investments, Inc.* PCB 11-79, Feb. 16, 2012, *slip op.* at 10.³⁵ In *People v. Michel Grain*

³⁴ See also *Allaert Rendering, Inc. v. Ill. Pollution Control Bd.*, 91 Ill. App. 32 153, 155-56 (3rd Dist. 1980) (Wastewater in lagoon that threatened river contained high levels of contamination); *Freeman Coal Mining v. Illinois Pollution Control Board*, 21 Ill.App.3d 157 (1974) (The source of the contamination that discharged was the mine refuse pile);

³⁵ *People v. Inverse Investments, Inc.* is also inapplicable because it concerned Respondent’s Motion to Dismiss. The standard for a Motion to Dismiss is significantly different than a Motion for Summary Judgment. In a Motion to Dismiss a Complaint in front of the Board, dismissal is only proper if the Complaint is frivolous or duplicative. *Sierra Club et al. v. MWG*, PCB 13-15 (Oct 3, 2013), *slip op* at 17 or “unless it is clear that no set of facts could be proved which would entitle the plaintiff to relief.” *Inverse* at 9. The standard for a summary judgment is notably higher and is only “appropriate when the pleadings, depositions, admissions on file, and affidavits disclose that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *NRDC et al v. Dynegy Midwest Gen., Inc.*, PCB No. 13-17, *slip op.* at 37.

Company, et al., PCB 96-143, the Illinois EPA alleged that both the prior owner and the current owner were responsible for alleged soil and water contamination from a fertilizer facility even though the current owner had never operated a fertilizer company or handled fertilizer. *People v. Michel Grain Company, et al.*, PCB 96-143, Stipulation and Proposal for Settlement, Oct. 22, 2007 attached as Ex. 23. Similar to the *Inverse* case, it was also a motion to dismiss, and the source of contamination was known and continuing. Ex. 23 at 6-7 (The Stipulation required the former owner to remediate the site). As there was an existing source, the Board concluded that the current owner “may” have caused a violation even if there was no active disposal.³⁶ *Michel Grain Co.*, PCB 96-143, 2002 WL 2012414, Aug. 22, 2002, *slip op.* at p. 3. The key in all these cases is that the current owner of property with historic contamination is only held responsible where the source is known and ongoing, such that the owner “allowed” the contamination to continue. Here, the source is not known and Mr. Seymour concludes it is not continuing, so MWG has not allowed it to continue.

In addition to establishing that the Historic Ash Areas are a source, to establish that MWG “allowed” a discharge from the Historic Ash Areas, Complainants must establish that MWG had the capability to control the Historic Ash Areas. See *A.J. Davinroy* at 1286. It is undisputed that the Stations each operated for over 20 years before MWG owned and operated the Stations and the Historic Ash Areas were placed long before MWG’s ownership. See Sec. V.a; Complainants’ Exs. 12, 15, 17, 18 and Complainants’ Exs. A2, B4, C3, and D3. Complainants have not established as a matter of law that the groundwater impacts from the Historic Ash Area continued during

³⁶ In 2007, the Parties came to a settlement, which was incorporated by reference by the Board Order on Dec. 6, 2007. In the settlement, the People agreed that they could not prevail on their allegations against the current owner stating, “Mr. Todd [the current owner] did not participate in the violation of the Act at [his property]” See Ex. 22 at p. 11.

MWG's operation after 1999. MWG did not and does not have the capacity to control impacts to groundwater that occurred long before its ownership.

Here, Mr. Seymour concluded historic ash at the Stations is not a source of the constituents in the groundwater. Seymour Report, pp. 45-46, 52. Mr. Seymour states that "there is no evidence that historical ash in fill materials outside of the ash ponds is a source of groundwater impacts based on leaching analyses of the existing weathered ash in the fill materials and the observed groundwater concentrations." *Id* at 52. There is no evidence to show otherwise. As Complainants have not established based on the record that the Historic Ash Areas are the source of contaminants at the Stations or that MWG had the capability to control a historic groundwater impact, there is no basis in law to allow summary judgment. *See also* Section IV.b. and VI.a of this Response.

iii. The Groundwater Conditions Have Not Created a Nuisance or Rendered the Waters Harmful

Groundwater exceedances alone are not enough to establish water pollution. The groundwater exceedances must be shown to create a nuisance or render the waters harmful, detrimental or injurious. The undisputed analysis conducted by Mr. Seymour shows that the groundwater conditions at the Stations do not pose a risk to the surface water receptors. Complainants' Ex. G, pp. 44-45, and Appendix B. As there is no risk to the surface waters, the groundwater conditions have not created a nuisance or rendered the waters harmful.³⁷ At the very least, there is an issue of fact and law on this question that precludes summary judgment.

The definition of water pollution is an alteration of the properties of any waters of the State, "as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety and welfare...or other legitimate use, or to livestock, wild animals, bird,

³⁷ The GMZ and ELUC areas at the Stations, as established through the Illinois EPA-approved CCAs, prevents access to impacted groundwater at or beneath the Stations. *See* Complainants' Exs. A7-A8, B7-B9, C7-C8, and D13-D15, 23. As a result, there is no use of those areas.

fish, or other aquatic life.” 415 ILCS 5/3.545. Thus, to find water pollution it is not sufficient to show the mere presence of a source of water pollutants on the land; instead it must be shown that the source was likely to create a nuisance or to render the waters harmful, detrimental or injurious. *Jerry Russell Bliss, Inc. v. Illinois EPA*, 138 Ill.App.3d 699, 704 (5th Dist. 1985).

The Board relied upon *Bliss* in denying a partial motion for summary judgment in *Environmental Site Developers, Inc. v. White & Brewer Trucking*, PCB 96-180, Nov. 20, 1997, 1997 WL 735012. In *Environmental Site Developers Inc. (“ESDI”)*, the Board found that exceedances of the groundwater quality standards for manganese, sulfate, boron and total dissolved solids were insufficient to find a violation of Section 12(a) of the Act. *Id* at 6. Relying upon *Bliss*, the Board held that groundwater exceedances alone did not establish that concentrations of a chemical in the groundwater at the site created a “nuisance or render[ed] the waters harmful, detrimental or injurious.” *Id* at 6. Instead, it was an issue of fact as to whether the groundwater had been rendered the waters harmful, detrimental or injurious. *Id* at 7. Similarly, in *People v. Hendricks*, PCB 97-31, June 17, 1998, 1998 WL 343516, the Board declined to find water pollution in violation of Section 12(a) of the Act when water used to fight a tire fire flowed into a creek, holding that the record was devoid of any evidence establishing the effects of the fire runoff on the waters of the State. *Id* at 7. Citing to *Bliss*, the Board held that without the evidence of contamination the Board could not find that the runoff rendered the waters harmful, detrimental, or injurious. *Id*.

The cases Complainants rely on to argue that water pollution exists as a result of the Historic Ash Areas are inapplicable. In particular, in *Int’l Union et al v. Caterpillar, Inc.* PCB 94-240, the issue of whether the alleged contamination had rendered the waters harmful, detrimental or injurious was not addressed. Following entry into the Illinois EPA Pre-Notice Program, the

predecessor to the current Illinois EPA Site Remediation Program, Caterpillar excavated 13,000 tons of contaminated soil and initiated groundwater monitoring. *Id* at 8, 10. Caterpillar admitted responsibility for the dry cleaning operation that caused a release in the 1970s. *Id* at 29. Thus, because the contaminated soils on the site were the actual source of the groundwater impacts, and because Caterpillar admitted that it was responsible for the source, the Board found that the degradation of the groundwater by Caterpillar was a violation of Section 12(a) of the Act.³⁸ Complainants' reliance on *CIPSC v. the Pollution Control Board*, 116 Ill.2d 397 (1987) is also misplaced. *CIPSC* concerned CIPSC's petition pursuant to Section 28 of the Act for site-specific water-quality standards for groundwater, and not an evaluation of whether Section 12(a) of the Act had been violated.³⁹

Here, even assuming *arguendo* that the Historic Coal Ash is actually a source of the groundwater conditions, there is no dispute that the waters have not been rendered harmful detrimental or injurious. As shown in the Seymour Report, at each of the Stations there is no risk to the surface waters and the levels are below the water quality standards or water quality criteria that are considered to be protective of human health and the environment. Complainants' Ex. G, App. B. As Complainants have not put forth any contrary evidence, Seymour's opinions regarding the lack of risk to human health and the environment are not disputed. Thus, without rendering the waters harmful or detrimental or injurious to public health or to aquatic life, there is no water pollution as defined in Section 3.545 of the Act. 415 ILCS 5/3.545.

³⁸ Ultimately, the Board found no penalty was necessary nor any other injunctive relief because Caterpillar was remedying the groundwater pursuant to a GMZ. *Id* at 30.

³⁹ Complainants' reliance on *People v. Texaco Refining and Marketing, Inc.*, PCB 02-03, Nov. 6, 2003 2003 WL 22761195, for the premise that 12(a) provides no exemption from liability, is unsupported by the Board order. A close reading of the opinion shows that the defense was stricken because Texaco had not presented the Board with any new facts that would defeat the People's claim of water pollution. *Id* at 8. Thus, had Texaco submitted a more substantive affirmative defense, instead of merely one sentence, it is possible that the Board would have declined to strike the defense.

iv. MWG was Informed That There was No Groundwater Contamination

Complainants assert that MWG allowed a discharge from the Historic Ash Areas because, they argue, MWG knew that historic ash was present at the Stations and did not take extensive precautions. Complainants ignore the fact that knowledge of the existence of ash used as fill long ago at the Stations does not equate to knowledge of the existence of groundwater impacts. Moreover, none of the cases cited by Complainants stand for the proposition that a person is liable for contamination when it had knowledge that there was no contamination.

It is undisputed that when MWG purchased the Stations there was no groundwater contamination at any of the Stations, other than the known contamination from the Griess-Pfleger Tannery adjacent to the Waukegan Station. *See* Complainants' Exs. A2, B4, C3, and D3. In fact, all of the due diligence reports from 1998 stated that "[t]here is no requirement under Illinois environmental law to further investigate or remediate this property." *Id.* Thus, upon purchase of the Stations, MWG had affirmative knowledge that there was no groundwater contamination related to coal ash and was not obligated to continue to search. Unlike any other case that involves an actual pollutant, such as swine waste,⁴⁰ sewage⁴¹ or gasoline,⁴² MWG could not have and would not have knowledge that the coal used as structural fill could potentially be a source.

Later, MWG voluntarily conducted additional groundwater monitoring near its coal ash ponds at the request of Illinois EPA. The results of the groundwater monitoring revealed new information on the constituents in the groundwater relating to the ash ponds. As detailed in Section V.b. of this Response, despite disagreeing that groundwater constituents were caused by the ponds

⁴⁰ *Perkinson v. Illinois Pollution Control Board*, 187 Ill.App.3d 689 (3rd Dist. 1989)

⁴¹ *People v. A.J. Davinroy*, 249 Ill.App.3d 788 (5th Dist. 1993)

⁴² *People v. State Oil*, PCB 97-103, 2002 WL 560904 (April 4, 2002)

at the Stations, MWG responded to the more recent groundwater results by conducting significant, extensive and effective measures to respond to the constituents in the groundwater.

VII. MWG HAS NOT CAUSED OR ALLOWED OPEN DUMPING

Complainants have not established, and the record does not support, a claim that MWG has caused or allowed open dumping of Historic Coal Ash. As stated in MWG's First Defense to the Complaint, in ¶¶67 and 68, MWG did not open dump any of the Historic Coal Ash on the Stations because the other locations that may contain historic coal ash combustion debris "were not created by MWG, nor used or filled with any coal combustion material, or any other material, by MWG. See ¶67 of MWG Answer and Defenses to the Second Amended Complaint. Thus, "MWG did not cause or allow open dumping because ... the historical areas were not created, filled, or used by MWG for any storage or disposal of any coal combustion material, or any other material."

a. **Complainants Violate The Law Of The Case Doctrine**

Complainants expend a considerable amount of time attempting to establish a violation of Section 21(a) of the Act by arguing that the ash areas are not "sanitary landfills." *Complainants' Memorandum* at 39-43. Remarkably, Complainants attempt to re-insert an allegation of a RCRA violation in their analysis by stating that the Stations cannot qualify as sanitary landfills because they do not meet the requirements of RCRA and the regulations thereunder "which is a necessary component of a sanitary landfill as defined at 415 ILCS 5/3.445." *See* Complainants' Motion at 39. Complainants make this argument despite the Board's explicit rejection in its Oct. 3, 2013 Decision in this matter. *Sierra Club et al. v. Midwest Generation, Inc.*, PCB13-15, Oct. 3, 2013, at p. 24. Notably, Complainants do not cite to a *single* Illinois case, from the Board or a Court, regarding open dumping in its Section evaluating whether the MWG Stations are "sanitary landfills" under RCRA. *See* Complainants' Memorandum Sec. III.a, pp. 39-41.

Complainants are in clear violation of the law of the case doctrine which bars re-litigation of an issue previously decided in the same case. *Krautsack v. Anderson*, 223 Ill. 2d 541, 552, 861 N.E.2d 633, 642 (2006). As the Board has stated, “the law of the case doctrine provides that ‘a rule established as controlling in a particular case will continue to be the law of the case in the absence of error or a change of facts.’” *Elmhurst Memorial Healthcare et al v. Chevron, U.S.A et al*, PCB 09-066, 2011 WL 2838628, July 7, 2011, *slip op.* at *27 citations omitted.

The Board stated in its Oct. 3, 2013 opinion that it “disagrees with Complainants that mere reference in the Act’s definition of “sanitary landfill” to RCRA and regulations thereunder makes 40 CFR Part 257 an enforceable part of the Act” and “the Act does not make a violation of 40 CFR part 275 a violation of the Act. *Sierra Club et al. v. Midwest Generation, Inc.*, PCB13-15, Oct. 3, 2013, at p. 24. Thus, all of Sierra Club’s arguments as it relates to any allegations of violations of RCRA which they set forth in their memorandum are inapplicable here. For the very reason of ignoring the Board’s Order in this matter, Complainants’ Motion should be denied.

b. MWG Did Not Cause Or Allow Open Dumping Because Coal Ash Is Not a “Waste”

A fundamental element of “open dumping” is that there is “waste.” The coal ash used to build portions of the Stations and the berms for the ash ponds are part of the fill for the Stations.⁴³ There is no evidence that the ash was “discarded” and thus it is not a “waste” as that term is defined in the Act.

Section 21(a) states that no person shall cause or allow the open dumping of any waste. 415 ILCS 5/21(a). “Waste” is defined as “any garbage,...or other *discarded* material...resulting from industrial, commercial, mining and agricultural operations...” 415 ILCS 5/3.535. The burden

⁴³ As stated in Section IV.d. of this Response, MWG disputes that other allegedly “landfilled” areas contain coal ash. In addition, although Complainants’ exclude the ponds from the definition of Historic Coal Ash, they specifically include boring logs from the berms of those ponds.

is upon the Complainants to prove that the coal ash is a “waste” as that term is defined in the Act. *City of Chicago v. Speedy Gonzalez Landscaping, Inc.* PCB AC07-25, 2009 WL 788636, March 19, 2009 *slip op.* at 27. (Board found Complainants had not satisfied their burden of proof that a tanker was “waste”). In evaluating the definition of “discarded” the Supreme Court has found that discarded materials do not include “materials that would otherwise be disposed of or discarded but instead are returned to the economic mainstream in the form of raw materials and products. *Alternate Fuels, Inc. v. Illinois EPA*, 215 Ill.2d 219, 240 (2004).⁴⁴

Here, Complainants make no attempt to establish the coal ash located in Historic Coal Ash areas at the Stations is “waste” as that term is defined in the Act.⁴⁵ As established by the record, the coal ash in various parts of the Stations was used at least 30 years ago or more as fill to support construction. *See* Sec. V.a. There is no evidence that the ash was abandoned or cast aside. Additionally, unlike the other cases cited, both State and Federal rules continue to allow coal ash to be used as structural fill. *See* 415 ILCS 5/3.135 and 40 CFR 257.53.⁴⁶ Notably, Complainants have not put forth, and MWG has not found, any cases that state that coal ash used as fill is a “waste” or “discarded material.” Because Complainants have not established that the coal ash in

⁴⁴ An important distinction between this matter and more recent cases evaluating “discarded material” is that the coal ash here was used as fill material when the stations were built approximately 40 to 100 years ago. *Compare People ex rel. Madigan v. Lincoln, Ltd.*, 383 Ill. App. 3d 198, 890 N.E.2d 975 (1st Dist. 2008) (Court held that the clean construction debris which was planned to be used as fill in 2002 to build a ski slope was “discarded material”).

⁴⁵ In all of the cases relied by the Complainants, it was undisputed that the materials placed on the land was a “waste.” *Gonzalez v. Pollution Control Board*, 960 N.E.2d 772 (Respondent responsible for waste fly-dumped onto Respondents’ property); *Illinois EPA v. Coleman*, PCB AC04-46, 2004 WL 2578712, (Nov. 4, 2004) at 7. (Respondent’s property had multiple piles of discarded materials, including gravel and a barrel that “should have been removed” by the prior owner); *Illinois EPA v. Rawe*, PCB AC92-5, 1992 WL 315780, (Oct. 16, 1992) at 5. (Respondents found in violation for allowing “litter” by the presence of old cars buried as erosion controls because “abandoned vehicles” are explicitly identified in the definition of “litter”)

⁴⁶ USEPA has recently re-stated that the State environmental agencies are responsible for regulating beneficial use. Nevertheless, beneficial use of coal combustion residuals is currently excluded from federal regulation under USEPA’s May 2000 regulatory determination that the Bevill amendment applies to such uses. *See* <https://www.epa.gov/coalash/coal-ash-reuse>.

Historic Coal Ash areas is a waste, MWG could not have caused or allowed open dumping of a waste in violation of Section 21(a) of the Act. Thus, the Board must deny Complainants' motion.

c. MWG did not Cause or Allow Open Dumping of the Historic Coal Ash

The analysis for open dumping is the same as that for water pollution. There are two elements for open dumping, whether a person "caused" a waste to be dumped or "allowed" a waste to be dumped. Complainants have established neither here. As set forth in Section VI.d.ii.1 and 2 of this Response, there is no source, and MWG did not cause or allow open dumping of the Historic Coal Ash at the Stations. The term "cause" cannot be applied retroactively to actions that occurred prior to the effective date of the Act because it deals with a certain course of conduct. *Illinois EPA v. Rawe*, PCB AC92-5, 1992 WL 315780 (Oct. 16, 1992), *slip op* at 4 (Board held son who inherited property could not have "caused" the burial of cars placed as erosion controls by his father). As MWG has not placed any coal ash outside of the ponds, including in the areas defined by Complainants as the "Historic Ash Areas," MWG could not have "caused" open dumping of the Historic Coal Ash.

Similarly, as discussed in Section VI.d.ii. 2, MWG could not have "allowed" open dumping because the Historic Coal Ash is not a source and MWG did not have the capability to control the Historic Ash Areas.

VIII. CONCLUSION

Due to the complexity of this matter, the numerous disputed material facts, and the absence of proof that MWG has caused or allowed water pollution or open dumping, MWG respectfully requests that the Board deny Complainants' Motion for Partial Summary Judgment.

Respectfully submitted,

MIDWEST GENERATION, LLC.

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ATTACHMENTS

Appendix A: Midwest Generation, LLC's Responses to Complainants' Statement of Undisputed Facts

Exhibits:

1. Map of Waukegan Station ELUC
2. Waukegan Compliance Commitment Agreement
3. Map of Will County Station ELUC
4. Map of Will County Station GMZ
5. Map of Joliet 29 Station GMZ
6. ENSR Phase II boring logs for the Joliet 29 Station
7. Map of Powerton Station ELUC
8. Map of Powerton Station GMZ
9. Deposition of Christopher Lux, relevant pages
10. Expert Report on Groundwater Contamination by James R. Kunkel, July 1, 2015
11. Expert Deposition of James R. Kunkel, Relevant pages
12. ENSR Phase I of the Waukegan Station, 1998
13. Remedial Investigation Report for the Griess-Pfleger Tannery, Relevant pages
14. Remedial Objectives Report for the Griess-Pfleger Tannery, Relevant pages
15. ENSR Phase I of the Will County Station, 1998
16. Removal Reports of the slag from Will County Station
17. ENSR Phase I of the Joliet 29 Station, 1998
18. ENSR Phase I of the Powerton Station, 1998
19. MWG Letters of Response to the Waukegan Violation Notice
20. MWG Letters of Response to the Will County Violation Notice
21. MWG Letters of Response to the Joliet 29 Violation Notice
22. MWG Letters of Response to the Powerton Violation Notice
23. People v. Michel Grain Company, et al, PCB 96-143, Stipulation and Proposal for Settlement
24. Supplement to John Seymour Expert Report
25. Waukegan Survey
26. Deposition of Jim DiCola, relevant pages
27. Coal Ash Characteristics, Management, and Environmental Issues, EPRI, 2009

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RESPONSE TO MOTION FOR PARTIAL SUMMARY JUDGMENT

APPENDIX A

**MIDWEST GENERATION'S RESPONSE TO
COMPLAINANTS' STATEMENT OF
UNDISPUTED FACTS**

**MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' STATEMENT
OF UNDISPUTED FACTS**

Midwest Generation, LLC's ("MWG") General Objections to Complainants' Statements of Undisputed Facts:

MWG objects to the paragraphs in Complainants' Statement of Undisputed Facts that are based upon "no evidence in the record" and are not supported by any citation to the record. *Seegers Grain Co. v. Kansas City Millwright Co.*, 230 Ill. App. 3d 565, 569, 595 N.E.2d 113, 116 (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.") MWG further objects to those paragraphs because Complainants have the burden to prove a violation in this matter and may not shift that burden onto MWG. *Illinois EPA v. Trilla Steel Drum Corp.* PCB 86-56, 1987 WL 56111 (June 25, 1987), *slip op* at 2. ("Given that the burden is on the Agency to present proof of a violation, absent such finding, no violation can be found."); *see also Northern Illinois Anglers' Assoc. v. Kankakee Water Co., Inc.* PCB 81-127, 1981 WL 21931 (September 24, 1981), *slip op.* at 1 ("Complainant ... bears the burden of proof of the alleged violation...")

Subject to and without waiving its objections, MWG responds to Complainants' Statements of Undisputed Facts as follows:

1. MWG owns and operates both the Waukegan Electric Generating Station ("Waukegan") in Waukegan, Lake County, Illinois, and the Will County Electric Generating Station ("Will County") in Romeoville, Will County, Illinois. MWG operates both the Joliet 29 Electric Generating Station ("Joliet 29") in Joliet, in Will County, Illinois, and the Powerton Electric Generating Station ("Powerton") in Pekin, Tazewell County, Illinois. Resp't Answer and Defenses to Second Compl., ¶¶ 1, 3, 5, 7. MWG has operated each of these four plants since 1999. John Seymour, P.E., Expert Report of John Seymour, P.E. 6 (Nov. 2, 2015) [hereinafter Seymour Report], attached hereto as Ex. G. Two depictions of each site, one current and one from 1998, are extracted from documents cited below and compiled as Exhibits A1, B1, C1, and D1.

MWG RESPONSE: Undisputed. MWG notes that Ex. G is not the complete Expert Report by John Seymour. Mr. Seymour submitted a supplement to his expert report. Complainants' Ex. E5. Tr. 141:20-143:8. MWG has attached the Supplement to Mr. Seymour's Report as Ex. 24.

2. During the period of violations alleged in the Second Amended Complaint and prior to that period, Waukegan, Will County, Joliet 29 and Powerton were all coal-fired power plants that burned coal to generate electricity. See, e.g. Ex. F, Seymour Report, at 13, 16, 18, and 21.

MWG RESPONSE: Undisputed.

3. Historic Coal Ash at the four plants resulted from the burning of coal. See, e.g., Ex. C2, KPRG, Joliet CCB Determination Report, at Bates MWG13-15_19486 (referring to “ash and slag resulting from the combustion of coal.”).

MWG RESPONSE: MWG does not dispute that coal ash, to the extent located in borings at the four properties, likely resulted from the burning of coal. MWG did not operate the properties when historic ash was placed. See C. Lux Dep, Ex. 9, p. 6:22-24 (“Midwest Gen took over in 1999...”). Complainants’ citation to Ex. C2, relating solely to Joliet 29, is misplaced and does not support the statement of fact. The KPRG Joliet CCB report is only regarding coal ash in a 13.2 acre area on the west side of the Joliet 29 property. Further, Complainants’ definition of “Historic Coal Ash” specifically excludes the area referenced in Ex. C2. See Complainants’ Memorandum, FN3, ¶3.

4. Historic Coal Ash at Waukegan includes coal ash in the following repositories:

- A “Former Slag/Fly Ash Storage Area” directly west of the two ash ponds at Waukegan. ENSR, Phase II Environmental Site Assessment—Waukegan Generating Station Bates MWG13-15_45814 (Dec. 7, 1998) [hereinafter Waukegan Phase II ESA], attached hereto as Ex. A2.

MWG RESPONSE:

MWG disputes that the “Former Slag/Fly Ash Storage Area” contains coal ash. The portion of the ENSR Phase II relied on by Complainants consists of a map/figure with the area labelled on it. It does not include any sampling of that area to establish there is coal ash in the area, and there is no record in the Phase II that shows where or how ENSR came to understand its description of the “Former Slag/Fly Ash Storage Area.” The 1998 ENSR Phase I also does not describe the source of how ENSR understood that the “Former Slag/Fly Ash Storage Area” was at that location. See Ex. 12 to this Response.

MWG does not know if that area is a former ash disposal area. See M.Race Dep., Complainants’ Ex. E4, Tr. 89:6-19, Ex. 9, Tr. 29:4-15, R. Frendt Dep, Complainants’ Ex. E7, Tr. 97:5-6. MWG has not used the “Former Slag/Fly Ash Storage” area as a slag, ash, or fly ash storage area. See M.Race Dep. Complainants’ Ex. E4, Tr. 90:18-21. Moreover, there is no information that the ash is still there, only that it is a grassy field. See F. Veenbaas Dep. Complainants’ Ex. E6, 74:3-8.

MWG disputes that the area is within the defined Historic Coal Ash at Waukegan based on Complainants’ exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants’ Motion, FN3; see MWG Response to Complainants’ Motion, IV.a.i.

- In fill in the far north center-west portion of the Waukegan site, where soil boring B-11 was installed, as indicated by the presence of slag in the boring log for that boring. *Id.* at Bates MWG13-15_45821-45842.

MWG RESPONSE:

MWG disputes that the area of B-11 is owned or operated by MWG. Bates MWG13-15_45821-45842 cited by Complainants are for boring logs B-1 through B-23. MWG is presuming that Complainants mean MWG13-15_45830, which is the Bates number for Boring-11. According to the ENSR Phase II map, which is not to scale, B-11 is located to the west of the main building as shown on the map at MWG13-15_45817. When MWG purchased the Waukegan Station from ComEd, ComEd retained certain portions of the property. See Waukegan Survey attached as Ex. 25, MWG13-15_48428. According to the survey, the area around B-11 appears to have been retained by ComEd and MWG does not have control over it.

- In the area east of the ash ponds where groundwater monitoring wells MW-1 through MW-4 were installed, and between the ash ponds and the Former Slag/Fly Ash Storage Area, where monitoring well MW-5 was installed, as indicated by the presence of ash in the boring logs for these wells. Patrick Engineering Inc., *Hydrogeological Assessment Report, Waukegan Generating Station* Bates MWG13-15_7167-7175 (Feb. 2011) [hereinafter Patrick, *Waukegan Hydrogeological Assessment Report*], attached hereto as Ex. A3.

MWG RESPONSE: MWG does not dispute that the boring logs show the presence of some historic coal ash. MWG disputes that the area is within the defined Historic Coal Ash at Waukegan based on Complainants' exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants' Motion, FN3; see MWG Response to Complainants' Motion, IV.a.i.

- In the areas immediately northwest and north of the Slag/Fly Ash Storage Area, where (a) groundwater monitoring wells MW-8 and MW-9 were installed, as indicated by the presence of ash in the boring logs for these wells; (KPRG, *Geologic Logs for MW-8 and MW-9* Bates MWG13-15_45648-45649 (Apr. 2014), attached hereto as Ex. A4), and (b) ENSR soil borings B-16 and B-22 were completed, as indicated by the presence of ash or slag in those borings. See Ex. A2, ENSR, *Waukegan Phase II ESA* at Bates MWG13-15_45817-45842.

MWG RESPONSE: MWG does not dispute that the boring logs show the presence of some historic coal ash. Based on the exhibits cited, MWG is unable to identify the locations of the borings and disputes whether they are within the defined Historic Coal Ash at Waukegan.

5. Historic Coal Ash at Will County includes coal ash in the following repositories:

- The areas immediately east of, but outside of, ash ponds 1-N, 1-S, 2-S, and 3-S, as indicated by the presence of "coal ash" and "coal cinders" in the soil borings for groundwater monitoring wells MW-1 through MW-4 and MW-6. See Patrick Engineering Inc., *Hydrogeological Assessment Report, Will County Generating Station* Bates MWG13-15_7251-7256 (Feb. 2011) [hereinafter Patrick, *Will County Hydrogeological Assessment Report*], attached hereto as Ex. B3.

MWG RESPONSE: MWG does not dispute that the boring logs show the presence of some historic coal ash. MWG disputes that the area is within the defined Historic Coal Ash at Will County based on Complainants' exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants' Motion, FN3; see MWG Response to Complainants' Motion, IV.a.ii.

- A Slag and Bottom Ash Dumping Area in the southeast corner of the site and a Slag Dumping Area next to the "Switchyard" in the middle of the site. ENSR, *Will County Phase II Environmental Site Assessment – Will County Generating Station* Bates MWG13-15_5739 (Dec. 7, 1998) [hereinafter ENSR *Will County Phase II ESA*], attached hereto as Ex. B4.

MWG RESPONSE:

MWG disputes that these areas contain coal ash. Two witnesses testified that they have never known of any ash at either of these areas. *See* F. Veenbaas Dep., Complainants' Ex. E6, Tr. 37:19-39:23 and B.Maddox Dep., Complainants' Ex. E2, Tr. 45:14 – 46:24. The ENSR Phase II, Complainants' Ex. B4, contains a label on a map, with no sample results and no further description. MWG disputes that the Slag Dumping Area is within the defined Historic Coal Ash at Will County based on Complainants' exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants' Motion, FN3; see MWG Response to Complainants' Motion, IV.a.ii.

- Coal ash fill in various areas around the Will County plant, as indicated by the presence of "coal ash" or "ash" in soil borings B-1 through B-7. *Id.* at Bates MWG13- 15_5747-5753.

MWG RESPONSE:

MWG does not dispute that some of the boring logs, B-1 through B-5, and B-7, show the presence of some historic coal ash. B-6 does not contain coal ash or ash. Bates MWG13-15_5752. MWG disputes that the area around B-5 contains coal ash. The more recent borings taken by Patrick Engineering for MW-9 and MW-10, located adjacent to B-5, as seen in Ex. B3 attached to Complainants' motion (MWG13-15_7259-7260 and shown on the map at MWG13-15_7250) do not contain any ash. MWG disputes that the area around borings B5 and B7 is within the defined Historic Coal Ash at Will County based on Complainants' exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants' Motion, FN3; see MWG Response to Complainants' Motion, IV.a.ii.

- Ash in several areas in the southern portion of the Will County site, including in what has been identified as the "spent slurry pond" (also identified as "SPD5") and the "south area runoff basin" (also identified as "SPD8"). MWG, *Response to U.S. EPA Questionnaire for the Steam Electric Power Generating Effluent Guidelines* Bates MWG13-15_2014, 2017, 2458 (Oct. 12, 2010) [hereinafter MWG, *U.S. EPA Questionnaire*], attached in part

hereto as Ex. H. The spent slurry pond, furthermore, has contained scrubber sludge. Veenbaas Dep. 20:22-21:4, Feb. 20, 2015, attached hereto as E6.

MWG RESPONSE:

MWG disputes that these areas contain coal ash. MWG disputes that the U.S.EPA Questionnaire is a reliable source of information as multiple witnesses have testified that the responses to the U.S. EPA Questionnaire contains mistakes. *See* M.Race Dep. Complainants' Ex. E4, Tr. 67:10-11 and 67:21-68:3, and M.Kelly Dep. Complainants' Ex. E1, Tr. 69:24-70:3, and thus cannot be used as a basis for an undisputed fact.

Regarding the "spent slurry pond," Mr. Veenbaas did not testify that the spent slurry pond ever contained ash, only that it was built for a "pilot program" to be used to contain ash. Complainants' Ex. E6, Tr. 20:22-21:4. Ms. Maddox testified that she called that area the "old SO2 ponds," that she had never hear the term "slurry" and that the "old SO2 ponds" were not used for anything. Complainants' Ex. E2, Maddox Dep. Tr. at 27:21-28:6, 28:12-15.

Regarding the south area runoff basin, Mr. Veenbaas testified that the south area runoff basin was not used for ash. Veenbaas Dep. Tr. 23:19-24:4. Ms. Maddox testified that she was not aware of fly ash in the south area runoff, and that it has always been used for stormwater runoff. Complainants' Ex. E2, Maddox Dep. Tr. at 35: 1-18.

6. There is also coal ash in the boiler slag stockpile at Will County, located near the retention basin, which still contained an ash pile as of December 2, 2014. Ex. E2, Maddox Dep. 39:17-40:16; Ex. B2, KPRG, *Will County CCB Determination Report* Bates MWG13-15_49566; Ex. F, Resp't Supp. Resp. to Compl.'s First Set of Interrogs. at 5.

MWG RESPONSE:

MWG disputes that there is a boiler slag stockpile at Will County. MWG removed the stockpile of approximately 1,800 tons of material from the area in March and April 2015. *See* Ex. 16. MWG13-15_49257-49267. MWG disputes that the area is within the defined Historic Coal Ash at Will County based on Complainants' exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants' Motion, FN3; *see* MWG Response to Complainants' Motion, IV.a.ii.

7. Historic Coal Ash at Joliet 29 includes coal ash in the following repositories:

- Ash in two ash landfills, one at the northeast end of the property and a second on the southwest end of the property. ENSR, *Phase II Environmental Site Assessment – Joliet 29 Generating Station* Bates MWG13-15_23339-23343 (Dec. 7, 1998) [hereinafter *Joliet 29 Phase II ESA*], attached hereto as Ex. C3; KPRG, Inc., *Inspection Summary Letter, Joliet #29 Former Ash Burial Area Runoff Inspection 2009* Bates MWG13-15_19442-19444 (Aug. 27, 2009), attached hereto as Exhibit C4.

MWG RESPONSE:

MWG disputes that the southwest ash landfill contains ash. The ENSR Phase II, Complainants' Ex. C4, contains a label on a map, with no sample results and no further description.

Additionally, MWG personnel were not aware of a "southwest ash landfill." M.Race Dep. Complainants' Ex. E4, Tr. 51:11-13 and J.DiCola Deposition, attached as Ex. 26, Tr. 65:4-14.

MWG also disputes that the area at the northeast end of the property contains ash. The ENSR Phase II, Complainants' Ex. C4, contains a label on a map, with no sample results and no further description. MWG has no current information that ash is actually located in that area and it is an issue of fact whether ash is actually located in that area. Jim DiCola testified that he did not know if the area actually contained coal ash. See Ex. 26, Tr. 57:15-20.

- Ash in fill near the center of the Joliet site. See KPRG, *Geotechnical Analysis of Soil Surrounding Settling Basins/Ponds* Bates MWG13-15_24264, 24289-24297 (Oct. 13, 2005) [hereinafter KPRG, *Geotechnical Analysis*], attached hereto as Ex. I; KPRG and Associates, Inc., *Re-Issuance of Figure 4-1 for Geotechnical Summary Report* Bates MWG13-15_24387-24392 (Oct. 23, 2005) [hereinafter KPRG, *Geotechnical Analysis Joliet Map*], attached hereto as Ex. J.

MWG RESPONSE:

MWG disputes that there is "ash in fill near the center of the Joliet 29 site," because Complainants have not sufficiently identified the area where they assert ash exists. The only sample location cited by Complainants that is arguably "near the center of the Joliet site" is B-2, which has less than one foot of "some slag" mixed with sand and gravel. See Complainants' Ex. I, MWG13-15_24293. The majority of the 15 foot boring log is clay gravel and silt. See Complainants' Ex. I, MWG13-15_24293. MWG disputes that the area is within the defined Historic Coal Ash at Joliet 29 based on Complainants' exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants' Motion, FN3; see MWG Response to Complainants' Motion, IV.a.iii.

8. There is also coal ash at Joliet 29 in a former ash area, which is referred to by MWG consultant KPRG as the "former ash placement area," in the western portion of the site. Ex. E3, Gnat Dep. 46:10-15; Ex. E4, Race Dep. 59:20-60; Ex. C2, KPRG, *Joliet CCB Determination Report* Bates MWG13-15_19495, 19499-19517; Ex. E5, Seymour Dep. 145:14-148:1.

MWG RESPONSE: MWG does not dispute that KPRG Report shows the presence of some historic coal ash. MWG disputes that the area is within the defined Historic Coal Ash at Joliet 29 based on Complainants' exclusion of repositories for which MWG's expert cited leach test data. Complainants' Motion, FN3; see MWG Response to Complainants' Motion, IV.a.iii.

9. Both the northwest and southwest ash landfills at Joliet 29 are on property that MWG leases. MWG's Resp. to Compl.'s Fourth Set of Doc. Reqs., Second Set of Interrogs., and Second Set of Reqs. for Admis. to Resp't. at 9 (Mar. 31, 2015), attached hereto as Ex. K.

MWG RESPONSE:

MWG disputes that there is a northwest ash landfill at Joliet 29 because there is no information presented that it exists. MWG disputes that there is any ash in the area defined by Complainants as the southwest ash landfill. *See supra* SOF No. 7, ¶1. MWG does not dispute that it leases the area defined by Complainants as the southwest ash landfill.

10. Historic Coal Ash at Powerton includes coal ash in the following repositories:

- The “former ash basin” (variously described as “former ash pond” and “old ash pond”) in the northeastern part of the site contains large volumes of ash, as indicated by a series of soil borings that found ash "up to around 10 feet thick in places.” *See* E-mail from Richard Frendt, Patrick Engineering Inc., to Maria Race, MWG, Bates MWG13-15_14227-14251, 14267 (Aug. 9, 2012, 5:14pm CST) [hereinafter Patrick, *Powerton Former Ash Basin Borings*], attached hereto as Ex. D2 (showing ash (“cinders”), mixed with other materials, up to 30 feet deep).

MWG RESPONSE: MWG does not dispute that there is ash in the former ash basin as shown in borings. MWG disputes that the area is within the defined Historic Coal Ash at Powerton based on Complainants’ exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants’ Motion, FN3; *see* MWG Response to Complainants’ Motion, IV.a.iv.

- Fill outside of named ash disposal areas, including fill surrounding the ash ponds, and west of the ash ponds but east of the onsite coal pile. *See* ENSR, Phase II Environmental Site Assessment – Powerton Generating Station Bates MWG13-15_3309-3315 (Dec. 7, 1998) [hereinafter ENSR, *Powerton Phase II ESA*], attached hereto as Ex. D3; Patrick Engineering, Hydrogeological Assessment Report for Powerton Generating Station Bates MWG13-15_7111-7121 (Feb. 2011) [hereinafter Patrick, *Powerton Hydrogeological Assessment Report*], attached hereto as Exhibit D4. Patrick Engineering Inc., Quarterly Groundwater Monitoring Results – Bypass Cleaning Basin Bates MWG13-15_40019-40022 (Oct. 21, 2011), attached hereto as Ex. D5; Patrick Engineering Inc., Bimonthly Groundwater Monitoring Results—April 2011. Powerton Station—Metal Cleaning Basin Bates MWG13-15_44762-4767 (Aug. 1, 2011), attached hereto as Ex. D6; Ex. I, KPRG, Geotechnical Analysis at Bates MWG13-15 24306-24310. Soil borings and groundwater monitoring well borings surrounding the ash ponds show ash (“cinders”) up to 24 feet beneath the surface. *Id.* Additional borings west of the ash ponds, but east of the onsite coal pile, showed ash up to 12 feet deep. Ex. D3, ENSR, *Powerton Phase II ESA* at Bates MWG13-15_3320 – 3324.

MWG RESPONSE:

MWG cannot define or identify the “areas” Complainants are referencing. Complainants do not cite to a map or boring locations that they allege contain coal ash, and based upon Complainants’ general description, could mean the entire Station. MWG does not dispute that the cited boring logs show some historic coal ash as identified in the logs. MWG disputes that certain of the areas

are within the defined Historic Coal Ash at Powerton based on Complainants' exclusion of repositories subject to corrective action under the Compliance Commitment Agreements. Complainants' Motion, FN3; see MWG Response to Complainants' Motion, IV.a.iv.

11. There has been coal ash in the Limestone Runoff Basin at Powerton. Ex. H, MWG, U.S. EPA Questionnaire at Bates MWG13-15_1273, 1276 (Limestone Runoff Basin is designated SPD6); Andrews Env'tl. Engineering Inc., Draft Sampling Plan Report Prepared for Midwest Generation, Powerton Generating Station Bates MWG13-15 11305-11311 (June 2004) [hereinafter Andrews Env'tl. Engineering, Draft Sampling Plan Report], attached hereto as Exhibit D7.

MWG RESPONSE:

MWG does not dispute that coal ash has historically been in the Limestone Basin, but it no longer contains ash. As testified to by M. Kelly, it has been many years since any ash was placed in the Limestone Basin, and the ash placed in the basin was removed. M.Kelly Dep., Complainants' Ex. E1, Tr. p. 75:8-20). MWG disputes that the area is within the defined Historic Coal Ash at Powerton based on Complainants' exclusion of repositories for which MWG's expert cited leach test data, FN3; see MWG Response to Complainants' Motion, IV.a.iv.

12. The coal ash located in Historic Ash Areas is not "coal combustion byproducts" as defined by 415 ILCS 5/3.135. That definition sets out ten circumstances in which coal combustion waste constitutes CCB. These are:

- (1) The extraction or recovery of material compounds contained within CCB.
- (2) The use of CCB as a raw ingredient or mineral filler in the manufacture of the following commercial products: cement; concrete and concrete mortars; cementitious products including block, pipe and precast/prestressed components; asphalt or cementitious roofing products; plastic products including pipes and fittings; paints and metal alloys; kiln fired products including bricks, blocks, and tiles; abrasive media; gypsum wallboard; asphaltic concrete, or asphalt based paving material.
- (3) CCB used (A) in accordance with the Illinois Department of Transportation ("IDOT") standard specifications and subsection (a-5) of this Section or (B) under the approval of the Department of Transportation for IDOT projects.
- (4) Bottom ash used as antiskid material, athletic tracks, or foot paths.
- (5) Use in the stabilization or modification of soils providing the CCB meets the IDOT specifications for soil modifiers.
- (6) CCB used as a functionally equivalent substitute for agricultural lime as a soil conditioner.
- (6.5) CCB that is a synthetic gypsum.

(7) Bottom ash used in non-IDOT pavement sub-base or base, pipe bedding, or foundation backfill.

(8) Structural fill, designed and constructed according to ASTM standard E2277-03 or Illinois Department of Transportation specifications, when used in an engineered application or combined with cement, sand, or water to produce a controlled strength fill material and covered with 12 inches of soil unless infiltration is prevented by the material itself or other cover material.

(9) Mine subsidence, mine fire control, mine sealing, and mine reclamation.

415 ILCS 5/3.135(a). There is no evidence in the record that the coal ash discussed herein has been used for any of these purposes. Even if some of the coal ash was originally used as “structural fill” in a general sense, it would not comply with section 3.135(a)(8) because there is no evidence in the record that the structural fill was designed and constructed according to the above-cited standards, and there are numerous instances in the record of coal ash being covered by less than 12 inches of soil.¹ Moreover, coal ash used as “structural fill” according to section 3.135(a)(8) is subject to additional requirements found in section 3.135(a-5), including notification to the Illinois Environmental Protection Agency of the intention to use coal ash as CCB. 415 ILCS 5/3.135(a-5). There is no evidence in the record showing that these requirements have been met.

MWG RESPONSE:

MWG objects to Complainants SOF No. 12 as calling for a legal conclusion. MWG also objects when it has not been established that the cited statute, first enacted in 1995 as PA89-93, is applicable to fill placed at the properties prior to that date. MWG objects to SOF No. 12 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

13. There is no evidence in the record of Illinois EPA permits allowing Historic Coal Ash to be used as fill or construction material in Historic Ash Areas.

MWG RESPONSE:

MWG objects to SOF No. 13 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”) Without waiving its objection, Complainants’ SOF No. 13 presumes that an Illinois EPA permit was

¹ See, e.g., Ex. I, KPRG, *Geotechnical Analysis* at Bates MW13-15_24285-24287, 24292-24294, 24297, 24304, 24307 (presenting soil borings in which coal ash was observed in the top foot of soil at the Will County, Joliet 29, and Powerton sites); see also Ex. A3 Patrick, *Waukegan Hydrogeological Assessment Report* at Bates MWG_7167-7176 (showing coal ash in the top foot of soil in the borings for groundwater monitoring wells MW-1 through MW-5).

required for using coal ash as fill or construction material at the time it was placed, which MWG disputes.

14. There are different types of coal ash, including but not limited to “fly ash” and “bottom ash.” Ex. E5, Seymour Dep. 225:23-24, 226:2-10. “Slag” and “cinders” are both forms of bottom ash. Ex. E1, Kelly Dep. 10:16, 10:21.

MWG RESPONSE: Undisputed. However, Complainants’ citations to Mr. Seymour’s and Mr. Kelly’s testimony, is incorrect and does not support the statement of fact. MWG disputes that Ex. E5, Seymour Dep. 225:23-24, 226:2-10 states that that there are different types of coal ash. Mr. Seymour testified that fly ash was recycled and bottom ash was commonly used as fill, and that bottom ash was less leachable than fly ash. Ex. E5, Seymour Dep. 225:23-24, 226:2-10. Mr. Kelly specifically testified that “boiler slag” and “coal cinders” are types of bottom ash. Ex. E1, Kelly Dep. 10:16, 10:21.

15. The ash in the ground at all four plants is not uniform. Ex. E5, Seymour Dep. 226:11-17 (“I’m not saying it’s only bottom ash. It’s lots of different things if you look at the boring logs.”). The type of coal ash varies both from site to site and in different areas within each site, as detailed in the following paragraphs.

MWG RESPONSE:

MWG does not dispute that ash at the four plants as identified in boring logs is not uniform, as each Station may or may not contain areas of ash at varying depth and quantity. Mr. Seymour’s cited testimony reflects that “lots of different things” are seen on the boring logs (i.e. fill, gravel, sand) not solely ash.

16. At Waukegan, coal ash at different areas of the site is described as slag, cinders, and fly ash. There is:

- Slag on the far north-center portion of the site, and coal/slag northwest of the Former Slag/Fly Ash Storage Area. Ex. A2, ENSR, *Waukegan Phase II ESA*, at Bates MWG13-15_45817, 45830, 45835 and 45841.

MWG RESPONSE:

MWG does not dispute that the boring logs cited show that there is slag or coal/slag in the boring logs. MWG disputes that the area of B-11 is owned by MWG. *See* MWG Response to Complainants’ SOF No. 4, ¶ 2.

- Coal mixed with gray coal ash immediately north of the Former Slag/Fly Ash Storage Area. *Id.* at Bates MWG13-15_45817, 45841.

MWG RESPONSE: Undisputed.

- Black coal cinders mixed with other materials in boring logs taken from the land running along the eastern perimeter of the east ash pond, in some places extending from the surface to 20 feet deep. Ex. A3, Patrick, *Waukegan Hydrogeological Assessment Report* at Bates MWG13-15_7166-7176. Just to the west of the west ash pond, a boring log shows a mixture of black coal cinders and other materials, which in this location is over 16 feet thick. *Id.* at Bates MWG13-15_7175-76.

MWG RESPONSE: MWG does not dispute that the boring logs cited show occasional black coal cinders mixed with sand and gravel. MWG does not dispute that one location extends to 20 feet.

- Both fly ash and slag in the Former Slag/Fly Ash Storage area. Ex. A2, ENSR *Waukegan Phase II ESA* at Bates MWG13-15_45817.; Ex. E6, Veenbaas Dep. 72:9-21, 73:17 – 74:5.

MWG RESPONSE: MWG disputes that this area contains coal ash. See MWG's Response to Complainants' SOF No. 4, ¶1, incorporated by reference.

17. At Will County, ash in different areas of the site is described as bottom ash, slag, coal cinders and fly ash. There is:

- Slag and bottom ash in fill in the northern portion of the site, as well as just south of the 1-North ash pond and just east of the 1-South ash pond. Ex. I, KPRG, *Geotechnical Analysis* at Bates MWG13-15_24282-24286.

MWG RESPONSE: MWG does not dispute that three of the boring logs cited in Complainants' Ex. I show slag and bottom ash mixed with silt and gravel.

- Bottom ash in fill just southwest of the 2-South ash pond. *Id.* at Bates MWG13-15_24287.

MWG RESPONSE: Undisputed. MWG does not dispute that the one boring log cited shows bottom ash mixed with sand and gravel.

- Black coal cinders immediately to the east and southeast of ash pond 1-North and immediately to the east of the 3-South ash pond. Ex. B3, Patrick, *Will County Hydrogeological Assessment Report* at Bates MWG13-15_7250-7252, 7256.

MWG RESPONSE: MWG does not dispute that the one boring log cited shows black coal cinders mixed with clay, sand, and gravel.

- Fly ash and wet bottom slag tank overflow in the South Area Runoff Basin (SPD8). Ex. H, MWG, *U.S. EPA Questionnaire* at Bates MWG13-15_2014, 2017.

MWG RESPONSE:

MWG disputes that the South Area Runoff Basin area contains ash. *See* MWG Response to SOF No. 5, ¶4, incorporated by reference. Mr. Veenbaas testified that the south area runoff basin was not used for ash. Veenbaas Dep. Tr. 23:19-24:4. Additionally, MWG disputes that the U.S.EPA Questionnaire is a reliable source of information as multiple witnesses have testified that the responses to the U.S. EPA Questionnaire contains mistakes. *See* M.Race Dep. Complainants' Ex. E4, Tr. 67:10-11 and 67:21-68:3, and M.Kelly Dep. Tr. 69:24-70:3 and thus cannot be used as a basis for an undisputed fact.

- Wet bottom slag tank overflows and bottom ash sluice in the Spent Slurry Pond (SPD 5). *Id.* at Bates MWG13-15_2017. This pond, furthermore, has contained scrubber sludge. Ex. E6, Veenbaas Dep. 20:22-21:4.

MWG RESPONSE:

MWG disputes that Spent Slurry Pond contains coal ash. *See* MWG Response to SOF No. 5, ¶4, incorporated by reference. Mr. Veenbaas did not testify that the spent slurry pond ever contained ash, only that it was built for a “pilot program” to be used to contain ash. Veenbaas Dep. Complainants' Ex. E6, Tr. 20:22-21:4. Additionally, MWG disputes that the U.S.EPA Questionnaire is a reliable source of information as multiple witnesses have testified that the responses to the U.S. EPA Questionnaire contains mistakes. *See* M.Race Dep. Complainants' Ex. E4, Tr. 67:10-11 and 67:21-68:3, and M.Kelly Dep. Complainants' Ex. E1, Tr. 69:24-70:3, and thus cannot be used as a basis for an undisputed fact.

- Bottom ash and slag in the boiler slag stockpile. Ex. B2, KPRG and Associates, Inc., *CCB Determination Report* at Bates MWG13-15_49568 (“The ash deposits are consistent and homogenous consisting [sic] bottom ash/slag from the coal combustion process”). Although much of that bottom ash and slag was removed in 2015, some slag remains there. Ex. F, Resp't Supp. Resp. to Compl.'s First Set of Interros at 5 (6/10/15).

MWG RESPONSE: Undisputed. *See* MWG Response to SOF No. 6, incorporated by reference.

18. At Joliet 29, ash in different areas of the site is described as bottom ash, slag and fly ash. There is:

- Bottom ash, slag and fly ash in the “former ash placement area” in the western portion of the site. Ex. C2, KPRG, *Joliet CCB Determination Report* at Bates MWG13-15_19499-19517; Ex. E5, Seymour Dep. 145:14-148:1. Logs from borings completed in 2005 in the former ash placement area show that ash there consists primarily, though not entirely, of bottom ash. Ex. C2, KPRG, *Joliet CCB Determination Report* at Bates MWG13-15_19499-19517. They show as much as 18 feet of bottom ash and slag in places. *See*,

e.g., id. at Bates MWG13-15_19507. Of the nineteen borings taken, sixteen contained bottom ash, one boring contained fly ash, three borings contained slag, and three borings contained no ash. *Id.* at Bates MWG13-15_19499-19517.

MWG RESPONSE: MWG does not dispute that the boring logs in the “former ash placement area” at Joliet 29 as described by the *Joliet CCB Determination Report* show bottom ash, slag and fly ash mixed with other materials.

- Bottom ash and, to a lesser extent, slag in the ash fill from around the center of the Joliet 29 site. Ex. I, KPRG, *Geotechnical Analysis* at Bates MWG13-15_24292-24297. Three boring logs in the area identify bottom ash and a fourth shows slag. *Id.*

MWG RESPONSE: MWG disputes that there is bottom ash or slag “around the center of the Joliet 29 site, because there are no sample locations “around the center of the Joliet 29 site” in Ex. I. See MWG Response to SOF No. 7, ¶2, incorporated by reference.

19. The record contains no evidence showing what types of ash are contained in the northeast or southwest ash landfills at Joliet 29.

MWG RESPONSE:

MWG objects to SOF No. 19 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objection, MWG disputes that either the northeast or southwest ash landfills contains ash as there are no borings in the record that reflects actual ash in that area. See MWG Response to Complainants’ SOF No. 7, ¶1 incorporated by reference.

20. At Powerton, ash in different areas of the site is described as coal cinders, bottom ash, slag, and fly ash. There is:

- Bottom ash, boiler slag and coal cinders – up to ten feet thick – in the Former Ash Pond, also called the “Old Ash Basin.” Ex. D2, Patrick, *Powerton Former Ash Basin Borings* at Bates MWG13-15_14225-14269; Ex. H, MWG, *U.S. EPA Questionnaire* at Bates MWG13-15_1273, 1276 (Old Ash Basin is designated SPD 5).

MWG RESPONSE:

MWG does not dispute that Ex. D2 shows sand mixed with “coal cinders,” however, the cited evidence does not show either bottom ash or boiler slag in the Former Ash Pond. Additionally, MWG disputes that the U.S.EPA Questionnaire is a reliable source of information as multiple witnesses have testified that the responses to the U.S. EPA Questionnaire contains mistakes. See M.Race Dep., Complainants’ Ex. E4, Tr. 67:10-11 and 67:21-68:3, and M.Kelly Dep., Complainants’ Ex. E1 Tr. 69:24-70:3, and thus cannot be used as a basis for an undisputed fact.

- Fly ash in the Limestone Runoff Basin. *Id.* (Limestone Runoff Basin is designated SPD 6); Ex. D7, Andrews Env'tl. Engineering, *Draft Sampling Plan Report* at Bates MWG13-15_11305-11311.

MWG RESPONSE:

MWG disputes that the Limestone Basin currently contains ash. *See* MWG Response to SOF No. 11, incorporated by reference. As testified to by M. Kelly, it has been many years since any ash was placed in the Limestone Basin, and the ash placed in the basin was removed and placed with other fly ash for disposal. (M.Kelly Dep. Tr. p. 75:8-20).

- Slag, bottom ash, and coal cinders at various areas around the Powerton site (other than the Limestone Runoff Basin and the Former Ash Pond). Ex. D3, ENSR, Powerton Phase II ESA at Bates MWG13-15_3307-3342; Ex. I, KPRG, Geotechnical Analysis at Bates MWG13-15_24301-24310; Ex. D4, Patrick, Powerton Hydrogeological Assessment Report at 7111-7121; Patrick Engineering Inc., Quarterly Groundwater Monitoring Results, First Quarter 2012, Powerton Generating Station –Bypass Cleaning Basin Bates MWG-13-15_4059-4064 (May 17, 2012), attached hereto as Ex. D8; Patrick Engineering Inc., Quarterly Groundwater Monitoring Results, Third Quarter 2011, Powerton Generating Station –Bypass Cleaning Basin Bates MWG-13-15_4100-4105 (Oct. 2011), attached hereto as Ex. D22. Some of those borings documented ash 16-18.5 feet thick in places. *Id.* at Bates 4100-4105.

MWG RESPONSE:

MWG does not dispute that some but not all of the boring logs show sand and gravel mixed with slag, bottom ash or coal cinders. MWG notes that Complainants appear to have swapped Exhibits D8 and D22. MWG disputes that some of the borings documented in Bates MWG13-15_4100-4105 show 16-18.5 feet thick of ash, as those borings show a mix of gravel, rock, sand and cinders.

21. Different types of ash leach differently. Ex. E5, Seymour Dep 226:2-10.

MWG RESPONSE:

MWG disputes that the Seymour Deposition states that different types of ash leach differently. Mr. Seymour stated that bottom ash is less leachable than fly ash because it is more solidified, hardened and courser and has less surface area. Ex. E5, Seymour Dep 226:2-10. “[T]he chemical composition of coal ash is determined primarily by the chemistry of the source coal and the combustion process.” *Coal Ash Characteristics, Management, and Environmental Issues*, EPRI, Ex. 27, p. 3. Both experts in this matter agreed with this statement. *See* Kunkel Dep. Ex. 11, Tr. p. 23:14-22 and Mr. Seymour Expert Report, p. 41.

22. Particles of fly ash differ in size from those of bottom ash. *Id.*

MWG RESPONSE:

MWG does not dispute that fly ash particles may differ in size from bottom ash. However, MWG disputes that Mr. Seymour testified that the fly ash particles differ in size than those of bottom ash. In his deposition, Mr. Seymour stated that bottom ash is more solidified, hardened and courser, and has a smaller surface area than fly ash for the same weight. Ex. E5, Seymour Dep 226:2-10. Mr. Seymour did not testify as to the different sizes of the particles.

23. Wherever the particle size of coal ash varies from one area to another, the leachability of that ash will also vary from area to area. See *id.* However, any coal ash – including ash that has existed since before 1998 – can and does leach if it comes into contact with water. Ex. E5, Seymour Dep. 69:18-20; *id.* at 224:14-21.

MWG RESPONSE:

MWG disputes that Mr. Seymour testified as to any of the statements in SOF No. 23 and objects to Complainants fabricating facts. Without waiving its objection, As stated in response to No. 21 and 22, Mr. Seymour testified that bottom ash is more solidified, hardened and courser, and has a smaller surface area than fly ash for the same weight. Ex. E5, Seymour Dep 226:2-10. “[T]he chemical composition of coal ash is determined primarily by the chemistry of the source coal and the combustion process.” *Coal Ash Characteristics, Management, and Environmental Issues*, EPRI, Ex. 27, p. 3. Both experts in this matter agreed with this statement. See Kunkel Dep., Ex. 11, Tr. p. 23:14-22 and Mr. Seymour Expert Report, p. 41.

24. There is no leach test of any Historic Ash Areas at Waukegan. Ex. G, Seymour Report at 46-48. There is no evidence in the record that the Historic Ash Areas at Waukegan are not contributing to groundwater contamination at Waukegan.

MWG RESPONSE:

MWG does not dispute that Mr. Seymour did not reference a leach test of ash from the Waukegan Site on pp. 46-48 of his Expert Report. MWG disputes that there is no evidence that the Historic Ash Areas at Waukegan are not contributing to groundwater contamination. MWG expert, Mr. Seymour, stated in his report under the heading “Historical Ash in Fill Materials Outside of the Ponds is Not Adversely Impacting Groundwater” that “It is my opinion that the current conditions of the existing weathered ash are not contributing to groundwater exceedances at the four sites based on leaching analysis of actual ash at the sites. Seymour Report, pp. 45-46.

Further, as Complainants have defined “Historic Ash Areas” to exclude areas addressed by the CCAs there are no “Historic Ash Areas” at Waukegan except for the boring in B-11, which MWG disputes is owned by MWG. See MWG Response to SOF No. 4 and MWG Response at Sec. IV.a.i.

25. There are no leach tests of Historic Ash Areas at Will County.

MWG RESPONSE:

As defined by Complainants, MWG does not dispute that there are no leach tests of “Historic Ash Areas at Will County.” Complainants have carefully attempted to define “Historic Ash Areas” to exclude tested areas of ash. There are leach tests of ash from Will County which show that “The NLET metals data from the 20 sample locations indicate with a high degree of certainty that the criteria established in 415 ILCS 5/3.135 (formerly 415 ILCS 5/3.94) a-5(B) are met...” See Seymour Report, p. 48, *quoting KPRG Will County CCB Determination Support Report*, Sept. 8, 2015. The leach tests are within the KPRG Will County CCB Determination Support Report, Sept. 8, 2015 attached as Exhibit B2 to Complainants’ Motion. Mr. Seymour opines that, as to Will County, the leach tests are representative of the other areas of ash. See Complainants’ Ex. G, p. 48 and MWG’s Response to SOF No. 26.

26. The 2015 leach test at the Boiler Slag Stockpile cited by Seymour, Id. at 48, is not representative of the Historic Coal Ash at Will County because other areas of Will County contain different types of ash and different types of ash leach differently. As discussed above, at the time the leach tests were taken the Boiler Slag Stockpile contained bottom ash and slag. In contrast, the South Area Runoff Basin (SPD8) contains fly ash and wet bottom slag tank overflow. Supra ¶ 17. The areas to the immediate east and southeast of ash pond 1-North, and to the east of ash pond 3-South, contain coal cinders. Supra ¶ 17. The Spent Slurry Pond (SPD 5) contains wet bottom slag tank overflows and bottom ash sluice, as well as scrubber sludge. Supra ¶ 17; Ex. E6, Veenbaas Dep. 20:22-21:4.

MWG RESPONSE:

MWG objects to the argument in SOF No. 26 that the 2015 leach test is not representative.

Without waiving its objection, MWG disputes that the KPRG CCB determination is not representative of the Historic Ash Areas at Will County. In his report, Mr. Seymour stated under the heading “Historical Ash in Fill Materials Outside of the Ponds is Not Adversely Impacting Groundwater” that “It is my opinion that the current conditions of the existing weathered ash are not contributing to groundwater exceedances at the four sites based on leaching analysis of actual ash at the sites.” Complainants’ Ex. G, pp. 45-46. Additionally, Mr. Seymour used the results of the ash samples in his analysis to conclude that “leachate from historical ash in fill materials at Will County is not adversely impacting the groundwater.” Complainants’ Ex. G, p. 48.

27. There are no leach tests of the northeast or southwest ash landfills at Joliet 29.

MWG RESPONSE:

MWG does not dispute that no leach tests of the northeast or southwest ash landfills at Joliet 29 because MWG disputes that there is actually ash in either of the areas. See MWG Response to SOF No. 7, ¶1, incorporated by reference.

28. There was a leach test at the “former ash placement area” at Joliet 29. Ex. G, Seymour Report at 46-47. Ex. E5, Seymour Dep. 145:14-148:1; Ex. J5, KPRG, Joliet CCB Determination Report at Bates MWG13-15_19495.

MWG RESPONSE: Undisputed.

29. The leach test done at the “former ash placement area” is not representative of the Historic Ash Areas at the Joliet 29 site because other areas of Joliet 29 contain different types of ash and different types of ash leach differently. *Supra*, ¶¶ 18, 21-23. As discussed above, the former ash area at Joliet contains bottom ash, slag and fly ash. *Supra*, ¶ 18. In contrast, the ash fill near the center of the site contains solely bottom ash and slag. *Id.* There are no soil borings or other evidence establishing the type of ash contained in the northeast and southwest ash landfills at Joliet. Ex. C2, KPRG, *Joliet CCB Determination Report* at Bates MWG13-15_19499-19517; Ex. E5, Seymour Dep. 39:21—40:14.

MWG RESPONSE:

MWG objects to the argument in SOF No. 29 that the leach test at Joliet 29 is not representative.

Without waiving its objection, MWG disputes that the Joliet 29 leach test is not representative of the Historic Ash Areas at the Joliet 29 Site. In his report, Mr. Seymour stated under the heading “Historical Ash in Fill Materials Outside of the Ponds is Not Adversely Impacting Groundwater” that “It is my opinion that the current conditions of the existing weathered ash are not contributing to groundwater exceedances at the four sites based on leaching analysis of actual ash at the sites. Complainants’ Ex. G, pp. 45-46. Additionally, in his deposition, Mr. Seymour stated that he evaluated whether the Joliet 29 samples were representative of fill elsewhere on the Joliet Site and stated that fill was variable as well as the samples, and thus the samples were consistent with the variable type of fill. Complainants’ Ex. E5. Tr. 148:3-9.

30. The only evidence in the record regarding sampling of the northeast ash landfill at Joliet 29 states that, “In 1992, the abandoned ash landfill area located east of Joliet 29 was identified as a possible storm water discharge point, primarily due to exposed ash products. Subsequent sample collection taken during the storm water permitting process indicated that there was, indeed, moderate contamination of the runoff caused by contact with this exposed ash.” Memorandum from B.A. Renwick to J.P. Smith re: The Abandoned Ash Landfill Area, Bates MWG13-15_25370-25371 (Apr. 4, 1995), attached hereto as Ex. C12.

MWG RESPONSE:

MWG does not dispute that the memorandum cited as Ex. C12 contains the quoted statement but disputes that this “is the only evidence in the record,” *See* MWGW Response to SOF No. 29, and disputes that the sampling was of the contents of northeast ash landfill at Joliet 29. There are no sampling results attached to Ex. C12, so the alleged facts cannot be established. *See also* MWG’s Response to Complainants’ SOF No. 7, ¶1, incorporated by reference.

31. There are no leach tests of the Former Ash Pond at Powerton or of the ash fill located around the Powerton site.

MWG RESPONSE:

MWG does not dispute that there are no leach tests of the Former Ash Pond at Powerton. MWG cannot identify the areas Complainants' describe as "ash fill located around the Powerton Site" and thus disputes this part of the Statement of Undisputed Facts.

32. Leach testing was conducted at the Limestone Runoff Basin. Ex. D7, Andrews Env'tl. Engineering, *Draft Sampling Plan Report* at Bates MWG13-15_11302-11305.

MWG RESPONSE:

MWG does not dispute that leach testing was conducted of the historical ash in fill materials located in the Limestone Runoff Basin. MWG notes that the complete Andrews Environmental Engineering Report is located at MWG13-15_11302-11492.

33. Some coal ash in the Limestone Runoff Basin failed the leach test to determine whether it could be re-used as a coal combustion byproduct. *Id.* at MWG13-15_11302.

MWG RESPONSE:

MWG disputes that MWG13-15_11302 shows that some coal ash "failed" the leach test. MWG states that one of the NLET samples detected selenium greater than the Illinois EPA Class 1 Groundwater Quality Standard and that one sample detected selenium and chromium above the Illinois EPA Class I Groundwater Quality Standard. All other metals in the NLET results from the eight ash samples were less than the Illinois EPA Class 1 Groundwater Quality Standards. Complainants' Ex. G, p. 47 and Ex. D7, Andrews Environmental Engineering Report, MWG13-15_11302-11492.

34. The leach test from the Limestone Runoff Basin is not representative of the Historic Ash Areas at the Powerton site because other areas of Powerton contain different types of ash and different types of ash leach differently. *Supra*, ¶¶ 20-23. Eight ash samples were collected from test pits in the Limestone Runoff Basin. Ex. G, *Seymour Rep.* at 47. The test pits in the limestone runoff basin had materials that were described as fly ash, bottom ash, or both in combination with other materials that were presumed to be something other than coal ash. Ex. D7, Andrews Env'tl. Engineering, *Draft Sampling Plan Report* at Bates MWG13-15_11305-11311. Neither the Former Ash Basin nor the ash fill around Powerton contains fly ash, and Historic Ash Areas around the Powerton site contain "slag" and "cinders," which were not identified in the Limestone Runoff Basin. *Supra*, ¶ 20. Mr. Seymour conceded in his deposition that he had merely assumed that the material in the limestone runoff basin was "consistent with" coal ash located in other areas. Ex. E5, *Seymour Dep.* 151:11-152:21.

MWG RESPONSE:

MWG objects to the argument in SOF No. 34 that the leach test in the Limestone Basin is not representative.

Without waiving its objection, MWG disputes that the Andrews Environmental Engineering, Inc. sampling of the Limestone Runoff Basin is not representative of the Historic Ash Areas at Powerton Site. In his report, Mr. Seymour stated under the heading “Historical Ash in Fill Materials Outside of the Ponds is Not Adversely Impacting Groundwater” that “It is my opinion that the current conditions of the existing weathered ash are not contributing to groundwater exceedances at the four sites based on leaching analysis of actual ash at the sites.” Complainants’ Ex. G, pp. 45-46. Additionally, in his deposition, Mr. Seymour stated that the ash placed in the Limestone Runoff Basin was based upon the sub-bituminous Powder River Basin coal that the Station had been burning consistently at the various power plants, thus the coal ash would also be consistent. Complainants’ Ex. E5, Tr. 151:11-152:21.

35. As MWG’s own expert concedes, the constituents found in the groundwater at MWG’s plants are representative of coal ash. Ex. E5, Seymour Dep. 46:17-46:18 (“The inorganics that are in the groundwater are characteristic of coal ash materials.”).

MWG RESPONSE:

MWG does not dispute that Mr. Seymour stated the quoted sentence in his deposition. MWG disputes the mischaracterization of Mr. Seymour’s testimony. In his testimony, Mr. Seymour stated that the analyzed ash at Powerton was not contributing enough to cause the constituents in the groundwater and thus there must be something else causing the inorganics in the groundwater that were characteristic of coal ash materials. Ex. E5, Seymour Dep. Tr. 46:17-23.

36. Boron is a good coal ash indicator. Letter from Susan M. Franzetti, Counsel for Midwest Generation, LLC, to Andrea Rhodes, Illinois EPA, Re: Violation Notice 6282 at Bates MWG13-15_389 (July 27, 2012) [hereinafter *MWG response to Powerton NOV*] attached hereto as Ex. D9, at 6 (“[B]oron is generally considered a reliable tracer of potential ash leachate impacts.”); Patrick Engineering Inc., *Proposal for Ash Pond Investigation* Bates MWG13-15_10763 (Aug. 18, 2010) attached hereto as Ex. D10; Ex. E5, Seymour Dep. 89:5-89:17 (“The Witness. In general, boron is a good indicator. Q. Why do you say ‘boron is a good indicator’? A. Well, it’s a characteristic of ash and it is often found in ash areas, and it’s shown by studies to be mobile in the environment.”).

MWG RESPONSE:

MWG does not dispute that boron is one of the many indicators of coal ash in groundwater. See Complainants’ Ex. G, pp. 40-41, and Tables 5-1 and 5-2, and Response Brief at Sec. IV.c.

37. Sulfate is an indicator of coal ash. Ex. D9, *MWG response to Powerton NOV* at Bates MWG13-15_389 (“Boron and sulfate are constituents known to be associated with coal ash.”);

Ex. E5, Seymour Dep 88:5-88:14; Ex. D10, Patrick Engineering Inc., *Proposal for Ash Pond Investigation* at Bates MWG13-15_10763.

MWG RESPONSE:

MWG does not dispute that sulfate is one of the many indicators of coal ash in groundwater. See Complainants' Ex. G, pp. 40-41, and Tables 5-1 and 5-2, and Response Brief at Sec. IV.c.

38. Manganese is an indicator of coal ash. *Id.*; Ex. G, *Seymour Report* at 40, 42.

MWG RESPONSE:

MWG does not dispute that manganese is one of the many indicators of coal ash in groundwater. See Complainants' Ex. G, pp. 40-41, and Tables 5-1 and 5-2, and Response Brief at Sec. IV.c.

39. As shown in MWG's expert's report, boron and sulfate have been detected in every single well at all four plants at issue in this litigation. Ex. *Id.* at Tbl.5-4.

MWG RESPONSE: MWG does not dispute that Table 5-4 of Mr. Seymour's expert report, and including the supplement attached to his report in Ex. 24, shows detections of various constituents.

40. In June 2012, IEPA issued Violation Notices to MWG alleging exceedances of Class 1 groundwater quality standards at all four plants. IEPA, *Violation Notice: Midwest Generation, LLC, Waukegan Generating Station* Bates MWG13-15_328-332 (June 11, 2012), attached hereto as Ex. B5; IEPA, *Violation Notice: Midwest Generation, LLC, Will County Generating Station* Bates MWG13-15_333-34 (June 11, 2012), attached hereto as Ex. B5; IEPA, *Violation Notice: Midwest Generation, LLC, Joliet #29 Generating Station* Bates MWG13-15_342-347 (June 11, 2012), attached hereto as Ex. C5; IEPA, *Violation Notice: Midwest Generation, LLC, Powerton Generating Station* Bates MWG13-15_348-358 (June 11, 2012), attached hereto as Ex. D11.

MWG RESPONSE: MWG does not dispute that IEPA issued violation notices to MWG in 2012 concerning MWG's coal ash ponds.

41. MWG and the agency entered into site-specific Compliance Commitment Agreements ("CCAs") for all four plants on October 14, 2012. IEPA & MWG, *Waukegan Compliance Commitment Agreement* Bates MWG13-15_565-570 (Oct. 24 2012) [hereinafter *Waukegan CCA*], attached hereto as Ex. A6; IEPA & MWG, *Will County Compliance Commitment Agreement* Bates MWG13-15_559-564 (Oct. 24 2012) [hereinafter *Will County CCA*], attached hereto as Ex. B6; IEPA & MWG, *Joliet #29 Compliance Commitment Agreement* Bates MWG13-15_571-576 (Oct. 24 2012) [hereinafter *Joliet CCA*], attached hereto as Ex. C6; IEPA & MWG, *Powerton Compliance Commitment Agreement* Bates MWG13-15_552-558 (Oct. 24 2012) [hereinafter *Powerton CCA*], attached hereto as Ex. D12.

MWG RESPONSE: MWG does not dispute that it entered in site-specific CCAs for corrective actions with Illinois EPA to resolve the alleged violations in Illinois EPA violation notices. MWG notes that Complainants have mislabeled their exhibits. Complainants' Exhibit A6 is the Powerton CCA, and the Waukegan CCA appears to not be attached to Complainants' motion. To assist the Board, MWG has attached the Waukegan CCA to this Response as Ex. 2.

42. Pursuant to the CCAs, Groundwater Management Zones were established at Will County, Joliet 29, and Powerton. MWG applied for the GMZs for each of these three sites on January 18, 2013. MWG, *Compliance Commitment Agreement—Groundwater Management Zone Application—Will County Generating Station Bates MWG13-15_622-666* (Jan. 18. 2013), attached hereto as Ex. B7; MWG, *Compliance Commitment Agreement—Groundwater Management Zone Application—Joliet #29 Generating Station Bates MWG13-15_17185-17229* (Jan. 18. 2013), attached hereto as Ex. C7; MWG, *Compliance Commitment Agreement—Groundwater Management Zone Application—Powerton Generating Station Bates MWG13-15_724-775* (Jan. 18. 2013), attached hereto as Ex. D13.

MWG RESPONSE: MWG does not dispute that it established GMZs as a corrective action under the CCAs at the Will County, Joliet 29 and Powerton Stations. Maps of the areas of corrective action are attached as Exs. 4, 5, 8.

43. IEPA approved Will County's GMZ on July 2, 2013. Letter from William E. Buscher, Manager, Hydrogeology and Compliance Unit, Groundwater Section, Bureau of Water, IEPA to John Kennedy, Senior Vice President, Generation, MWG at Bates MWG13-15_16564 (Jul. 2, 2013) [hereinafter *Will County GMZ Approval Letter*], attached hereto as Ex. B8; IEPA approved MWG's Joliet 29 GMZ on August 8, 2013. Letter from William E. Buscher, Manager, Hydrogeology and Compliance Unit, Groundwater Section, Bureau of Water, IEPA to Amy Hanrahan, Senior Environmental Manager, MWG at Bates MWG13-15_17183 (Aug. 8, 2013) [hereinafter *Joliet GMZ Approval Letter*], attached hereto as Ex. C8. IEPA approved Powerton's GMZ October 3, 2013. Letter from William E. Buscher, Manager, Hydrogeology and Compliance Unit, Groundwater Section, Bureau of Water, IEPA to John Kennedy, Senior Vice President, Generation, MWG at Bates MWG13-15_23977 (Oct. 3, 2013) [hereinafter *Powerton GMZ Approval Letter*], attached hereto as Ex. D14.

MWG RESPONSE: Undisputed.

44. No GMZ was established at Waukegan. Ex. L, Resp't Answer and Defenses to Second Compl. ¶ 85.

MWG RESPONSE: Undisputed.

45. Class I groundwater quality standards have been and remain in effect at Waukegan throughout the entire period of alleged violations in the Second Amended Complaint. Ex. B5,

IEPA, *Violation Notice: Midwest Generation, LLC, Waukegan Generating Station* Bates MWG13-15_328-332 (June 11, 2012).

MWG RESPONSE: Undisputed.

46. Class I standards were in effect at Will County until Illinois EPA's approval of the GMZ for that site on July 2, 2013. Ex. B8, *Will County GMZ Approval Letter* at Bates MWG13-15_16564; Ex. B5, IEPA, *Violation Notice: Midwest Generation, LLC, Will County Generating Station* Bates MWG13-15_333-34 (June 11, 2012).

MWG RESPONSE: Undisputed. MWG further states that upon establishment of GMZ as a corrective action, pursuant to 35 Ill. Adm. Code 250(e), the otherwise applicable standards specified in Subpart D of Part 620 are not applicable.

47. Class I standards were in effect at Joliet 29 until Illinois EPA's approval of a GMZ for that site on August 8, 2013. Ex. C8, *Joliet GMZ Approval Letter* at Bates MWG13-15_17183; Ex. C5, IEPA, *Violation Notice: Midwest Generation, LLC, Joliet #29 Generating Station* Bates MWG13-15_342-347 (June 11, 2012).

MWG RESPONSE: Undisputed. MWG further states that upon establishment of GMZ as a corrective action, pursuant to 35 Ill. Adm. Code 250(e), the otherwise applicable standards specified in Subpart D of Part 620 are not applicable.

48. Class I standards were in effect at Powerton until Illinois EPA's approval of a GMZ for that site on October 3, 2013. Ex. D14, *Powerton GMZ Approval Letter* at Bates MWG13-15_23977; Ex. D11, IEPA, *Violation Notice: Midwest Generation, LLC, Powerton Generating Station* Bates MWG13-15_348-358 (June 11, 2012).

MWG RESPONSE: Undisputed. MWG further states that upon establishment of GMZ as a corrective action, pursuant to 35 Ill. Adm. Code 250(e), the otherwise applicable standards specified in Subpart D of Part 620 are not applicable.

49. Pursuant to the CCAs, Environmental Land Use Controls ("ELUC") were established at Waukegan, Will County, and Powerton. MWG applied for GMZs for each of these sites on January 18, 2013. MWG, *Compliance Commitment Agreement—ELUC, Midwest Generation, LLC, Waukegan Station; ID No. 6281* Bates MWG13-15_599-610 (Jan. 18, 2013) [hereinafter *Waukegan ELUC Application*], attached hereto as Ex. A7; MWG, *Compliance Commitment Agreement—ELUC, Midwest Generation, LLC, Will County Station; ID No. 6283* Bates MWG13-15_611-621 (Jan. 18, 2013) [hereinafter *Will County ELUC Application*], attached hereto as Ex. B9; MWG, *Compliance Commitment Agreement—ELUC, Midwest Generation, LLC, Powerton Station; ID No. 6282* Bates MWG13-15_712-723 (Jan. 18, 2013) [hereinafter *Powerton ELUC Application*], attached hereto as Ex. D15.

MWG RESPONSE: MWG does not dispute that that it established ELUCs as a corrective action under the CCAs at the Will County, Waukegan and Powerton Stations, Maps of the areas of corrective action are attached as Exs. 1, 3, 7. MWG does not dispute that it applied for the GMZs on January 18, 2013. MWG also applied for the ELUCs on January 18, 2013.

50. The ELUC at Waukegan was approved on August 26, 2013; the ELUC at Will County was approved on September 26, 2013; and the ELUC at Powerton was approved on August 26, 2013. Exhibits I, K, and H, respectively, of Resp't Mem. in Supp. of Mot. to Stay, attached hereto as Ex. A8, Ex. B10 Ex. D23.

MWG RESPONSE: Undisputed.

51. These ELUCs all state that “[t]he reason for an ELUC is to ensure protection of human health and the environment. The limitations and requirements contained herein are necessary in order to protect against exposure to contaminated groundwater that may be present on the property....” Ex. A7, *Waukegan ELUC Application* at Bates MWG13-15_601, Ex. B9, *Will County ELUC Application* at Bates MWG13-15_613; Ex. D15, *Powerton ELUC Application* at Bates MWG13-15_714;

MWG RESPONSE: MWG does not dispute that the ELUCs contain the quoted language written and established by Illinois EPA.

52. These three ELUCs also state that an ELUC “shall not be released until the IEPA, upon written request, issues a no further remediation determination approving modification or removal of the limitation(s) or requirement(s); and until a release or modification of the land use limitation or requirement is filed on the chain of title for the Property.” Ex. A7, *Waukegan ELUC Application* at Bates MWG13-15_602, Section Four; Ex. B9, *Will County ELUC Application* at Bates MWG13-15_614, Section Four. Ex. D15, *Powerton ELUC Application* at Bates MWG13-15_715, Section Four.

MWG RESPONSE: MWG does not dispute that the ELUCs contain the quoted language written and established by Illinois EPA.

53. Concentrations of coal ash constituents in the groundwater at Waukegan have been detected at levels exceeding Class I groundwater quality standards on hundreds of occasions and exceeding the Appendix I Maximum Contaminant Levels (“MCLs”) indicating open dumping. Ex. G, Seymour Report at 21 and Tbls.B-4-1; Patrick Engineering, Quarterly Groundwater Monitoring Results—Annual Report 2011—Waukegan Generating Station- Ash Impoundment Bates MWG13-15_41687-41690 (Mar. 5, 2012) [hereinafter 2011 Waukegan Annual Report], attached hereto as Ex. A9; KPRG and Associates, Inc., Fourth Quarter and Annual Groundwater Monitoring Report—Waukegan Generating Station Bates MWG13-15_20468-20473 (Jan. 21, 2014) [hereinafter 2013 Waukegan Annual Report], attached hereto as Ex. A10; NRG Energy, Annual and Quarterly Groundwater Monitoring Report—Waukegan Generating Station Bates

MWG13-15_45344 (Jan. 22, 2015) [hereinafter 2014 Waukegan Annual Report], attached hereto as Ex. A11 at; NRG Energy, Annual and Quarterly Groundwater Monitoring Report—Waukegan Generating Station Bates MWG13-15_56444-46450 (Jan. 22, 2016) [hereinafter 2015 Waukegan Annual Report], attached hereto as Ex. A12; DRAFT—Groundwater Analytical Results, Midwest Generation, LLC, Waukegan Station, Waukegan, IL at Bates MWG13-15_56632-56638, attached hereto as Ex. A13. Boron has exceeded Class I standards dozens of times at Waukegan since 2010. *Id.*

MWG RESPONSE:

MWG objects to SOF No. 53 as calling for a legal conclusion as it relates to “indicating open dumping.”

Without waiving its objection, MWG disputes that there are concentrations of “coal ash constituents” in the groundwater at Waukegan because Complainants have not defined “coal ash constituents” in their motion and MWG cannot identify the constituents Complainants are identifying for this SOF No. 53. *See* MWG Response Sec. IV.c. MWG disputes that there are concentrations of “coal ash constituents” in the groundwater at Waukegan “indicate open dumping” *See* MWG’s Response, Secs. VI, and VII. MWG also disputes that it is subject to the Federal MCLs in this matter. *See* Oct. 13, 2013 Board Order at p. 25, stating that the Board “lacks authority to hear claims for violation of 40 CFR Part 257.” MWG does not dispute that the reports Complainants reference exist and reflect results of the groundwater analysis at the Waukegan Station.

54. Concentrations of coal ash constituents in the groundwater at Will County have been detected at levels exceeding Class I standards on hundreds of occasions and exceeding the Appendix I MCLs indicating open dumping. Ex. G, Seymour Report at 23 and Tbls.B-5-1; Patrick Engineering, Quarterly Groundwater Monitoring Results—Annual Report 2011—Will County Generating Station- Ash Impoundment Bates MWG13-15_42724-42729 (Mar. 5, 2012) [hereinafter 2011 Will County Annual Report], attached hereto as Ex. B10; KPRG and Associates, Inc., Fourth Quarter and Annual Groundwater Monitoring Report—Will County Generating Station Bates MWG13-15_26415-26424 (Jan. 21, 2014) [hereinafter 2013 Will County Annual Report], attached hereto as Ex. B11; NRG Energy, Annual and Quarterly Groundwater Monitoring Report—Will County Generating Station Bates MWG13-15_56525, 56536-56545 (Jan. 22, 2016) [hereinafter 2015 Will County Annual Report], attached hereto as Ex. B12. Boron has exceeded Class I standards more than 100 times at Will County since 2010. *Id.*

MWG RESPONSE:

MWG objects to SOF No. 54 as calling for a legal conclusion as it relates to “indicating open dumping.”

Without waiving its objection, MWG disputes that there are concentrations of “coal ash constituents” in the groundwater at Will County because Complainants have not defined “coal ash constituents” in their motion and MWG cannot identify the constituents Complainants are identifying for this SOF No. 54. *See* MWG Response Sec. IV.c. MWG disputes that there are concentrations of “coal ash constituents” in the groundwater at Will County that indicate open

dumping *See* MWG's Response, Secs. VI, and VII. MWG also disputes that it is subject to the Federal MCLs in this matter. *See* Oct. 13, 2013 Board Order at p. 25, stating that the Board "lacks authority to hear claims for violation of 40 CFR Part 257." MWG does not dispute that the reports Complainants reference exist and reflect results of the groundwater analysis at the Will County Station.

55. Concentrations of coal ash constituents in the groundwater at Joliet 29 have been detected at levels exceeding Class I standards on more than one hundred occasions. Ex. G, Seymour Report at 15 and Tbls.B-2-1; Patrick Engineering Inc., Quarterly Groundwater Monitoring Results—Annual Report 2011—Joliet #29 Generating Station- Ash Impoundment Bates MWG13-15_38538-38544 (Mar. 5, 2012) [hereinafter 2011 Joliet 29 Annual Report], attached hereto as Ex. C9; KPRG and Associates, Inc., Fourth Quarter and Annual Groundwater Monitoring Report—Joliet #29 Generating Station Bates MWG13-15_17358-17368 (Jan. 21, 2014) [hereinafter 2013 Joliet 29 Annual Report], attached hereto as Ex. C10; NRG Energy, Annual and Quarterly Groundwater Monitoring Report—Joliet #29 Generating Station Bates MWG13-15_56349-56359 (Jan. 22, 2016) [hereinafter 2015 Joliet 29 Annual Report], attached hereto as Ex. C11. Boron has exceeded Class I standards at Joliet #29 since 2010. *Id.*

MWG RESPONSE:

MWG disputes that there are concentrations of "coal ash constituents" in the groundwater at Joliet 29 because Complainants have not defined "coal ash constituents" in their motion and MWG cannot identify the constituents Complainants are identifying for this SOF No. 55. *See* MWG Response Sec. IV.c. To the extent Complainants refer to boron as a coal ash constituent, boron has not been above the Class I standard at Joliet 29 since June 2011. *See* Complainants' Ex. C11, at MWG13-15_56411. MWG does not dispute that the reports Complainants reference exist and reflect results of the groundwater analysis at the Joliet 29 Station.

56. Concentrations of coal ash constituents in the groundwater at Powerton have been detected at levels exceeding Class I standards on hundreds of occasions and exceeding the Appendix I MCLs indicating open dumping. Ex. G, Seymour Report at 18 and Tbls.B-3-1; Patrick Engineering, Quarterly Groundwater Monitoring Results—Annual Report 2011—Powerton Generating Station- Ash Impoundment Bates MWG13-15_39724-39729 (Mar. 5, 2012) [hereinafter 2011 Powerton Annual Report], attached hereto as Ex. D16; KPRG and Associates, Inc., Fourth Quarter and Annual Groundwater Monitoring Report—Powerton Generating Station Bates MWG13-15_19821-19836 (Jan. 21, 2014) [hereinafter 2013 Powerton Annual Report], attached hereto as Ex. D17; NRG Energy, Annual and Quarterly Groundwater Monitoring Report—Powerton Generating Station Bates MWG13-15_56210-56225 (Jan. 22, 2016) [attached hereto 2015 Powerton Annual Report], attached hereto as Ex. D18. Boron has exceeded Class I standards dozens of times at Powerton since 2010. *Id.*

MWG RESPONSE:

MWG objects to SOF No. 56 as calling for a legal conclusion as it relates to "indicating open dumping."

Without waiving its objection, MWG disputes that there are concentrations of “coal ash constituents” in the groundwater at Powerton because Complainants have not defined “coal ash constituents” in their motion and MWG cannot identify the constituents Complainants are identifying for this SOF No. 56. *See* MWG Response Sec. IV.c. MWG disputes that there are concentrations of “coal ash constituents” in the groundwater at Powerton that indicate open dumping. *See* MWG’s Response, Secs. VI, and VII. MWG also disputes that it is subject to the Federal MCLs in this matter. *See* Oct. 13, 2013 Board Order at p. 25, stating that the Board “lacks authority to hear claims for violation of 40 CFR Part 257.” MWG does not dispute that the reports Complainants reference exist and reflect results of the groundwater analysis at the Powerton Station.

57. Historic Ash Areas at Waukegan have contributed to groundwater contamination at that plant. Seymour testified, “I believe there are some historical uses at these properties that have caused some old releases.” Ex. E5, Seymour Dep. 59:11-13; *see also id.* at 58:13-59:3; *id.* at 59:11-13 (“[T]here are other characteristics of coal ash that aren’t characteristic of a tannery.”). Senior Environmental Program Manager from MWG consultant Patrick Engineering states that “The elevated concentrations of compounds of interest in MW-5 appear to be the result of the well being installed in a former ash disposal area.” Email from Richard Frendt, P.E., Patrick Engineering, Inc. to Maria Race, MWG at Bates MWG13-15_14167 (Feb. 10, 2012 11:21am) [hereinafter Patrick, Ash Pond Data Evaluation & Summary], attached hereto as Exhibit M. (attaching January 2012 Ash Pond Data Evaluation & Summary reports for each plant).

MWG RESPONSE:

MWG disputes that the “Historic Ash Areas,” as defined by Complainants in FN3 of their Memorandum, have contributed to groundwater contamination at the Waukegan Station during MWG operation of the Stations. *See* Complainants’ Ex. G, pp. 45-46, 52 and MWG Response Brief, Sec. VI. Complainants do not specify a time period and MWG only operated the site after 1999. *See* Ex. 9, p. 6:22-24. Mr. Seymour states that former ash areas are not a source and he stated that “if ash is really old, and it had been there a long time, it would have less and less impact with time.” *See* Complainants’ Ex. G, at 52 and Complainants’ Ex. E5, Tr. 63:9-11.

Further, as Complainants have defined “Historic Ash Areas” to exclude areas addressed by the CCAs there are no “Historic Ash Areas” at Waukegan except for the boring in B-11, which MWG disputes is owned by MWG. *See* MWG Response to SOF No. 4 and MWG Response at Sec. IV.a.i. As there are no “Historic Ash Areas”, there cannot be any contribution to groundwater contamination.” *See also* MWG Response at Sec. IV.a.i., IV.b. and VI.

58. Historic Ash Areas at Will County have contributed to groundwater contamination at that plant. Seymour indicated that the contamination at Will County was from “historical sources,” specifically from an “old power plant.” Ex. E5, Seymour Dep. 53:13-14. Seymour further testified that the sources contributing to the groundwater constituents at Will County were “the same as Powerton” about which he stated “there’s uncontained waste that historically caused some impacts.” *Id.* at 54:24-55:3; *infra* SOF ¶ 60.

MWG RESPONSE:

MWG disputes that the “Historic Ash Areas,” as defined by Complainants in FN3 of their Memorandum, have contributed to groundwater contamination at the Will County Station during MWG operation of the Stations. *See* Complainants’ Ex. G, pp. 48, 52 and MWG Response Brief, p. VI. Complainants do not specify a time period and MWG only operated the Station after 1999. *See* Ex. 9, p. 6:22-24. Mr. Seymour states that former ash areas are not a source and he stated that “if ash is really old, and it had been there a long time, it would have less and less impact with time.” *See* Complainants’ Ex. G, at 52 and Complainants’ Ex. E5, Tr. 63:9-11.

Further, as Complainants have defined “Historic Ash Areas” to exclude areas addressed by the CCAs, there are no “Historic Ash Areas” at Will County, which show any contribution to groundwater contamination. *See* also MWG Response at Sec. IV.a.ii., IV.b., and VI.

59. Historic Ash Areas at Joliet 29 have contributed to groundwater contamination at that plant. Ex. E5, Seymour Dep. 38:2-4 (“there are many historic uses at the site that may have caused the impacts that we’re seeing, and they may be related to coal ash from historic uses.”); *Id.* at 38:13 (“I know there are historic uses of ash that they’ve used that may be causing these – contamination to exist.”).

MWG RESPONSE:

MWG disputes that the “Historic Ash Areas,” as defined by Complainants in FN3 of their Memorandum, have contributed to groundwater contamination at the Joliet 29 Station during MWG operation of the Stations. *See* Complainants’ Ex. G, pp. 46-47, 52 and MWG Response Brief, p. VI. Complainants do not specify a time period and MWG only operated the Station after 1999. *See* Ex. 9, p. 6:22-24. Mr. Seymour states that former ash areas are not a source and he stated that “if ash is really old, and it had been there a long time, it would have less and less impact with time.” *See* Complainants’ Ex. G, at 52 and Complainants’ Ex. E5, Tr. 63:9-11.

Further, as Complainants have defined “Historic Ash Areas” to exclude areas addressed by the CCAs, there are no “Historic Ash Areas” at Joliet 29, which show any contribution to groundwater contamination. *See* also MWG Response at Sec. IV.a.iii., IV.b. and VI.

60. Historic Ash Areas at Powerton have contributed to groundwater contamination at that plant. “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.” Ex. E5, Seymour Dep. 48:3-20; *see* also Letter from Richard R. Gnat, P.G., Principal, KPRG and Associates, Inc. to Lynn Dunaway, Illinois Environmental Protection Agency at Bates MWG13-15_9644-9645 (Sept. 11, 2013), attached hereto as Ex. D19 (noting that monitoring wells installed in 2010, specifically MW-1, MW-9, and MW-10, are potentially affected by past ash management practices and fall “within an area of impacted groundwater from historical ash-related handling activities.”); Ex. D4, Patrick, Powerton Hydrogeological Assessment Report at Bates MWG13-15_7081; Ex. E5, Seymour Dep. 46:11 (“The inorganics that are in the groundwater are characteristic of coal ash materials.”).

MWG RESPONSE:

MWG disputes that the “Historic Ash Areas,” as defined by Complainants in FN3 of their Memorandum, have contributed to groundwater contamination at the Powerton Station during MWG operation of the Stations. *See* Complainants’ Ex. G, pp. 47-48, 52 and MWG Response Brief, p. VI. Complainants do not specify a time period and MWG only operated the Station after 1999. *See* Ex. 9, p. 6:22-24. Mr. Seymour states that former ash areas are not a source and he stated that “if ash is really old, and it had been there a long time, it would have less and less impact with time. *See* Complainants’ Ex. G, at 52 and Complainants’ Ex. E5, Tr. 63:9-11.

Further, as Complainants have defined “Historic Ash Areas” to exclude areas addressed by the CCAs, there are no “Historic Ash Areas” at Powerton, which show any contribution to groundwater contamination. *See* also MWG Response at Sec. IV.a.iv., IV.b. and VI.

61. The 1998 Phase II Environmental Site Assessment for Waukegan identifies the Former Slag/Fly Ash Storage Area and the Former Slag Field, and contains multiple boring logs showing slag and ash at the site. Ex. A2 ENSR, Waukegan Phase II ESA at Bates MWG13-15_45814, 817, 821-842;

MWG RESPONSE:

MWG does not dispute that Complainants’ Ex. A2 identifies on a map a Former/Fly Slag/Fly Ash Storage Area and a Former Slag Field. MWG objects to the reference to Bates MWG13-15_817, 821-842 as they are not attached to Complainants’ Motion. MWG located the referenced bates documents and they do not relate to the Waukegan property but instead MWG13-15_817 is a Powerton monitoring well map, and MWG13-15_821-848 are the introductory and instruction pages of the U.S.EPA Questionnaire.

62. Additional soil borings reveal coal ash beneath the surface at various places around the Waukegan site. Ex. I, KPRG, Geotechnical Analysis at Bates MWG13-15_24264-24392 (providing a geotechnical analysis of soil surrounding the ponds at Joliet, Powerton, Waukegan, and Will County); Ex. A4, KPRG, Geologic Logs for MW-8 and MW-9 at Bates MWG13-15_45648-45649.

MWG RESPONSE:

MWG does not dispute that certain soil borings in Complainants’ Ex. I and Ex. A4 show historic coal ash mixed with sand and gravel. The KPRG Geotechnical Analysis, Complainants’ Ex. I, does not include any groundwater sample analysis.

63. MWG’s current Director of Asset Management and former Director of Environmental Services, Maria Race, testified that she had seen ash borings from Former Slag/Fly Ash Storage Area near where MW-5 is located. Ex. E4 Race Dep. at 89:12-13.

MWG RESPONSE:

MWG disputes Complainants' SOF No. 63. Maria Race testified that she saw ash borings logs in the area of MW-5. Complainants' Ex. E4 Race Dep. at 89:12-13. Maria Race stated that she did not know if that area was a former disposal area. Complainants' Ex. E4, at 89:6-19.

64. In addition, ash boring logs for MW-5 that were done as part of the Waukegan Hydrogeological Assessment Report reveal black coal cinders (intermixed with other materials such as sand and silt) from 0.5 feet depth to 17 feet. Ex. A3, Patrick, Waukegan Hydrogeological Assessment Report at Bates MWG13-15_7175.

MWG RESPONSE: MWG does not dispute that the MW-5 boring log shows black coal cinders mixed with medium sand, brick, and silt.

65. Richard Frenzt of Patrick Engineering—the consultants responsible for the initial hydrogeological assessment, Id. at 7148-7229—advised Midwest Generation that the monitoring well located in the Former Fly Ash /Slag Storage Area appeared to be showing contamination caused by the ash in that area. Ex. M, Patrick, Ash Pond Data Evaluation & Summary at Bates MWG13-15_14167.

MWG RESPONSE:

MWG disputes that Ex. M states that MW-5 was located in the in the area defined by Complainants here as the “Former Slag/Fly Ash Storage Area.” The Draft Patrick Summaries state that MW-5 appears to have been installed in a former ash disposal area. MWG further disputes that Mr. Frenzt has any knowledge that the area west of the Waukegan ash ponds is a former ash disposal area. Mr. Frenzt testified in his deposition that he did not know if the area west of the ash ponds was actually a former ash disposal area. Complainants' Ex. E7, Tr. 97:5-6.

66. Groundwater monitoring wells MW-5, MW-6, MW-7, MW-8 and MW-9 are located near the Former Slag/Fly Ash Area. See Ex. A1, Waukegan Site Maps.

MWG RESPONSE:

MWG does not dispute the locations of MW-5, MW-6, and MW-7 depicted in Complainants' Ex. A1. Complainants fail to identify the location of MW-8 and MW-9 on the Ex. A1.

67. Groundwater monitoring reports at Waukegan revealed that coal ash constituents including boron, manganese, and sulfate continued to exceed Class I standards at MW-5 every quarter from 2012-2015. 2013 Waukegan Annual Report at Bates MWG13-15_20472; 2015 Waukegan Annual Report at Bates MWG13-15_56448.

MWG RESPONSE:

Complainants have not identified the exhibit number for their citations. MWG disputes that the groundwater monitoring reports show that “coal ash constituents” continue to exceed Class I

Standards because Complainants have not defined that term and thus MWG cannot properly respond to Complainants' allegation. *See* MWG Response, Sec. IV.c. MWG also disputes that the groundwater monitoring reports show that "coal ash constituents" continue to exceed Class I Standards. *See* Ex. G, pp. 45-46, 52. As to boron, manganese and sulfate, MWG does not dispute sample results as shown in the groundwater monitoring reports.

68. MWG never installed a liner at the Former Slag/Fly Ash Storage Area. Ex. K, Resp't Resp. to Compl.'s Fourth and Fifth Set of Interrogatories and Document Requests, Answer to RFA 17, at 13 (March 31, 2015).

MWG RESPONSE:

MWG objects to Complainants' mischaracterization of its Response to RFA 17. MWG's Response to No. 17 of Complainants' Request to Admit states that MWG did not have sufficient information to admit or deny the request.

Without waiving its objection, MWG disputes that a liner is required beneath the area defined by Complainants as the "Former Slag/Fly Ash Storage Area" because MWG disputes that this area is a former disposal area or contains coal ash. *See supra* MWG Response to Complainants' SOF Nos. 4 ¶1, and 63-65. To the extent a response is required subject to its objections, MWG does not dispute that MWG did not install a liner in the area.

69. There is no evidence in the record that the Fly Ash/Slag Storage Area has a liner. The boring log for MW-5 contains no record of encountering a liner. Ex. A3, Waukegan Hydrogeological Assessment Report at Bates MWG 13-15_7175-7176.

MWG RESPONSE:

MWG objects to SOF No. 69 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.")

Without waiving its objection, MWG does not dispute that MW-5 has no record of encountering a liner. MWG disputes that MW-5 is located in the area defined by Complainants as the "Former Slag/Fly Ash Storage Area." *See supra*, MWG Response to Complainants' SOF No. 65.

MWG disputes that a liner is required beneath the area defined by Complainants as the "Former Slag/Fly Ash Storage Area" because MWG disputes that this area is a former disposal area or contains coal ash. *See supra* MWG Response to Complainants' SOF Nos. 4 ¶1, and 63-65, *see* also Ex. G, pp. 49-62. To the extent a response is required subject to its objections, MWG does not dispute that MWG did not install a liner in the area.

70. MWG never installed an impermeable cap over the Former Slag/Fly Ash Storage Area. Ex. K, MWGen Resp. to Compl.'s Fourth and Fifth Set of Interrogatories and Document Requests, Answer to RFA #21, at 14 (March 31, 2015).

MWG RESPONSE:

MWG objects to No. 70 on the grounds that the term “impermeable cap” is vague, ambiguous, and capable of varying interpretations. MWG does not dispute its response to Request to Admit No. 21, that MWG has not installed an impermeable cap in the area.

Without waiving its objection, MWG disputes that an impermeable cap is required on the area defined by Complainants as the “Former Slag/Fly Ash Storage Area” because MWG disputes that this area is a former disposal area or contains coal ash. *See supra* MWG Response to Complainants’ SOF Nos. 4 ¶1, and 63-65. To the extent a response is required subject to its objections, MWG does not dispute that MWG did not install an “impermeable cap” in the area.

71. There is no evidence on the record that the ash has been removed from the Former Slag/Fly Ash Storage Area at Waukegan.

MWG RESPONSE:

MWG objects to SOF No. 71 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objection, MWG disputes that any ash must be removed from the area defined by Complainants as the “Former Slag/Fly Ash Storage Area” because MWG disputes that this area contains coal ash. *See supra* MWG Response to Complainants’ SOF No. 4 ¶1, and Nos. 63-65. MWG also disputes that any ash must be removed. *See Ex. G*, pp. 49-62.

72. There is no evidence in the record that MWG has capped, lined, or removed the ash contained in the fill immediately to the east of the east ash pond at Waukegan, shown by boring logs for MW-1 through MW-4. Ex. A3, Patrick, Waukegan Hydrogeological Assessment Report, at Bates MWG13-15_7166-7176.

MWG RESPONSE:

MWG objects to SOF No. 72 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objection, MWG disputes that the areas of MW-1 through MW-4 require a cap, liner or removal of ash. MW-1 through MW-4 are on berms that contains the Waukegan ash basins and are used as structural fill. *See MWG Response Brief*, Sec. V.a.i. MWG also disputes the areas require a cap, liner or removal. *See Complainants’ Ex. G*, pp. 49-62.

73. The CCA for Waukegan did not address inspecting, lining, capping or removing ash from the historic ash areas at the site. Ex. A6, Waukegan CCA at Bates MWG13-15_552-558.

MWG RESPONSE:

MWG does not dispute the contents of the CCA for Waukegan attached here as Ex. 2. MWG disputes that the “Historic Ash Areas” require inspection, lining, capping or removal. *See* MWG Response, Sec. IV.a.i., IV.b., IV.d, and Complainants’ Ex. G, pp. 49-62. MWG notes that Complainants’ Ex. A6 is not the Waukegan CCA, it is the Powerton CCA.

74. The 1998 Phase II Environmental Site Assessment for Will County labels the slag dumping area and the slag and bottom ash dumping area on the site plan, and contains a boring log for boring B1 that shows 3 feet of coal ash in the slag and bottom ash dumping area at the site. Ex. B4, ENSR, Will County Phase II ESA at Bates MWG13-15_5699, 5739.

MWG RESPONSE:

MWG disputes that the areas defined here as the slag dumping area and the slag and bottom ash dumping area contain ash. *See supra* MWG Response to Complainants’ SOF No. 5, ¶2. MWG does not dispute that the boring log for B-1 shows ash mixed with gravel, brick and clay.

75. The U.S. EPA Questionnaire response for Will County shows the South Area Runoff Basin and the Spent Slurry Pond at Will County, and MWG employees are familiar with those areas. MWG, U.S. EPA Questionnaire at Bates MWG13-15_2014, 2458; Ex. E2, Maddox Dep. at 27:21-28:4 and 34:20-24.

MWG RESPONSE:

MWG disputes that either of these areas contain ash. *See supra* MWG Response to Complainants’ SOF No. 5, ¶4.

MWG disputes the mischaracterization of Rebecca Maddox’s testimony. When discussing the Spent Slurry Pond in her deposition, Ms. Maddox testified that she was familiar with the area defined in the USEPA Questionnaire as SF05, that she calls it the “old SO2 ponds”, and that she was not familiar with the term “slurry.” Complainants’ Ex. E2, Maddox Dep. at 27:21-28:6. Additionally, Ms. Maddox testified that the “old SO2 ponds” were not used for anything. Complainants’ Ex. E2, Maddox Dep. at 28:12-15.

When discussing the south area runoff basin, Ms. Maddox testified that she was not aware of fly ash in the south area runoff, and that it has always been used for stormwater runoff. Complainants’ Ex. E2, Maddox Dep. Tr. at 35:1-18.

Additionally, MWG disputes that the U.S.EPA Questionnaire is a reliable source of information as multiple witnesses have testified that the responses to the U.S. EPA Questionnaire contains mistakes. *See* M.Race Dep. Tr. 67:10-11 and 67:21-68:3, and M.Kelly Dep. Tr. 69:24-70:3, and thus cannot be used as a basis for an undisputed fact.

76. Additional soil borings reveal coal ash beneath the surface at various places around the Will County site. Ex. I, KPRG, Geotechnical Analysis at Bates MWG13-15_24264-24392 (providing a geotechnical analysis of soil surrounding the ponds at Joliet, Powerton, Waukegan,

and Will County); Ex. B3, Will County Hydrogeological Assessment Report at Bates MWG13-15_7252-7260.

MWG RESPONSE:

MWG does not dispute the boring logs from Ex. I nor from when MWG first installed the groundwater monitoring wells at the Will County Station, Ex. B3. MWG further states that the KPRG Geotechnical Analysis, Complainants' Ex. I, does not include any groundwater sample analysis.

77. MWG has suspected a possible underground leak between the Spent Slurry Pond and the river, but MWG did not do anything to investigate that possible leak. Ex. E6, Veenbaas Dep. at 20:18-22:2 and 26:7 – 27:22.

MWG RESPONSE:

MWG does not dispute that the Spent Slurry pond exists or that Mr. Veenbaas testified that there was a suspicion of a possible water link between the pond and the river. Mr. Veenbaas stated further that he did not know if there was any leak from the Spent Slurry Pond. Complainants' Ex. E6, Veenbaas Dep. Tr. at 28:14-16.

78. MWG did not install a liner beneath the Spent Slurry Pond or South Area Runoff Basin. Ex. H, MWG, U.S. EPA Questionnaire at Bates MWG13-15_2014.

MWG RESPONSE:

MWG disputes that a liner is required beneath either the Spent Slurry Pond or the South Area Runoff Basin because MWG disputes that either contained ash. *See supra* MWG Response to Complainants' SOF Nos. 5, ¶4, 75, 77. To the extent a response is required, MWG does not dispute that MWG did not install a liner in the area.

MWG has not installed any monitoring wells around the Spent Slurry Pond, the South Area Runoff Basin, or the Slag and Bottom Ash Dumping Area. *See* Ex. B3, Patrick, *Will County Hydrogeological Assessment Report* at Bates MWG13-15_7250.

MWG RESPONSE:

MWG notes that this Statement is not numbered in Complainants' Memorandum.

MWG does not dispute the locations of the monitoring wells located at the Will County Stations. MWG disputes that monitoring wells are required around the Spent Slurry Pond or the South Area Runoff Basin because MWG disputes that either area contained ash. *See supra* MWG Response to Complainants' SOF Nos. 5, ¶4, 75, 77.

79. The only monitoring wells to monitor groundwater for coal ash constituents at Will County were monitoring wells located around ash ponds 1N, 1S, 2S, and 3S. *See Id.*; Ex. E2,

Maddox Dep. 102-103 (testifying that there were only two monitoring wells installed before 2010 at Will County which were north of the main parking lot and unrelated to the ponds.).

MWG RESPONSE:

MWG objects to SOF No. 79 on the grounds that the term “coal ash constituents” is not defined. *See* MWG Response, Sec. IV.c.

Without waiving its objection, MWG does not dispute the locations of the monitoring wells located at the Will County Stations as identified in Complainants’ Ex. B3 and the constituents identified in sampling of such wells. *See* Complainants’ Ex. B3.

80. MWG failed to inspect the Spent Slurry Pond and the South Area Runoff Basin at Will County between 1999 and 2012. Ex. E6, Veenbaas Dep. Tr. at 28:2-6 and 32:23-33:8 (testifying that the Spent Slurry Pond and South Area Runoff Basin were never inspected while he was at Will County); *id.* at 7:18-9:18 (stating that Veenbaas worked at Will County from 1999 to 2012).

MWG RESPONSE:

MWG disputes any inspection of either Spent Slurry Pond or the South Area Runoff Basin was required because MWG disputes that either ever actually contained ash. *See supra* MWG Response to Complainants’ SOF Nos. 5, ¶4, 75, 77.

81. MWG never installed an impermeable cap over the Spent Slurry Pond or South Area Runoff Basin. Ex. H, MWG, *U.S. EPA Questionnaire* at Bates MWG13-15_2014; Ex. E6, Veenbaas Dep. 28:21-29:2.

MWG RESPONSE:

MWG objects to No. 81 on the grounds that the term “impermeable cap” is vague, ambiguous, and capable of varying interpretations. Without waiving its objection, MWG further disputes that the U.S.EPA Questionnaire supports the notion that there is no cap on either the Spent Slurry Pond or South Area Runoff Basin because the page Complainants cite to, MWG13-15_2014 does not discuss a cap, impermeable or otherwise. Additionally, MWG disputes that the U.S.EPA Questionnaire is a reliable source of information as multiple witnesses have testified that the responses to the U.S. EPA Questionnaire contains mistakes. *See* M.Race Dep. Tr. 67:10-11 and 67:21-68:3, and M.Kelly Dep. Tr. 69:24-70:3, and thus cannot be used as a basis for an undisputed fact.

MWG disputes that an “impermeable cap” is required on the Spent Slurry Pond or the South Area Runoff Basin because MWG disputes that either ever actually contained ash. *See supra* MWG Response to Complainants’ SOF No. 5, ¶4, 75, 77. To the extent a response is required, subject to its objections, MWG does not dispute that MWG has not installed an “impermeable cap” in the areas identified in SOF No. 81.

82. There is no evidence in the record of either the Spent Slurry Pond or the South Area Runoff Basin being closed and capped.

MWG RESPONSE:

MWG objects to No. 82 on the grounds that the term “closed and capped” is vague, ambiguous, and capable of varying interpretations. Further, MWG objects to SOF No. 82 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objections, MWG disputes that either the Spent Slurry Pond or the South Area Runoff Basin must be “closed and capped” because MWG disputes that either ever actually contained ash. *See supra* MWG Response to Complainants’ SOF No. 5, ¶4, 75, 77.

83. The ash from the Spent Slurry Pond has not been removed. Ex. B14, Email from Rebecca Maddox, Environmental Specialist, MWG to Yvonne Dedrickson, Bates MWG 13-15_48566 (Sept. 1 2010, 4:52pm) (noting that the Spent Slurry pond has never been dredged and, as of 2010, the wastewater it contained was “not getting pumped anywhere. It just sits in the pond.” There is no evidence in the record of ash being removed subsequent to 2010.

MWG RESPONSE:

MWG disputes the quoted statement that wastewater in the Spent Slurry Pond was “not getting pumped anywhere. It just sits in the pond.” Exhibit B14 cited by Complainants does not contain that language. MWG further disputes that Ex. B14 supports the claim that there is any ash in the Spent Slurry Pond that would need to be removed because Ex. B14 does not contain any such reference. MWG objects to SOF No. 83 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

MWG disputes that ash must be removed from the Spent Slurry Pond because MWG disputes that it contained ash. *See supra* MWG Response to Complainants’ SOF Nos. 5, ¶4, 75, 77. MWG also disputes that any ash must be removed. *See* Ex. G, pp. 49-62.

84. There is no evidence in the record of ash ever being removed from the South Area Runoff Basin. Ex. H, MWG, *U.S. EPA Questionnaire* at Bates MWG13-15_2014, 2017.

MWG RESPONSE:

MWG objects to SOF No. 84 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objection, MWG disputes that ash must be removed from the South Area Runoff Basin because MWG disputes that it ever actually contained ash. *See supra* MWG Response to Complainants’ SOF Nos. 5, ¶4. 75. Additionally, MWG disputes that the U.S.EPA

Questionnaire is a reliable source of information as multiple witnesses have testified that the responses to the U.S. EPA Questionnaire contains mistakes. *See* M.Race Dep. Tr. 67:10-11 and 67:21-68:3, and M.Kelly Dep. Tr. 69:24-70:3, and thus cannot be used as a basis for an undisputed fact. MWG also disputes that any ash must be removed. *See* Ex. G, pp. 49-62.

85. There is no evidence in the record showing the capping, lining or complete removal of ash in fill at Will County, specifically the slag and bottom ash shown in boring logs from 2005 (Ex. I, KPRG, *Geotechnical Analysis* at Bates MWG13-15_24282 – 24287) and the black coal cinders shown in boring logs in Ex. B3, Patrick, *Will County Hydrological Assessment Report* at Bates MWG13-15_7250-7252, 7256.

MWG RESPONSE:

MWG objects to SOF No. 85 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objection, MWG disputes that the slag and bottom ash identified in the KPRG Report, Ex. I is an area defined by Complainants as a “Historic Ash Area.” *See* MWG Response to Complainants’ SOF No. 76. Thus, MWG disputes that any of these areas must be capped, lined or have the ash removed. *See* Ex. G, pp. 49-62

86. The CCA for Will County did not address inspecting, lining, capping or removing ash from the Historic Ash Areas at the site. Ex. B6, *Will County CCA* at Bates MWG13-15_559-564.

MWG RESPONSE:

MWG does not dispute the contents of the CCA for Will County. MWG disputes that there are any “Historic Ash Areas” as they are defined by Complainants. *See supra* MWG’s Response, Sec. IV.a.ii and MWG’s Response Complainants’ SOF Nos. 5, 6, 75, 76, 77. Thus, MWG disputes that the “Historic Ash Areas” require inspection, lining, capping or removal. *See* Ex. G, pp. 49-62.

87. The 1998 Phase II Environmental Site Assessment for Joliet 29 labels the Northeast and Southwest Ash Landfills each as an “ash landfill” and contains one boring log, out of a total of five boring logs, that shows slag at the site. Ex. C3, ENSR, *Joliet Phase II ESA* at Bates MWG13-15_23342, 23345-23349.

MWG RESPONSE:

MWG does not dispute that Complainants’ Ex. C3 labels the Northeast and Southwest landfills. However, MWG dispute that there is actually ash in either of those locations. *See supra* MWG Response to Complainants No. 7, ¶1.

MWG disputes that the ash identified in the boring log in Ex. C3 is an area defined by Complainants as a “Historic Ash Area” because Complainants have not identified it as such.

Complainants' Memo, p. 4 and SOF No. 7. In fact, this paragraph, No. 87, is the first instance Complainants' reference the boring log in Ex. C3 as it relates to Joliet 29. MWG objects to the confusion, intentional or otherwise, created by Complainants' failure to accurately identify the area it is discussing in its Motion for Partial Summary Judgment, because it adversely affects MWG's ability to respond.

Without waiving its objection, MWG also disputes that the boring logs in MWG13-15_23345-23349 are from the Joliet 29 Station. As shown in the caption for each of the logs, the boring logs are from the Joliet 9 Station, which is not a part of this matter. MWG conducted an additional search for the Joliet 29 Station boring logs from the ENSR Phase II, and found the boring logs attached as Ex. 6 within the Joliet 9 ENSR Phase II at the Joliet 9 Station. There is no coal ash, ash, or otherwise similarly described substance in any of the boring logs. See Ex. 6.

88. A 1995 document discussing the northeast landfill at Joliet 29, states that sampling Northeast Ash Landfill showed "moderate contamination of the runoff caused by contact with this exposed ash" and "highly acidic runoff that has historically occurred when precipitation is exposed to ash in this area (e.g. pH = 2.38 when measured in 1992)." Memorandum from Dave Cohn to Elsie Briette, Abandoned Ash Landfill Area, Bates MWG13-15_25369 (Apr. 20, 1995), attached hereto as Ex. C13; Ex. C12, Memorandum from B.A. Renwick to J.P. Smith, The Abandoned Ash Landfill Area, (April 4, 1995) Bates MWG13-15_25371-25372, at Bates MWG13-15_25370.

MWG RESPONSE:

MWG does not dispute that Ex. C12 discusses historical sampling of stormwater runoff at the area defined here as the northeast ash landfill. MWG disputes that Complainants' Ex. C12 and C13 are evidence of sampling of the Northeast Ash Landfill. MWG disputes that there is coal ash in the area defined here as the northeast ash landfill. *See supra* MWG Response to Complainants' No. 7, ¶1.

89. KPRG's 2005 borings from around the center of the site document bottom ash and slag outside of the ponds. Ex. I, KPRG, Geotechnical Analysis at Bates MWG13-15_24292-24297.

MWG RESPONSE:

MWG disputes that there are borings from the KPRG 2005 report "around the center of the site" and cannot clearly identify the location(s) Complainants are describing in No. 89. Thus, MWG disputes SOF No. 89. *See Supra* MWG Response to Complainants' SOF No. 7, ¶2. KPRG did not sample the groundwater in 2005 and the KPRG 2005 contains no groundwater sampling results. Ex. I of Complainants' motion.

90. MWG has not installed any monitoring wells around the northeast ash landfill or the southwest ash landfill at Joliet 29. Ex. E3, Gnat Dep. 52:13-53:2; Ex. E4, Race Dep. 55:8-11, 56:13-57:17 (stating that she had no knowledge of wells aside from monitoring wells around the ash ponds).

MWG RESPONSE:

MWG does not dispute that the locations of the monitoring wells located at the Joliet 29 Station as identified in Complainants' Ex. C1.

91. The only monitoring wells at Joliet 29 were installed around the ash ponds pursuant to the Hydrogeological Assessment Plan in 2010. Id.; Patrick Engineering Inc., Hydrogeological Assessment Plan, Joliet Generating Station No. 29 Bates MWG13-15_13875 (July 2010), attached hereto as Ex. C14; Deposition Transcript of Richard Frendt, attached hereto as Exhibit E7, at 43; Patrick Engineering Inc., Hydrogeological Assessment Report, Joliet Generating Station No. 29 Bates MWG13-15_6981 (February 2011) [hereinafter Patrick, Hydrogeological Assessment Report], attached hereto as Exhibit C15.

MWG RESPONSE:

MWG does not dispute that the locations of the monitoring wells located at the Joliet 29 Station as identified in Complainants' Ex. C1.

92. MWG did not install an impermeable cap over the Northeast Ash Landfill at Joliet 29. Ex. K, MWG Resp. to Compl.'s Fourth and Fifth Set of Interrogs. and Doc. Reqs., Answer to Request for Admission 11, at 11 (March 31, 2015).

MWG RESPONSE:

MWG objects to No. 92 on the grounds that the term "impermeable cap" is vague, ambiguous, and capable of varying interpretations. MWG disputes that it admitted in its response to Complainants' Request for Admission 11 that it did not install an impermeable cap over the Northeast Ash Landfill at Joliet 29. MWG states that it admitted that there is no impermeable cap over Ash Landfill NE at Joliet 29 in its response to Request to Admit No. 11.

Without waiving its objections, MWG disputes that an impermeable cap is required above the area defined here as the Northeast Ash Landfill because MWG disputes that this area contains coal ash. *See supra* MWG Response to Complainants' SOF No. 7, ¶1.

93. There is no evidence in the record that there has ever been any impermeable cap over the Northeast Ash Landfill.

MWG RESPONSE:

MWG objects to SOF No. 93 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.") *See also* Response to Complainants' SOF No. 92, incorporated by reference.

Without waiving its objections, MWG disputes that an impermeable cap is required above the area defined here as the Northeast Ash Landfill because MWG disputes that this area contains coal ash. *See supra* MWG Response to Complainants' SOF No. 7, ¶1, incorporated by reference.

94. There is no evidence in the record that there has ever been any impermeable cap over the Southwest Ash Landfill at Joliet 29.

MWG RESPONSE:

MWG objects to No. 94 on the grounds that the term “impermeable cap” is vague, ambiguous, and capable of varying interpretations. *See* Response to Complainants' SOF No. 92, incorporated by reference.

MWG further objects to SOF No. 94 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objections, MWG disputes that an impermeable cap is required above the area defined here as the Southwest Ash Landfill because MWG disputes that this area contains coal ash. *See supra* MWG Response to Complainants' SOF No. 7, ¶1, incorporated by reference.

95. There is no evidence in the record that there has ever been any impermeable cap over the ash fill outside the ponds near the center of the site at Joliet 29.

MWG RESPONSE:

MWG objects to No. 95 on the grounds that the term “impermeable cap” is vague, ambiguous, and capable of varying interpretations. MWG objects SOF No. 95 as vague, because MWG cannot readily identify the “areas with ash fill outside of the ponds near the center of the site at Joliet 29.” Complainants do not cite to a map or boring locations that they allege contain coal ash.

MWG further objects to SOF No. 95 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”) *See also* Response to Complainants' SOF No. 92, incorporated by reference.

Without waiving its objections, MWG presumes that Complainants mean the area it describes in SOF No. 7, ¶2. MWG disputes that this area exists. *See supra* MWG Response to Complainants' No. 7, ¶2.

MWG disputes that an impermeable cap is required over any of the areas identified in No. 95 because MWG disputes that any contain historic ash. *See supra* MWG Response to Complainants' SOF No. 7, incorporated by reference.

96. There is no evidence in the record that there has ever been a liner beneath the ash at the Northeast Ash Landfill, Southwest Ash Landfill, nor in areas with ash fill outside of the ponds near the center of the site at Joliet 29.

MWG RESPONSE:

MWG objects SOF No. 96 as vague, because MWG cannot readily identify the “areas with ash fill outside of the ponds near the center of the site at Joliet 29.” Complainants do not cite to a map or boring locations that they allege contain coal ash. Further, MWG objects to SOF No. 96 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objections, MWG presumes that Complainants mean the area it describes in SOF No. 7, ¶2. MWG disputes that this area exists. *See supra* MWG Response to Complainants’ No. 7, ¶2, incorporated by reference.

MWG disputes that a liner is required beneath any of the areas identified in No. 96 because MWG disputes that any contain coal ash. *See supra* MWG Response to Complainants’ SOF No. 7, incorporated by reference.

97. MWG did not make any determination as to whether the Northeast Ash Landfill was lined. Ex. *Id.*, MWG Resp. to Compl.’s Fourth and Fifth Set of Interrogs. and Doc. Reqs., Answer to Interrogatory 7, at 10 (March 31 , 2015).

MWG RESPONSE:

MWG disputes that its answer to Interrogatory No. 7 in Complainants’ Ex. K is regarding the Northeast Ash Landfill, for Interrogatory No. 7 is regarding borax use at the Tannery Site located in Waukegan.

If Complainants meant to state RFA No. 7, MWG disputes Complainants’ mischaracterization of MWG Response to Complainants’ Request to Admit. MWG’s response to Complainants’ Request to Admit No. 7 stated it did not have sufficient information to admit or deny the request.

MWG disputes that a liner is required beneath the area defined here as the “Northeast Ash Landfill” because MWG disputes that this area contains coal ash. *See supra* MWG Response to Complainants’ SOF No. 7, ¶1, incorporated by reference.

98. There is no evidence in the record that MWG has ever completely removed the ash from the Northeast Ash Landfill, Southwest Ash Landfill, or the areas with ash fill outside the ponds near the center of the site at Joliet 29.

MWG RESPONSE:

MWG objects SOF No. 98 as vague, because MWG cannot readily identify the “areas with ash fill outside of the ponds near the center of the site at Joliet 29.” Complainants do not cite to a

map or boring locations that they allege contain coal ash. MWG further objects to SOF No. 98 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objections, MWG presumes that Complainants mean the area it describes in SOF No. 7, ¶2. MWG disputes that this area exists. *See supra* MWG Response to Complainants’ No. 7, ¶2.

MWG disputes that removal of the historic coal ash is required beneath any of the areas identified in No. 98 because MWG disputes that any contain ash. *See supra* MWG Response to Complainants’ SOF No. 7, incorporated by reference. MWG also disputes that any ash must be removed. *See* Ex. G, pp. 49-62.

99. The 1998 Phase II ESA for Powerton shows that there were coal ash constituents exceeding IEPA standards in both surface and subsurface soils at Powerton, and that there was slag in borings logs for areas outside of ponds at the Powerton site. Ex. D3, ENSR, Powerton *Phase II ESA* at Bates MWG13-15_3269-3275, 3307-3342.

MWG RESPONSE:

MWG disputes that Ex. D3 shows “coal ash constituents” at Powerton because Complainants have not defined “coal ash constituents” in their motion and MWG cannot identify the constituents Complainants are identifying for this SOF No. 99. *See* MWG Response, Sec. IV.c. MWG does not dispute the contents of the 1998 Phase II document.

MWG notes that in this SOF No. 99, Complainants do not identify the boring logs it refers to. By failing to include reference to the boring logs, MWG cannot readily identify the locations Complainants are describing in this SOF No. 99 or their motion for partial summary judgment. MWG objects to the confusion, intentional or otherwise, created by Complainants’ failure to accurately identify the areas it is discussing in its Motion for Partial Summary Judgment, because it adversely affects MWG’s ability to respond.

100. Monitoring well completion reports from 2010 note that bore holes for wells 6, 7, 8, 9, 11, 12, 13, 14 and 15 all pass through “cinders.” Patrick Engineering, *Monitoring Well Completion Reports for Powerton Ash Pond Assessments* Bates MWG13-15_10640-10658 (October 20, 2010) attached hereto as Ex. D20; see also Ex. D4, Patrick, *Powerton Hydrogeological Assessment Report for Powerton Generating Station* MWG13-15_7111-7120 (February 2011); Ex. D8, Patrick Engineering Inc., *Quarterly Groundwater Monitoring Results, Third Quarter 2011, Powerton Generating Station –Bypass Cleaning Basin* at MWG13-15_4100-4164.

MWG RESPONSE:

MWG notes that the “bore holes” for wells 6, 7, 8, 9, 11, 12, 13, 14 and 15 reference the boring logs identified in Complainants’ SOF No. 10, ¶2. MWG incorporates by reference to SOF No. 10, ¶2.

101. Borings in and around the Former Ash Basin revealed coal ash deposits “up to around ten feet thick.” Ex. D2, Patrick, *Powerton Former Ash Basin Borings* at Bates MWG13-15_14225-14269.

MWG RESPONSE:

MWG does not dispute that Ex. D2 shows sand mixed with “coal cinders.”

102. Additional soil borings reveal coal ash beneath the surface at various places around the Powerton site. Ex. I, KPRG, *Geotechnical Analysis* at Bates MWG13-15_24299-24310 (providing a geotechnical analysis of soil surrounding the ponds at Joliet, Powerton, Waukegan, and Will County).

MWG RESPONSE:

MWG objects to the term “various places” as vague and impossible to define. Without waiving its objection, MWG does not dispute that certain soil borings in Complainants’ Ex. I show coal ash. The KPRG Geotechnical Analysis, Complainants’ Ex. I, does not include any groundwater sample analysis.

103. On September 11, 2013, MWG sent a letter to IEPA noting that monitoring wells installed in 2010 are potentially affected by past ash management practices and fall “within an area of impacted groundwater from historical ash-related handling activities.” Ex. D19, Letter from Richard R. Gnat, P.G., Principal, KPRG and Associates, Inc. to Lynn Dunaway, Illinois Environmental Protection Agency at Bates MWG13-15_9644-9645 (Sept. 11, 2013).

MWG RESPONSE:

MWG disputes that Complainants’ Ex. D19 states that the monitoring wells installed in 2010 are potentially affected by past ash management practices. MWG does not dispute that Complainants’ Ex. D19 is regarding establishing the GMZ for the Powerton station and that it states that MW-1, MW-9 and MW-10 are “considered intermediate monitoring wells, being generally up gradient of the ash basins but still within an area of impacted groundwater from historical ash-related handling activities.” Complainants’ Ex. D19 at MWG13-15_9645.

104. Groundwater monitoring wells MW-1, MW-2, MW-5, MW-10 and MW-9 are located near the Former Ash Pond, and MWs 9 and 11 through 15 are located in areas of ash fill at Powerton. See Ex. D1, *Powerton Site Maps*; Ex. D19, *Letter from Richard R. Gnat, P.G., Principal, KPRG and Associates, Inc. to Lynn Dunaway, Illinois Environmental Protection Agency* at Bates MWG13-15_9644-9645 (Sept. 11, 2013).

MWG RESPONSE:

MWG does not dispute the locations of the groundwater monitoring wells at the Powerton Station. MWG disputes that Complainants' Exhibit D19 shows that MW-9 and MW-11 through MW-15 are located in areas of ash fill at Powerton.

105. There is no liner beneath the Former Ash Basin at Powerton. Ex. H, MWG, *U.S. EPA Questionnaire* at Bates MWG13-15_1273 (indicating that the Former Ash Basin—identified as SPD 5—is unlined).

MWG RESPONSE:

MWG disputes that the U.S.EPA Questionnaire is a reliable source of information as multiple witnesses have testified that the responses to the U.S. EPA Questionnaire contains mistakes. *See* M.Race Dep. Tr. 67:10-11 and 67:21-68:3, and M.Kelly Dep. Tr. 69:24-70:3, and thus cannot be used as a basis for an undisputed fact. MWG disputes that a liner is required beneath the Former Ash Basin. *See* Ex. G, pp. 49-62 and Complainants' Ex. D21, Notification of Intention to Initiate Closure of the Former Ash Basin.

106. There is no evidence in the record that MWG installed a liner at the Former Ash Basin subsequent to completing Ex. H, the U.S. EPA Questionnaire.

MWG RESPONSE:

MWG objects to SOF No. 106 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objection, MWG disputes that a liner is required beneath the Former Ash Basin. *See* Ex. G, pp. 49-62 and Complainants' Ex. D21, Notification of Intention to Initiate Closure of the Former Ash Basin.

107. There is no evidence in the record of a liner beneath the ash fill outside of the basins and ponds in various areas at Powerton Station.

MWG RESPONSE:

MWG objects SOF No. 107 as vague, because MWG cannot readily identify the “areas with ash fill outside of the basins and ponds in various areas at Powerton Station.” Complainants do not cite to a map or boring locations that they allege contain coal ash. MWG objects to the confusion, intentional or otherwise, created by Complainants' failure to accurately identify the areas it is discussing in its Motion for Partial Summary Judgment, because it adversely affects MWG's ability to respond.

Further, MWG objects to SOF No. 107 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the

burden to locate facts to a search of the entire 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.”)

Without waiving its objections, MWG disputes that a liner is required beneath the areas identified in SOF No. 107. *See* MWG Response to SOF No. 10 and Ex. G, pp. 49-62.

108. MWG has not installed an impermeable cap over the Former Ash Basin at Powerton. *Id.* (indicating that Former Ash Basin was active); *Notification of Intent to Initiate Closure of the Former Ash Basin* at Bates Comp. 053740 (Dec. 17, 2015), attached hereto as Ex. D21.

MWG RESPONSE:

MWG objects to SOF No. 108 on the grounds that the term “impermeable cap” is vague, ambiguous, and capable of varying interpretations. MWG further objects to SOF No. 108 as vague because it cites to “*Id*” as the citation for the assertion that the Former Ash Basin does not have an “impermeable cap.” SOF No. 107 does not have a citation for the basis of its assertion. Without waiving its objection, MWG assumes that Complainants intended to cite to Complainants’ Ex. H cited to in SOF No. 106. MWG disputes that the U.S.EPA Questionnaire at Complainants’ Ex. H, supports the notion that there no cap on the Former Ash Basin because the U.S.EPA Questionnaire does not discuss a cap, impermeable or otherwise.

MWG also disputes that Complainants’ Ex. D21 discusses or mentions an “impermeable cap,” for that phrase is not used in the document. To the extent a response is required subject to its objections, MWG does not dispute that MWG has not installed an impermeable cap over the Former Ash Basin or that Complainants’ Ex. D21 is MWG’s Notification of Intent to initiate closure of the Former Ash Basin pursuant to the new Federal CCR Rules, 40 CFR 257.100(c)(1).

109. There is no evidence in the record of an impermeable cap over the ash fill outside of the basins and ponds in various areas at Powerton Station.

MWG RESPONSE:

MWG objects to SOF No. 109 on the grounds that the term “impermeable cap” is vague, ambiguous, and capable of varying interpretations. MWG further objects to SOF No. 109 as vague, because MWG cannot readily identify the “areas with ash fill outside of the basins and ponds in various areas at Powerton Station.” Complainants do not cite to a map or boring locations that they allege contain coal ash. MWG objects to the confusion, intentional or otherwise, created by Complainants’ failure to accurately identify the areas it is discussing in its Motion for Partial Summary Judgment, because it adversely affects MWG’s ability to respond.

Further, MWG objects to SOF No. 109 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objections, MWG disputes that an “impermeable cap” is required over the areas identified in SOF No. 109. *See* Ex. G, pp. 49-62.

110. MWG has not completely removed the ash from the Former Ash Basin. Ex. K, MWG Resp. to Compl.’s Fourth and Fifth Set of Interrogs. and Doc. Reqs., Answer to Interrog. 3 (March 31, 2015) at 8.

MWG RESPONSE:

MWG disputes to Complainants’ mischaracterization of MWG Response to Complainants’ Interrogatory No. 3. MWG disputes that MWG’s Response to No. 3 of Complainants’ Interrogatory states that “MWG has not completely removed ash from the Former Ash Basin,” for the “Former Ash Basin” is not discussed in its response to Interrogatory No. 3.

MWG does not dispute that it is in the process of complying with the Federal CCR Rules, and pursuant to its Notification of Intent, ash in the Former Ash Basin will be consolidated into the South Pond. *See* Complainants’ Ex. D21.

111. There is no evidence in the record that MWG has completely removed the ash fill outside of the basins and ponds in various areas at Powerton Station.

MWG RESPONSE:

MWG objects to SOF No. 111 as vague, because MWG cannot readily identify the “areas with ash fill outside of the basins and ponds in various areas at Powerton Station.” Complainants do not cite to a map or boring locations that they allege contain coal ash. MWG objects to the confusion, intentional or otherwise, created by Complainants’ failure to accurately identify the areas it is discussing in its Motion for Partial Summary Judgment, because it adversely affects MWG’s ability to respond.

MWG also objects to SOF No. 111 on the grounds that it does not cite to the record to support a fact. Complainants must cite to the record to support a fact, rather than shifting the burden to locate facts to a search of the entire 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.”)

Without waiving its objections, MWG disputes that any ash at the Powerton Station must be completely removed. *See* Ex. G, pp. 49-62.

112. Groundwater has come into contact with coal ash at Waukegan Station. Groundwater elevations at Waukegan fluctuate between 579.27 and 584.56 feet above mean sea level. Ex. G, *Seymour Report*, at Tbl.4-5. Coal ash is buried at elevations as low as 582 feet above mean sea level. Ex. A4, KPRG, *Geologic Logs for MW-8 and MW-9* at Bates MWG13-15_45648-45649.

MWG RESPONSE:

MWG disputes that Complainants’ Exs A4 and Ex. G show groundwater in contact with coal ash at the Waukegan Station. Table 4-5 in the Seymour Report, Complainants’ Ex. G, show the

groundwater elevations for MW-1 through MW-7, but not the monitoring wells MW-8 or MW-9. Additionally, as Complainants' have not attached a map identifying the location of MW-8 or MW-9, it is impossible to identify their locations nor compare their locations to MW-1 through MW-7.

113. In monitoring well MW-05, ash in the form of black coal cinders are found as deep as 17 feet below the ground elevation of 601.526 feet—thus, at a depth of 584.526 feet above MSL. Ex. A3, Patrick, *Waukegan Hydrogeological Assessment Report* at Bates MWG13-15_7175. At the same well, groundwater was recorded as high as 584.55 feet on June 13, 2011. Ex. G, *Seymour Report*, Table 4-5.

MWG RESPONSE:

MWG disputes that Complainants' Exs A3 at MWG13-15_7175 shows any ground elevation. Additionally, MWG notes that the water elevation shown on MWG13-15_7175 is at 21.0 feet, 4 feet below the mix of sand, brick and black coal cinders. MWG does not dispute that groundwater in MW-5 was recorded once at 584.55 on June 13, 2011 and had not reached that level since that date, but instead is more commonly around 582 feet. Table 4-5 of Seymour Report, Complainants' Ex. G.

114. The boring log for the boring, B-1, next to monitoring well MW-11 shows a depth of ash up to 4 feet. *ENSR Phase II Environmental Site Assessment—Waukegan Generating Station* (November 1998), at Bates MWG13-15_45817, 45821. The groundwater elevation chart in the same ESA shows that groundwater in MW-11 as shallow as 3.04 feet. *Id.* at Bates MWG13-15_46054.

MWG RESPONSE:

MWG disputes that boring, B-1 shows coal ash, but instead shows sand and coal. Complainants' Ex. A2, at MWG13-15_45821.

This paragraph, No. 114, is the first instance Complainants reference B-1. MWG objects to the confusion, intentional or otherwise, created by Complainants' failure to accurately identify the areas it is discussing in its Motion for Partial Summary Judgment, because it adversely affects MWG's ability to respond.

115. The boring log for the boring, B-15, next to monitoring well MW-12 shows a depth of ash up to 4 feet. Ex. A2, ENSR, *Waukegan Phase II ESA* at Bates MWG13-15_45817, 45834. The groundwater elevation chart in the same ESA shows that groundwater in MW-12 as shallow as 3.47 feet. *Id.* at Bates MWG13-15_46054.

MWG RESPONSE:

MWG disputes that boring, B-15 shows coal ash but instead shows sand and coal. Complainants' Ex. A2, at MWG13-15_45834.

This paragraph, No. 115, is the first instance Complainants' reference B-15. MWG objects to the confusion, intentional or otherwise, created by Complainants' failure to accurately identify the areas it is discussing in its Motion for Partial Summary Judgment, because it adversely affects MWG's ability to respond.

116. Groundwater has come into contact with coal ash at Will County Station. Groundwater elevations at Will County fluctuate between 579.13 and 583.87 feet above mean sea level. Ex. G, *Seymour Report*, at Tbl.4-7. Coal ash is buried at elevations as low as 578.6 feet above mean sea level. Ex. B3, Patrick, *Will County Hydrogeological Assessment Report* at Bates MWG13-15_7252.

MWG RESPONSE:

MWG does not dispute that one boring log for MW-2 shows coal cinders at depth of 578.6 feet. MWG disputes that groundwater has come into contact with coal ash at Will County based upon one example of coal cinders in one boring log. MWG notes that five of the boring logs do not show any ash. *See supra* MWG's Response to Complainants' No. 5, ¶1.

117. At Will County, in monitoring well MW-2, ash in the form of wet black coal cinders are found as deep as 578.6 feet. *Id.* At the same well, groundwater was recorded as high as 580.6 feet in the same boring log, *id.*, and at 581.76 feet on June 15, 2011. Ex. G, *Seymour Report*, Tbl.4-7. At MW-03, ash is found at 583.0 feet, Ex. B3, *Will County Hydrogeological Assessment*, at Bates MWG13-15_7253, with groundwater in the same well never below 581.79 feet and as high as 583.76 feet. Ex. G, *Seymour Report*, Tbl.4-7. At MW-06, ash is found at 581.8 feet, Ex. B3, *Will County Hydrogeological Assessment*, at Bates Comp. 3806, with groundwater in the same well as high as 582.45 feet. Ex. G, *Seymour Report*, Tbl.4-7.

MWG RESPONSE:

MWG does not dispute the boring logs for MW-2, MW-3 and MW-6 in Complainants' Ex. B3, nor the groundwater elevations established in Table 4-7 of Mr. Seymour's Report. MWG disputes that MW-2 boring log shows "wet black coal cinders as deep as 578.6 feet" but instead is a mix of clay, sand, silty clay and black coal ash. MWG further disputes that MW-3 shows ash at 583.0, but instead shows a mix of gravel, sand, rock limestone, rubble and coal ash. MWG disputes that MW-6 shows ash, but instead shows a mix of crushed stone, sand, and coal cinders.

118. Groundwater has come into contact with coal ash at Powerton Station. Groundwater elevations at Powerton fluctuate between 429.94 and 451.84 feet above mean sea level. Ex. G, *Seymour Report*, at Tbl.4-3. Coal ash is buried at elevations as low as 443.2 feet above mean sea level. Ex. D4, Patrick, *Powerton Hydrogeological Assessment Report*, at Bates MWG13-15_7113.

MWG RESPONSE:

MWG does not dispute that one boring log for MW-6 shows coal cinders at depth of 443.3 feet. MWG disputes that groundwater has come into contact with coal as at Will County based upon one example of coal cinders in one boring log.

119. At Powerton, in monitoring well MW-5, ash in the form of trace black coal cinders is found as deep as 443.3 feet above mean sea level (MSL).⁶ *Id.* at Bates MWG13-15_7111. At the same well, groundwater was recorded as high as 444.11 feet above MSL on May 29, 2013. Ex. G, *Seymour Report* at Tbl.4-3. At MW-6, ash is found at 443.2 feet, Ex. D4, Patrick, *Powerton Hydrogeological Assessment*, at Bates MWG13-15_7113, with groundwater in the same boring log at 444.2 feet, *id.*, and groundwater in the same well measured at 449.46—449.65 feet. Ex. G, *Seymour Report*, Tbl.4-3. At MW-7, ash is found at 446.1 feet, Ex. D4, Patrick, *Powerton Hydrogeological Assessment*, at Bates MWG13-15_7115, with groundwater in the same well measured at 449.93. Ex. G, *Seymour Report*, Tbl.4-3. At MW-8, ash—in the form of “saturated” black cinders—is found at 444.2 feet, Ex. D4, Patrick, *Powerton Hydrogeological Assessment*, at Bates MWG13-15_7119, with groundwater in the same well measured at 448.53. Ex. G, *Seymour Report*, Tbl.4-3. At MW-9, ash—in the form of “moist” black cinders—is found at 449.2 feet, Ex. D4, Patrick, *Powerton Hydrogeological Assessment*, at Bates MWG13-15_7120, with groundwater in the same well measured at 449.35. Ex. G, *Seymour Report*, Tbl.4-3

MWG RESPONSE:

MWG does not dispute the boring logs for MW-5 through MW-9 in Complainants’ Ex. D4, nor the groundwater elevations established in Table 4-7 of Mr. Seymour’s Report. MWG disputes that the boring log for MW-5 shows trace coal cinders at 443.3 because the boring log does not show an elevation level at 443.3. MWG disputes that MW-7 shows ash, but instead shows a mixture of sand, gravel, clay and black cinders. Additionally, MWG further notes the groundwater elevation measurement of 449.93 was an anomaly, and that in all of the other measurements of the groundwater at MW-7, the groundwater elevation was approximately 10 feet below 449.93. *See* Table 4-3 of Seymour Report, Complainants’ Ex. G. MWG disputes that MW-9 shows moist black cinders, but instead shows a mixture of sand, brick, gravel and black cinders, noted as “dry” a majority of the boring. Additionally, MWG further notes the groundwater elevation measurement of 449.35 in MW-9 was an anomaly, and that in all of the other measurements of the groundwater at MW-9, the groundwater elevation was approximately 5 feet below 449.93.