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 No-2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent	)	

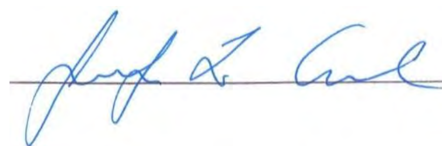
NOTICE OF ELECTRONIC FILING

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board **COMPLAINANTS' REPLY IN SUPPORT OF COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**, copies of which are herewith served upon you.

Respectfully submitted,



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Dated: September 2, 2016

Electronic Filing - Received, Clerk's Office : 09/02/2016

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COMPLAINANTS' REPLY IN SUPPORT OF COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairies Rivers Network and Citizens Against Ruining the Environment (collectively, "Citizen Groups") respectfully submit this Reply in support of their Motion for Partial Summary Judgment ("Motion").

Respondent Midwest Generation, LLC's ("Respondent" or "MWG")'s attempts to muddy the waters notwithstanding, the core of Citizen Groups' Motion is both straightforward and undisputed. MWG does not dispute that it owns or operates the four power plants at issue in this litigation. MWG Response Brief at 1, 20 and App. A., Response to SOF 1. MWG does not dispute that boron and sulfate are good indicators of coal ash contamination (*id*., App. A at SOF 36-37), nor does it dispute that boron and sulfate have been detected in every single monitoring well at all four plants, often at concentrations that exceed the state's groundwater protection standards. *Id*., App. A at SOF 39, 53-56. The fact that there is coal ash contamination in the groundwater at the four MWG plants is therefore clear.

The main question to be resolved – since there are multiple coal ash areas at each site – is where the contamination is coming from. To simplify, there are three types of coal ash areas at each site – coal ash ponds, areas outside the ponds for which the record contains leach tests, and areas outside the ponds for which the record does not contain leach tests. Citizen Groups acknowledge that there may be factual disputes concerning the first two categories of coal ash areas, which is why those areas were not included in the Motion.[1] The third category, areas outside the ponds for which the record does not contain leach tests, is the subject of Citizen Groups' Motion. Citizen Groups defined this third category as "Historic Coal Ash" in "Historic Ash Areas." Memorandum of Law in Support of Citizen Groups' Motion for Partial Summary Judgment ("Memo"), p. 2, FN 3; *id*. at SOF 4, 5, 7, and 10.

Historic ash is a source of the groundwater contamination at each plant, as testified to by MWG's expert in his deposition. *See infra*, section III.b.iii. Moreover, MWG has admitted that it has not removed Historic Coal Ash, installed a liner underneath Historic Coal Ash, or put a cap over the Historic Coal Ash to prevent that ash from leaching into groundwater. *See infra*, section III.a. As such, there is no real dispute that Historic Coal Ash at the plants is contributing to groundwater contamination at the plants, and that MWG has not taken precautions to prevent that contamination. Accordingly, MWG is liable for violations of Sections 12(a) and 21(a) of the Illinois Environmental Protection Act ("Act").

I. Citizen Groups' Definition of "Historic Ash Areas" is Clear.

MWG attempts to sow confusion by mischaracterizing Citizen Groups' delineation of Historic Ash Areas. MWG spends seven pages of its brief arguing that Citizen Groups exclude

[1] MWG argues that Citizen Groups "seek to exclude the leach test data because the data reveals that the historic ash is not leaching." MWG Response Brief at 11, FN 10. This is absolutely false. We excluded the areas with leach tests because the leach tests, and MWG's expert's interpretation of the tests, create potential factual disputes. Citizen Groups take the position that the leach tests are not adequate to illuminate the issue of whether the tested areas could be a source of contamination.

all "repositories that are subject to corrective action," and therefore exclude anything within the boundaries of Environmental Land Use Controls ("ELUCs") or Groundwater Management Zones ("GMZs"). *See* MWG Response Brief at 8-15; *see also* App. A., Response to SOF 3-8, 10. This is fiction. Nowhere do Citizen Groups state or imply that they are excluding all areas within the ELUCs or GMZs. Rather, Citizen Groups identify the Historic Ash Areas in two ways: by inclusion, specifically listing each Historic Ash Area in Statements of Fact ("SOF") 4, 5, 7 and 10, and by exclusion, identifying each excluded area for each site in footnote 3 of their Memo. For example, the Historic Ash Areas at Waukegan include the five areas listed in SOF 4, but do not include the West Ash Pond or the East Ash Pond, as Citizen Groups stated in footnote 3.

In support of its claim, MWG points to the last paragraph of footnote 3 of Citizen Groups' Memo. In that paragraph, Citizen Groups state that they are not conceding anything about the excluded areas and briefly summarize those areas, noting that Historic Coal Ash "does not include <u>certain</u> coal ash repositories that were subject to corrective action under Compliance Commitment Agreements with Illinois EPA," or repositories with leach test data. Citizen Groups nowhere state that they are excluding <u>all</u> areas within ELUCs or GMZs.[2] .

MWG also asserts that Citizen Groups added areas to their lists of Historic Ash Areas. *See* MWG Response Brief at 11, 13 and 15. We have already addressed this invention. *See* Citizen Groups' Response to Motion for Extension at 5-6. To briefly repeat, Citizen Groups list Historic Ash Areas in SOFs 4, 5, 7 and 10, as indicated by the language "Historic Ash Areas at [X] include…" MWG is complaining about SOFs 6, 8 and 11, which delineate areas containing "coal ash," clearly differentiating those areas from areas containing "Historic Coal Ash."[3]

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[2] MWG apparently believes that ELUCs and GMZs constitute "corrective action." MWG Response Brief at 8 – 9. Citizen Groups disagree.

[3] The lack of any inconsistency is reinforced by noting that SOFs 6, 8 and 11 list areas that were explicitly excluded from the definition of Historic Coal Ash in footnote 3 of the Memo.

In sum, Citizen Groups have described the areas at issue in the Motion and Memo as clearly as possible. MWG's claimed inconsistencies do not exist.

II. Partial Summary Judgment is Entirely Appropriate Here.

Partial summary judgment is appropriate here. First, partial summary judgment would save judicial resources. Second, under Board rules, a party may seek summary judgment for any part of the relief sought. Regardless of whether liability for Historic Ash Areas is a "major" or "minor" issue, part of the relief Citizen Groups seek stems from contamination caused by the Historic Ash Areas, and summary judgment is therefore appropriate.

First, the Board would save significant judicial resources by resolving MWG's liability for contamination from Historic Ash Areas on a motion for partial summary judgment. Summary judgment is "an important tool in the expeditious disposition of a lawsuit. [Summary judgment's] underlying policy is the facilitation of litigation; its benefits inure not only to the litigants in the saving of time and expense, but also to the community in avoiding congested trial calendars and the expense of unnecessary trials." *Miller v. Nat'l Ass'n of Realtors*, 271 Ill. App. 3d 653, 655 (1994) (internal quotation and citations omitted). MWG's argument that, in this case, summary judgment would not save time at trial disregards the obvious: while the same witnesses likely would testify on the remaining claims at hearing, their testimony would be significantly shortened if liability with regard to the Historic Ash Areas were already resolved. As such, summary judgment with regard to Historic Ash Areas would significantly alleviate the amount of time and money devoted to unnecessarily revisiting that issue at trial.

Second, summary judgment is appropriate because, under Board rules, "a party may move the Board for summary judgment for all *or any part* of the relief sought." 35 IAC 101.516 (emphasis added). Part of the relief sought by Citizen Groups stems from MWG's violations of

Sections 12(a) and 21(a) of the Act caused by Historic Coal Ash. Resolution of liability for contamination from the Historic Ash Areas is, thus, appropriate at this stage.

MWG's argument that partial summary judgment should be limited to "major issues," MWG Response Brief at 3-4, relies on law that does not apply in this case. In support of that argument, MWG cites state and federal rules. *Id*. However, under the Board's General Rules, "[e]xcept when the Board's procedural rules provide otherwise, the provisions of the Code of Civil Procedure [735 ILCS 5] and the Supreme Court Rules [Ill. S. Ct. Rules] *do not apply* to proceedings before the Board" unless "the Board's procedural rules are silent." 35 IAC 101.100 (emphasis added). Here, as MWG acknowledges (MWG Response Brief at 3), the Board's rules clearly permit summary judgment for "any part" of a claim. MWG is accordingly precluded from invoking state or federal law to determine what issues may be resolved on summary judgment.

Board precedent manifests the inapplicability of the state and federal rules providing that summary judgment should only be granted on "major" issues. The Board has repeatedly granted summary judgment on minor issues. *See W.R. Meadows, Inc. v. IEPA*, PCB No. 97-195 (May 1998) (characterizing one of three claims as the "major issue" while disposing of one of the other two claims in summary judgment); *see also People of the State of Illinois v. Stringini*, PCB 01-43 (Oct. 2003) (deliberating summary judgment on over 25 enumerated issues). MWG did not and cannot cite to any Board or Illinois case that denies partial summary judgment because the subject of the motion was not a "major issue." In fact, MWG fails to cite to any case where a party or an adjudicator even calls into question whether an issue is "major." Here, whether Historic Ash Areas are contributing to the continued contamination of four groundwater aquifers, leaving them indefinitely unsafe for human use, is plainly a "major" issue, but summary judgment would thus be appropriate even if it were somehow deemed "minor." In sum,

regardless of whether contamination from the Historic Ash Areas constitutes a "major" or "minor" issue, resolving whether MWG is liable for violations due to contamination from those areas on summary judgment is wholly consistent with the Board's rules.

Finally, Citizen Groups note that even if the Board were to find that a genuine issue of fact exists with regard to one or more Historic Ash Areas alleged in the Motion, the Board may, and should, rule on summary judgment with regard to those Historic Ash Areas that are not in dispute. *See, e.g.*, *D'Angelo Enterprises, Inc.,* 1999 Ill. ENV LEXIS 3, PCB No. 97-66 (PCB 1999) (holding that the People were entitled to summary judgment for violations of sections 21(f)(1) and (2) of the Act with respect to certain types of industrial waste, while denying summary judgment on other violations due to the presence of genuine issues of material fact regarding those alleged violations).

In sum, partial summary judgment on MWG's liability for contamination from the Historic Ash Areas is entirely appropriate because it would save significant judicial resources and is in keeping with Board Rules and practices.

III. There Is No Genuine Issue of Material Fact: MWG Controls the Four Plants, Historic Coal Ash is a Source of Groundwater Contamination at the Four Plants, and MWG has Not Taken Extensive Precautions to Prevent the Contamination.

MWG admits most of the facts that are material to this suit. As discussed in more detail below, MWG acknowledges that it owns or operates the four power plants, that coal ash is in the ground at all four plants, that coal ash leaches, and that two coal ash contamination indicators – namely, boron and sulfate – have been found in every single groundwater monitoring well at all four plants. MWG further acknowledges that it has not installed liners beneath the historic coal ash at the plants, placed impermeable covers over that historic ash, or removed the ash.

When MWG purports that a material fact is in dispute, the meager "evidence" it puts

forward is legally inadequate to establish an issue of fact defeating summary judgment. As a result, the material facts in this case are effectively uncontested.

a. MWG Concedes Critical Facts.

First, it is undisputed that MWG owns and operates the Will County and Waukegan power plants and operates the Joliet and Powerton power plants. MWG Response Brief, App. A, Response to SOF 1.

Second, it is undisputed that there is coal ash buried in the ground at all four plants. At Waukegan, MWG admits that there is coal ash in the berms (the "perimeter") of both the East and West ash ponds, as well as coal ash in multiple borings at the site. MWG Response Brief, at 2 and App. A, Response to SOF 4, 62, 64. At Will County, MWG admits that there is coal ash in the berms of the ash ponds and coal ash in numerous borings at the site. MWG Response Brief at 22-23 and App. A, Response to SOF 5-6. At Joliet 29, MWG admits that at least one boring near the center of the site, shown in Citizen Groups' Ex. I, MWG13-15_24290, 24293, contained coal ash.[4] MWG Response Brief, App. A, Response to SOF 7. And at Powerton, MWG admits that there is coal ash in the Former Ash Pond and in multiple soil borings at the site. *Id*., App. A, Response to SOF 10, 20, 100-102.

Third, it is undisputed that coal ash – including coal ash that has been buried for years – leaches. In his deposition, MWG expert John Seymour argued that ash leaches less over time but acknowledged that he could not identify an age at which ash would stop leaching. Citizen Groups' Ex. E5, Seymour Dep. Tr. 62:20 - 63:13; 224:14-225:21; MWG Response Brief, App. A, Response to SOF 21 (acknowledging Seymour's testimony that "bottom ash is less leachable

[4] MWG concedes that there is coal ash ("some slag") in what they refer to as B2 (identified in the boring log as GT-2). MWG Response Brief, App. A, Response to SOF 7; Citizen Groups' Ex. I, MWG13-15_24291-24293. MWG appears to have overlooked the fact that the boring logs for borings GT-1 and GT-3 clearly contain "bottom ash" (Citizen Groups' Ex. I, MWG13-15_24292, 24294), and that they are also located near the ash ponds, in the area that Citizen Groups have defined as a Historic Ash Area. *Id*. at MWG13-15_24290.

than fly ash”).

Fourth, it is undisputed that boron, sulfate, and manganese are good indicators of coal ash contamination. *See, e.g*., *id*., App. A, Response to SOF 36-38. These three constituents have also been identified as good coal ash indicators by the Illinois Environmental Protection Agency (“IEPA”), which states that:

> Boron, sulfate, and manganese are the same contaminants that have been found in recent hydrogeologic assessments of groundwater in multiple confirmed sample results collected from down-gradient dedicated monitoring wells adjacent to surface impoundment units containing CCW [coal ash] at power generating facilities in Illinois. These contaminants were found to attributable to these surface impoundments.

Illinois EPA, Statement of Reasons, Attachment A: Technical Support Document, p. 2, In the Matter of Coal Combustion Waste Surface Impoundments at power Generating Facilities: Proposed New 35 Ill. Adm. Code 841, R2014-010 (Oct. 28, 2013).

Fifth, it is undisputed that coal ash indicators boron and sulfate have been detected in every groundwater well at all four coal plants and that the concentrations of those indicators have exceeded Illinois Groundwater Protection Standards. MWG Response Brief, App. A, Response to SOF 39, 53-56; *see also* Motion, Ex. A (listing exceedances of Illinois Class I Groundwater Protection Standards through August, 2014).

Sixth, it is undisputed that groundwater has been found at higher elevations than buried coal ash at the Will County and Powerton plants. MWG Response Brief, App. A, Response to SOF 116-119.

Finally, it is undisputed that MWG has not taken precautionary measures to prevent the historic coal ash from leaking. MWG was aware of historic ash deposits when it bought the four plants in 1998. MWG Response Brief at 2. Nonetheless, MWG explicitly admits that it has not taken numerous specifically identified measures to prevent the ash from leaching, and the record

contains no evidence that it has taken any such measures, including installing liners below the ash, installing impermeable caps above the ash, or removing the ash at the sites. *See* MWG Response Brief, App. A, Response to SOF 68-73 (Waukegan), 77-86 (Will County), 90-98 (Joliet 29), and 105-11 (Powerton). Among other things, MWG admits: (1) it has not removed the coal ash from the Former Ash Basin at Powerton, nor installed an impermeable cap over that basin (MWG Response Brief, App. A, Response to SOF 108, 110); (2) it did not install a liner beneath, or place an impermeable cap over, the Former Slag/Fly ash Storage Area at Waukegan (*Id*. at App. A, Response to SOF 68, 70); (3) it did not install a liner beneath, or place an impermeable cap over, the Spent Slurry Pond at Will County (*Id*. at App. A, Response to SOF 78, 81); and (4) it did not install an impermeable cap over the NE ash landfill at Joliet 29. *Id*. at App. A, Response to SOF 92. In addition, MWG effectively admits that it never attempted to determine whether historic ash was contaminating groundwater because it admits that it never installed wells specifically designed to monitor such contamination from the historic ash. *Id*. at App A, Response to SOF 79, 90-91.

MWG argues that Citizen Groups fail to bear their burden when they allege that the record contains no evidence without a citation. MWG's argument is illogical and unsupported by legal authority. A party need not prove a negative. *Levine v. Pascal*, 94 Ill. App. 2d 43, 55 236 N.E.2d 425 (Ill. App. Ct. 1st Dist. 1968) ("The law seems consistent on the point that one need not prove a negative averment, the burden of proof being on the party who asserts the affirmative."). Similarly, one need not cite to the record to support the statement that the record contains no evidence. On the other hand, if MWG has evidence to support its position opposing that negative and absence in the record, then it must produce that evidence to create a disputed issue of material fact. *Id.*; *see also Snyder v. Ambrose*, 266 Ill. App. 3d 163; 639 N.E.2d 639(Ill.

App. Ct. 2nd Dist. 1994))("Additionally, one need not prove a negative averment, the burden of proof being on the party who asserts the affirmative.")

In short, the undisputed facts show that MWG allowed the discharge of contaminants into the groundwater so as to cause water pollution in violation of Section 12(a) of the Act.

b. Where MWG Claims a Dispute of Fact, those Claims Do Not Suffice to Establish a "Genuine Issue" of Fact.

MWG asserts that disputes exist concerning several facts. MWG claims that: (1) the presence of historic coal ash in certain Historic Ash Areas, such as the Former Slag/Fly Ash Storage Area at Waukegan, the Northeast Ash Landfill at Joliet, and the Spent Slurry Pond at Will County, is in dispute; (2) there is a dispute concerning the presence of contaminants from coal ash in the groundwater at the plants; and (3) a question exists regarding whether historic coal ash caused or contributed to the groundwater contamination at the four plants. *See* MWG Response Brief at 18 and App. A., Response to SOF 4, 5, 7, 57-60. None of the "evidence" that MWG adduces to purportedly establish a dispute of fact on those issues suffices to defeat summary judgment. The conclusory assertions and statements concerning lack of knowledge that MWG points to are, at best, speculative as to whether a dispute of fact may exist. Speculation is not enough. *See Sorce v. Naperville Jeep Eagle, Inc*., 309 Ill. App. 3d 313, 328 (Ill. App. 1999) ("Mere speculation, conjecture, or guess is insufficient to withstand summary judgment); *In re Marriage of Palacios*, 275 Ill. App. 3d 561, 568 (Ill. App. 1995) ("The mere suggestion that a genuine issue of material fact exists without supporting documentation does not create an issue of material fact precluding summary judgment."); *U.S. Bank v. Blachaniec*, 2016 IL App. (1st) 150175-UI, 2016 Ill. Unpub. Lexis 502 **18 (Ill. App. Ct. 1st Mar. 21, 2016) (upholding grant of summary judgment because "[m]ere speculation is not enough to create a genuine issue of material fact sufficient to survive a motion for summary judgment") (quoting *Judge-Zeit v.*

General Parking Corp., 376 Ill. App. 3d 573, 584 (Ill. App. 2007)). As explained in detail below, the "disputes" MWG alleges are little more than smoke and mirrors.

In addition, MWG alleges that there is a question as to whether MWG knew of coal ash contamination in groundwater when it purchased the plants. The document MWG cites in support of that statement in fact does not support it, but even if it did, MWG's knowledge of coal ash contamination at that time is immaterial to liability. Accordingly, there are no genuine disputes of material fact in this case.

i. MWG's assertions concerning Former Slag/Fly Ash Storage Area at Waukegan, the NE Ash Landfill at Joliet 29, and several Historic Ash Areas at Will County do not create a dispute of fact as to the presence of Historic Coal Ash in those areas.

MWG alleges that there is a question as to whether certain Historic Ash Areas – including the Former Slag/Fly Ash Storage Area at Waukegan, the NE Ash Landfill at Joliet, and the Spent Slurry Pond at Will County – actually contain coal ash. However, nothing that MWG points to in support of such "disputes" defeats summary judgment.

The record contains abundant evidence that there is coal ash in the Former Slag/Fly Ash Storage Area at Waukegan. That area is labeled "Former Slag/Fly Ash Storage Area" in the Environmental Site Assessment done for MWG when they purchased the plant in the late 1990s. *See* Citizen Groups' Ex. A2 at MWG13-15_45814; MWG Response Brief, App. A, Response to SOF 61. MWG witness Frederick Veenbaas, a longtime employee at the Waukegan plant, testified that he has seen pictures of ash being stored there. Citizen Groups' Ex. E6, Veenbaas Dep. Tr. at 72:10-21 and 73:3-10. Longtime MWG employee Maria Race testified that she had seen borings showing ash in that area. Citizen Groups' Ex. E4, Race Dep Tr. at 89:6-89:13; MWG Response Brief, App. A, Response to SOF 64. And MWG's consultant, Patrick Engineering, informed MWG that contamination in groundwater monitoring well 5 at Waukegan

"appear to be the result of the well being installed in a former ash disposal area…." *Id.*, App. A, Response to SOF 65; Citizen Groups' Ex. M, at MWG13-15_14167.

To support its assertion that there is a dispute re the presence of ash in the Former Slag/Fly Ash Disposal Area at Waukegan, MWG points to the testimony of two people – Ms. Race and Patrick Engineering employee Richard Frendt. However, neither Ms. Race nor Mr. Frendt testified that ash is <u>not</u> present in that area. Rather, both simply testified that they did not know whether there was ash there. Citizen Groups' Ex. E4, Race Dep. Tr. at 86:19-89:19; Citizen Groups' Ex. E7, Frendt Dep. Tr. at 97:5-6. Testimony concerning the lack of knowledge about a fact does not suffice to create a genuine dispute regarding that fact. *Steiner Elec. Co. v. NuLine Techs.*, 364 Ill. App. 3d 876, 847 N.E.2d 656, 661 (Ill. App. Ct. 1st Dist. 2006) (holding that a lack of knowledge cannot be used to create a question of fact on summary judgment). At best, the testimony of Ms. Race and Mr. Frendt suggests that there might be an issue of fact as to the presence of ash in the Former Slag/Fly Ash Storage Area at Waukegan, and a mere suggestion that there may be a dispute without any supporting evidence does not defeat summary judgment. *In re Marriage of Palacios*, 275 Ill. App. 3d at 568.

MWG's assertion that there is a dispute of fact concerning the presence of ash in the NE Ash Landfill at Joliet 29 is equally flawed. Again, there is strong evidence that ash is present in that area. MWG does not dispute that a 1995 memo in MWG's possession noted that "In 1992, the abandoned ash landfill area located east of Joliet 29 was identified as a possible stormwater discharge point, primarily due to exposed ash products." MWG Response Brief, App. A, Response to SOF 30; Citizen Groups' Ex. C12 at MWG13-15_25370. The NE Ash Landfill is labeled as "Ash Landfill" in the Environmental Site Assessment for Joliet 29 that was completed for MWG when it purchased the plant. MWG Response Brief, App. A., Response to SOF 87;

Citizen Groups' Ex.C3 at MWG13-15_23339. And a recent – 2009 – document authored by MWG consultant KPRG states that KPRG:

> completed a walk-over inspection of the former ash burial area on the northeast side of the Joliet #29 property…. on August 24th and 25th, 2009. The purpose of the inspection was to identify any erosional features that may expose the underlying buried ash/slag and channel runoff toward the Des Plaines River which is immediately south of this area. It is noted that the ash burial area also extends to the west to within the fenced portion of the Joliet #29 facility. This portion of the former ash burial area was inspected by Midwest Generation and KPRG on July 14, 2009.

Citizen Groups' Ex. C4 at MWG13-15_19442 (emphasis added). KPRG went on to say:

> Area 6 is located within the fenced boundary of the Joliet #29 facility, approximately 500 feet west of Area 5. As noted above, this area was inspected during a site meeting with Midwest Generation on July 14, 2009. Similar to Area 5, this is an area of sheet wash which has eroded most of the cover and has exposed ash/slag along the side of the bank. The area of ash exposure is about 50 feet wide and extends from the top of the slope to the fiver water interface."

Id. at MWG13-15_19444 (emphasis added).

To contest that clear evidence of the presence of ash in the NE Ash Landfill, MWG states that it "has no current information that ash is actually located in that area" and cites the testimony of MWG employee James DiCola, who, like Ms. Race and Mr. Frendt, "did not know" if there was ash in the NE Landfill. MWG Response Brief, App. A., Response to SOF 7. MWG's attempt to create a dispute of fact comes up short. Mr. DiCola's lack of knowledge concerning the NE Ash Landfill does not create a dispute of material fact about the presence of ash there, *see Steiner*, 847 N.E.2d at 661, and MWG's lack of knowledge regarding the current presence of ash in the landfill is, at most, speculation that there might no longer be ash there (even though it was found as recently as 2009 by MWG's own consultant). Such speculation does not suffice to defeat summary judgment. *See U.S. Bank v. Blachaniec*, 2016 Ill. Unpub. Lexis 502 **18 (Ill. App. Ct. 1st Mar. 21, 2016); *Judge-Zeit.,* 376 Ill. App. 3d at 584; *Sorce,* 309 Ill. App. 3d at 328.

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Finally, in an attempt to cast doubt on the clear evidence that coal ash is present in the Spent Slurry Pond, the South Area Runoff Basin, and the Slag and Bottom Ash Dumping Area at Will County, MWG goes so far as to discredit its own response to the U.S. EPA Information Collection Request (ICR). *See, e.g.*, MWG Response Brief, App. A, Response to SOF 5, 17, 20, 75, 81, 84, and 105 ("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"). It is troubling, to say the least, that MWG disavows statements that it made to the federal government about potential sources of pollution at its plants.

Setting that aside, we note that MWG has only identified two possible mistakes in the ICR response, neither of which pertains to the coal ash areas at issue in Citizen Groups' Motion. First, MWG cites the deposition testimony of Maria Race, [redacted] The "coal pile runoff basin" at Waukegan is not at issue in Citizen Groups' Motion. *See, e.g.*, Memo at 4-5, listing "Historic Coal Ash" repositories at Waukegan. Second, MWG cites the deposition testimony of Mark Kelly, [redacted] Citizen Groups' Ex. E1, Kelly Dep. Tr. 69:24-70:3. The "east yard runoff basin" is specifically excluded from the areas at issue in the Motion. *See* Memo at fn. 3.

Even though neither Ms. Race nor Mr. Kelly made any reference to specific errors in the ICR concerning the Spent Slurry Pond, the South Area Runoff Basin, and the Slag and Bottom Ash Dumping Area at Will County, MWG repeatedly cites their testimony in an attempt to discredit the entire 1,638-page ICR response as unreliable, and to purportedly create an issue of

fact with regard to the presence of ash in those areas. *See, e.g.*, MWG Response Brief, App. A., Response to SOF 5, 17, 20, 75, 81, 84, and 105. Their testimony does no such thing. At best, their testimony creates speculation that an issue of fact might exist, and that does not suffice to defeat summary judgment. *See In re Marriage of Palacios*, 275 Ill. App. 3d at 568.

Aside from the ICR response, the only evidence that MWG provides to show a "dispute" concerning the presence of ash in the above-described areas at Will County is deposition testimony in which the deponents expressed a lack of knowledge about the contents of various areas. *See, e.g.*, [redacted] As noted above, a lack of knowledge concerning a fact does not suffice to put that fact in dispute. *Steiner*, 847 N.E.2d at 661.

In sum, MWG has provided no evidence that suffices to create a genuine dispute regarding the presence of coal ash in the Former Slag/Fly Ash Storage Area at Waukegan, the NE Ash Landfill at Joliet, or the Spent Slurry Pond, the South Area Runoff Basin, and the Slag and Bottom Ash Dumping Area at Will County.

ii. There is no Real Dispute that Coal Ash Constituents are in the Groundwater at the Plants.

MWG's suggestion that there are genuine issues of fact relating to coal ash indicators and constituents is incorrect. First, MWG argues that "[t]he Parties' experts do not agree on the indicator constituents for coal ash." Resp. at 18. This is misleading. As discussed above, there is no dispute that boron, sulfate and manganese are good indicators of coal ash (*see* MWG Response Brief, App. A, Response to SOF 36-38), nor is there any dispute that those indicators are present in the groundwater at all four sites. *See id.*, App. A, Response to SOF 39, 53-56.

There is further no genuine dispute that coal ash produces many other contaminants and that several of those contaminants are in the groundwater at the Plants. Although MWG

complains that Citizen Groups "do not explicitly limit their discussions of coal ash constituents to boron, manganese and sulfate," *id*. at 18, those indicator constituents are only a subset of the long list of constituents of coal ash, as MWG acknowledges. *See id.*, App. A, Response to SOF 36-38 (stating that boron, sulfate and manganese are "one of the many indicators of coal ash in groundwater"). In his report, MWG's expert identified not only boron, sulfate, and manganese, but also antimony, arsenic, barium, beryllium, cadmium, chromium, cobalt, copper, iron, lead, mercury, nickel, selenium, thallium, and zinc in coal ash leachate. Motion Ex. E5, Seymour Depo Tr. at 80:1-18; Ex. G at Table 5-3. Coal ash contamination can therefore include both indicator constituents and other constituents of coal ash. There is no dispute that the indicator pollutants boron, sulfate and manganese, as well as several other coal ash constituents identified by MWG's expert – namely, antimony, arsenic, iron, selenium and thallium – are in the groundwater at the plants in this case. *See id.*, App. A., Response to SOF 36-38 and 53-56 (noting that the quarterly and annual groundwater monitoring reports for the four sites, which show the presence of antimony, arsenic, boron, iron, manganese, selenium, sulfate, and thallium, "exist and reflect results of the groundwater analysis" at the Plants). The fact that Citizen Groups discuss all of the contamination that may be related to coal ash, and not just the indicator constituents, is entirely reasonable and does not present a factual dispute.

iii. MWG's assertions that Historic Coal Ash is not a source of groundwater contamination do not suffice to create an issue of fact.

MWG attempts to dispute that Historic Ash Areas are a source of the groundwater contamination. MWG Response Brief at 29-31. In support, MWG relies on certain statements from the report of its expert, John Seymour. *Id*. at 29. However, in his sworn deposition testimony, Seymour states that Historic Coal Ash is a source of contamination at all four plants. This apparent contradiction is also resolved in Seymour's deposition testimony: As described in

more detail below, Seymour's conclusions hinge on whether an area has been "tested" with a leach test. Three areas were tested in this way, and Seymour does not believe that the ash in these areas is causing contamination.[5] This leads him to conclude that the contamination is coming from the remaining historic ash areas.

Regarding Waukegan, Mr. Seymour testified that historic uses of coal ash have contributed to the groundwater contamination:

> …I'm saying that the boron – some of the boron, not all of it could be coming from the offsite property. Q: Where does the remainder of the boron come from in your opinion? … A: As I've stated in the report, I believe there are some historical uses at these properties that have caused some old releases. … I know that it's not coming from what we've measured, but it must be coming from somewhere else onsite that I've not specifically identified. Q: So, to be clear, for your prior answer, you were saying that some of the boron you're alleging is coming from this offsite property, this tannery, but not all of the boron that's found in the monitoring wells at issue here is coming from the tannery. Is that accurate? A: That's accurate, considering there are other characteristics of coal ash that aren't characteristic of a tannery.

Citizen Groups' Ex. E5, Seymour Dep. Tr. 58:9- 59:13 (emphasis added). Where Seymour refers to "what we've measured," it is important to note that the only leach test data for Waukegan are from the ash ponds; no ash disposal areas outside of the ash ponds were subjected to leach testing. Citizen Groups' Ex. G, pp. 41, 46-48. "Somewhere else" must therefore be any or all of the Historic Ash Areas at Waukegan.

Regarding Powerton, Mr. Seymour testified "[t]he inorganics that are in the groundwater are characteristic of coal ash materials," Citizen Groups' Ex. E5, Seymour Dep. 46:17-18, and that historic uses of coal ash have caused the contamination:

> Q: Do you allege that the contamination in the groundwater at Powerton is resulting from historical uses at the site? A: Yes. … [T]hat is my opinion, that it's something other than the ponds and other than the ash that we've sampled and analyzed. Q: What specific historical uses at the Powerton site do you allege

[5] Citizen Groups question the validity of these leach tests, but excluded these three areas from the Motion in recognition that they may present a genuine factual dispute.

> contributed to the GW contamination at that site? A: 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.

Id. at 48:3-20 (emphasis added). Here, "what we've sampled and analyzed" includes material in the ash ponds and in the limestone runoff basin. Citizen Groups' Ex. G, pp. 41, 47-48. The "something other" must therefore be any or all of the Historic Ash Areas at Powerton.

Regarding Joliet, Mr. Seymour testified: "I know there are historic uses of ash that they've used that may be causing these – contamination to exist." Citizen Groups' Ex. E5, Seymour Dep. Tr. 38:13-15. Seymour went on to say "…looking at it by process of elimination, what we've seen out there so far doesn't appear to be an active source. So it must be from some other historic use." *Id*. at 41:2-5. The only area at Joliet 29 subjected to leach tests, other than the ash ponds, was the "former ash placement area." Citizen Groups' Ex. G, p. 46, citing Citizen Groups' Ex. C2; Citizen Groups' Ex. C2 at MWG13-15_19495. This area was specifically excluded from the Historic Ash Areas as defined by Citizen Groups. Motion at FN 3. The "other historic use" must therefore be any or all of the Historic Ash Areas at Joliet 29.

Regarding Will County, Mr. Seymour testified that historic uses of coal ash have caused the contamination.

> Q: Can you tell me what historic uses at Will County you allege are the sources of groundwater contamination at that site? A: It would be the same as Powerton … I'm dealing with what I know, and what I know versus what I don't know. Q: And you said that you knowledge of historic uses at coal plants of placing ash in an uncontained manner comes from discussions with the operators in part; is that accurate? A: In part, yes. Q: What else does it come from, if not only from that? A: The ENSR documents, documents where some coal ash has been placed…

Seymour Dep. Tr. 54:24-55:16. The leach test data for Will County came from a small area that Citizen Groups specifically excluded from their definition of Historic ash Areas. Citizen Groups' Ex. G, p. 48, citing Citizen Groups' Ex. B2; Citizen Groups' Ex. B2 at MWG13-15_49569;

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Motion at FN 3. The other historic uses must therefore be any or all of the Historic Ash Areas at Will County.

To summarize, MWG's expert acknowledges that groundwater contains constituents of coal ash, *see, e.g.*, Citizen Groups' Ex. E5, Seymour Dep. 46:17-18, but believes that the constituents are not coming from areas for which he has leach test data; by process of elimination, he concludes that they are coming from other historic coal ash deposits[6] – precisely the same areas defined by Citizen Groups as Historic Ash Areas in their Motion.

MWG relies almost exclusively on statements from Mr. Seymour's expert report in attempting to create a disputed issue of material fact as to whether Historic Ash Areas are contributing to the groundwater contamination. MWG Response Brief at 15-16. That attempt fails for several reasons.

First, conclusory statements in Mr. Seymour's report do not suffice to create a genuine dispute of material fact. *See Northrup v. Lopatka*, 610 N.E.2d 806, 812 (Ill. App. Ct. 1993) ("Affidavits submitted in opposition to motions for summary judgment must consist of facts admissible in evidence as opposed to conclusions, and conclusory matters may not be considered in opposition to motions for summary judgment"); *Landeros v. Equity Property and Development*, 747 N.E.2d 391, 397 (Ill. App. Ct. 2001) (affidavit submitted in opposition to summary judgment stricken when it did not include facts or evidence on which expert relied in

[6] Mr. Seymour also explained where his knowledge of historic coal ash practices comes from, in particular the practice of disposing of the coal ash on site in an uncontained manner.

> Q And you said that your knowledge of historic uses at coal plants of placing ash in an uncontained manner comes from discussions with the operators in part; is that accurate? A In part, yes. Q What else does it come from, if not only from that? A The ENSR documents, documents where some coal ash has been placed, of course, and some areas that have been reused for previous waste -- excuse me -- ash placement on a temporary basis. My experience, going to power plants and seeing how ash is handled historically. I've been going there for ten years or more now.

Citizen Groups' Ex. E5, Seymour Dep. Tr. 55:8-21.

reaching his conclusion). While Seymour's report states that "historical ash in fill materials outside of the ponds is not adversely impacting groundwater," Citizen Groups' Ex. G, p. 45, the factual support for that statement consists only of leach tests from three discrete areas outside of the ash ponds. *Id*. at 45-48. There were no leach tests of the Historic Ash Areas included in the Motion (*see* MWG Response Brief, App. A., Response to SOF at 24, 25, 27, 31), and there is no other evidence that those areas are not leaching. Except for the three discrete leach-tested areas, then, the report's general, broad statement that historic ash outside the ponds is not impacting groundwater is therefore a conclusory statement without evidentiary support that does not create a dispute of fact. Indeed, Seymour later clarified in his deposition that his conclusions concerning historic ash are in fact limited to "the ash that we've sampled and analyzed." Citizen Groups' Ex. E5, Seymour Dep. Tr. 48:11.

Second, Mr. Seymour's deposition testimony is clear and unequivocal about the fact that the historic coal ash deposits are causing or contributing to the groundwater contamination, leaving no room for contradictory statements—particularly earlier ones that were not made under oath and are unsupported by the evidence—to create issues of fact. *See Schmahl v. A.V.C. Enterprises, Inc.*, 499 N.E.2d 572, 577 (1986) ("[A] party may not create a genuine issue of material fact by taking contradictory positions"); *Adelman-Tremblay v. Jewel Cos*., 859 F.2d 517, 521 (7th Cir. 1988) (stating that summary judgment objectives – "to weed out unfounded claims, specious denials, and sham defenses"– are served by preventing a party from creating issues of credibility through its witnesses contradicting their own testimony).

The *Adelman-Tremblay* case has been relied upon by Illinois courts as the first case to apply "the rule against creating 'sham' issues" to testimony by a party's expert. 859 F.2d at 521

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cited in Tongate v. Wyeth Labs., 580 N.E.2d 1220, 1227 (Ill. App. Ct. 1st 1991).[7] In *Adelman-Tremblay*, the plaintiff suffered injuries from use of the defendants' products. 859 F.2d at 519. The plaintiff's medical expert, Dr. Hogan, initially testified in deposition that the plaintiff's injuries were caused by a toxic, not an allergic, reaction to the product. *Id*. In a later affidavit filed by the defendant, Dr. Hogan contradicted his previous testimony and said that he no longer believed that the plaintiff suffered a toxic reaction, instead believing that the plaintiff suffered from an extremely rare allergic reaction. *Id*. On the basis of these contradictory statements, the plaintiff opposed summary judgment, claiming that a question of fact remained. *Id*. The Court found that Dr. Hogan's deposition testimony was unequivocal and that plaintiff's use of the contradictory affidavit was a clear attempt to create a sham issue of fact and resuscitate her claim that the product was toxic. *Id*. at 520-21. Accordingly, the Court found no genuine issue of fact as to the cause of plaintiff's injuries. *Id*.

Similarly, in the present case, MWG is attempting to resurrect its claim that Historic Coal Ash is not a source of contamination by pointing to Mr. Seymour's unsworn, unsupported and conclusory statements in his report that "historical ash in fill materials outside of the ash ponds is [not] a source of groundwater impacts." MWG Response Brief at 16, citing Citizen Groups' Ex. G at 52. In his deposition, Mr. Seymour testified repeatedly that historical uses of the properties as coal plants – particularly historic coal ash disposed of at those plants – was a cause of the groundwater contamination. *See* Citizen Groups' Ex. E5, Seymour Dep. Tr. 38:13-15, 48:3-20,

[7] While the rule against creating sham issues is frequently applied in the context of affidavits from a deponent contradicting earlier deposition testimony, that is a distinction without a difference. The goal is to prevent a party from creating sham issues of fact for purposes of defeating summary judgment by contradicting deposition testimony that is clear and unequivocal. *Adelman-Tremblay*, 859 F.2d at 521. That same purpose is served in the present case, especially since Mr. Seymour's testimony is clear, unequivocal, and under oath as compared to his earlier, unsworn expert report.

54:24-55:21, 58:13-59:13. MWG may not create a sham issue of fact by pointing to contradictory statements from Mr. Seymour's report that he himself, under oath, discredited.

In a nutshell, the unsworn, conclusory, and unsupported statements from Seymour's expert report – statements contradicted by his sworn deposition testimony – do not suffice to establish a genuine issue of material fact.

Next, MWG argues that Citizen Groups' expert, James Kunkel, "could not opine whether the Historic Ash Areas are or are not a source." MWG Response Brief at 17. This is false. In fact, Kunkel was very clear that the Historic Ash Areas are a contributing cause of groundwater contamination at all four plants:

> Q: Now, you are not suggesting the presence of historic ash is causing – A: Yes, I am, completely. Q: Okay. Okay. A: The mere presence is part of the problem at all of the sites. Q: And that would mean at any site that contains coal ash, you would have the same opinion? A: Where it was used as a construction material or a leveling material, and it's, yes, absolutely available for leaching.

Kunkel Tr., attached hereto in relevant part as Ex.1, at 123:10-21. Kunkel's statements regarding the difficulty of attributing coal ash contamination in groundwater to any one coal ash deposit (*see, e.g.*, MWG Response Brief at 17), do not affect his conclusion, nor do they rule out any coal ash deposit as a source.

There is no dispute between the two parties' experts – Historic Coal Ash is a cause of the groundwater contamination at all four plants.

iv. <u>There is no real dispute that MWG did not take the necessary precautions to prevent the Historic Coal Ash from leaching</u>.

MWG suggests that there is an issue of fact with regard to its knowledge of coal ash contamination of groundwater at the time it purchased the plants. Specifically, MWG asserts that, prior to purchasing the coal plants, it had "affirmative knowledge that there was no groundwater contamination related to coal ash." MWG Response Brief at 43; *see also id*. at 21 –

26. There are several problems with this highly misleading statement. To begin with, the evidence that MWG relies on simply does not support it. The Environmental Site Assessments ("assessments") that MWG cites and the corresponding groundwater monitoring program did not measure the coal ash indicators boron, sulfate, and manganese, *see, e.g.*, Motion Ex. A2, MWG13-15_45811 ("Groundwater Sampling"), nor were groundwater monitoring wells placed near known coal ash deposits such as the "former slag/fly ash storage area" at Waukegan. *See id*. at MWG13-15_45817 (soil boring/monitoring well site plan).

Moreover, even if the assessments did conclusively show no groundwater contamination from coal ash at the time of purchase, that "fact" is immaterial. It is undisputed that MWG was aware that there was coal ash in the ground at the plants at the time of purchase. MWG Response Brief at 2; *see also* Memo, SOF 61, 74, 88, and 100; MWG therefore had the obligation to continue to investigate any contamination from that ash, and, if it found any, to take measures to prevent further contamination. It did not do so. As discussed below in section IV.a, MWG's failure to investigate the contamination from the coal ash is, standing alone, enough to establish liability for violations of 12(a).

MWG's knowledge of groundwater contamination stemming from coal ash at the time it purchased the plants is likewise irrelevant because coal ash contamination did became clear later, starting in 2010 when MWG began measuring coal ash indicators in groundwater. *See, e.g.,* Memo Exs. A9, B10, C9 and D16 (2011 Annual Groundwater Monitoring Reports for all four plants, containing data from 2010 and 2011) and MWG Response Brief, App. A., Response to SOF 53-56 (acknowledging that those reports "reflect results" of the groundwater analysis at the four plants). MWG has had repeated notice of the presence of coal ash contamination in the groundwater at the plants since 2010, including the results of the groundwater monitoring

analyses at the plants, the 2012 violation notices from Illinois EPA (Memo Exs. A5, B5, C5 and D11), and information from its own consultants. At Waukegan, for example, a MWG consultant told the company that "the elevated concentrations of compounds of interest in [Waukegan well] MW-5 appear to be the result of the well being installed in a former ash disposal area." Memo Ex. M., p. MWG13-14_14167. At Powerton, another MWG consultant noted that three monitoring wells were "within an area of impacted groundwater from historical ash-related handling activities." Memo Ex. D19, p. MWG13-15_9645. In sum, even if MWG had reason to believe that there was no coal ash contamination before the plants were purchased (as discussed herein, it did not), the company learned otherwise as soon as groundwater monitoring began.

In short, MWG was aware of subsurface coal ash deposits when it purchased the coal plants, and although it did not investigate the potential groundwater contamination from ash at that time, it was subsequently notified on multiple occasions that groundwater at the sites was contaminated by coal ash. And yet, as discussed above, it is undisputed that MWG did not take precautions to prevent contamination from Historic Ash Areas. *See* MWG Response Brief, App. A., Response to SOF 68-73 (Waukegan), 78-86 (Will County), 90-98 (Joliet 29), and 105-11 (Powerton). At no time did MWG have evidence that there was "no groundwater contamination related to coal ash," but even if MWG had possessed such evidence, whether MWG knew of groundwater contamination from coal ash at the time it purchased the plants is of no moment.

IV. Given the Facts Above, MWG Is Liable for Repeatedly Violating the Illinois Environmental Protection Act.

a. MWG is liable for 12(a) violations.

MWG makes several arguments in an attempt to escape liability for allowing groundwater contamination at the four plants, none of which withstand scrutiny. First, MWG suggests that where the source of the contamination is unknown, liability should not attach.

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MWG Response Brief at 29. Second, MWG argues that Historic Coal Ash has been present at the Plants since before MWG acquired them, implying that this fact absolves them of liability. *Id*. at 36. Third, MWG suggests that environmental assessments completed when it purchased the plants absolve it of liability because those analyses purportedly did not show groundwater contamination at the plants. *Id*. MWG is wrong on all counts.

MWG first attempts to circumvent liability for violations of 12(a) of the Act by arguing that, where the source of the contamination is unknown, liability should not attach. MWG Response Brief at 29. Here, however, the source of contamination is not unknown, as discussed in great detail above. The facts clearly show that Historic Ash Areas are a source of the groundwater contamination, and Citizen Groups need not establish more than that.

Section 12(a) of the Illinois Environmental Protection Act ("Act") provides that "No person shall... [c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, *either alone or in combination with matter from other sources....*" 415 ILCS 5/12(a) (emphasis added). Since the source of the contamination can be in combination with other sources, Citizen Groups need not show that Historic Ash Areas are the sole source of contamination at each Plant in order to establish MWG's liability. *See, e.g.*, *People v. Inverse Investments*, PCB 11-79, 2012 Ill. Env. Lexis 92, *27 (PCB Feb. 16, 2012) ("The People have alleged that Inverse is the owner of a Site containing contamination that is migrating offsite and polluting groundwater. That others might also be liable does not defeat the People's allegations in this complaint"). Citizen Groups can establish, and as shown above have established, that Historic Ash Areas are a contributing source of the groundwater contamination.

The cases cited by MWG are distinguishable. MWG Response Brief at 29-31. In *Harold*

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Craig and Robert Craig v. IPCB, 59 Ill. App. 3d 65 (4th Dist. 1978), it was undisputed that there was an animal manure release from Respondents' farm and it was undisputed that there was a fish kill. *Id*. at 66. However, the bacteria in the vicinity of the fish kill were from human waste. *Id*. at 68. Thus a conclusion that the animal waste release from the Respondents' farm caused or contributed to the fish kill was not supported by the evidence. *Id*. In the present case, Citizens Groups can show, and have shown, that Historic Ash Areas are one of the contributing sources of the groundwater contamination.

Similarly, in *Lonza v. IPCB*, there were two separate and independent facilities that were potential sources of the air pollution in the form of odors. 21 Ill. App. 3d 468, 469 (3rd Dist. 1974). The testimony failed to establish that *Lonza* was contributing even in small part to the air pollution. *Id*. at 473-75. There was no discussion in the *Lonza* case of any "indicators" that could link the odors to one facility or the other, nor was there any evidence showing that either facility was contributing to the odors. *Id*. at 473-75. Here, in contrast, the evidence – including the sworn testimony of MWG's own expert – shows that the Historic Ash Areas are contributing to the groundwater contamination present at all four plants.

MWG next attempts to avoid liability by claiming that Historic Coal Ash has been present at the Plants since before MWG acquired them. Citing testimony by Mr. Seymour that the Powerton plant "is over 50 years old," MWG argues that historic uses of the plant date back that far, while MWG did not own the plant until 1999. MWG Response Brief at 16. This is immaterial. Exactly when Historic Coal Ash was placed at the four Plants has no bearing on MWG's liability.[8] What matters is that MWG is the current owner/operator, with control over the

[8] MWG points to Seymour's statement that in looking at groundwater contamination, "there so far doesn't appear to be an active source. So it must be from some other historic use." MWG Response Brief at 16 (citing Seymour Dep. Tr. At 41:2-5). MWG also points out that Seymour stated that the Powerton plant "is over 50 years old." *Id*. at 16 (citing Seymour Dep. Tr. 38:1). While MWG apparently assumes that Mr. Seymour was referring to uses over 50

four sites and control over the sources of ongoing contamination – in this case the Historic Coal Ash – and that MWG has allowed the leaching of coal ash contaminants to continue. *See Gonzalez v. Pollution Control Bd.*, 960 N.E.2d 772 (Ill. App. First Dist. 2011). "[A] respondent with control over a site may be found in violation even if the respondent did not actively dispose of contaminants at the site." *People v. Michel Grain*, PCB No. 96-143, 2002 Ill. Env. Lexis 489, at *7 (Aug. 22, 2002). In sum, regardless of whether the Historic Coal Ash was placed at the Plants before MWG's acquired them, that ash continues to pollute the groundwater and MWG has control over it. It is therefore MWG's responsibility to investigate and stop the pollution. If MWG chooses not to do so – which is the case here – it allows that pollution to continue and is thus liable under § 12(a) of the Act.

Finally, MWG suggests that environmental assessments completed when it purchased the Plants absolve it of liability because those analyses purportedly did not show groundwater contamination at the plants. This argument likewise fails. To begin with, MWG's claim that the environmental assessments showed "no groundwater contamination related to coal ash" (MWG Response Brief at 21 – 26, 43) is disingenuous. As discussed above, a closer look reveals that those environmental assessments were not targeted at coal ash contamination. *See, e.g.*, *supra*, section III.b.iv; Motion Ex. A2, MWG13-15_45811 ("Groundwater Sampling"). Thus, they did not inform MWG one way or another as to the presence of coal ash contamination. But even if MWG had investigated the possibility of coal ash contamination at the time of purchase, it is of no import: since 2010, there has been plentiful evidence of groundwater contamination from coal ash. *See supra* section III.b.iv. Moreover, the intent of a party to violate, or not violate, the Act is

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years ago (*id.*), Mr. Seymour did not state this. When Mr. Seymour specified historic uses, he did not define historic uses with any time period or indicate that he was referring to uses from over 50 years ago. Seymour simply drew a distinction between current uses and historic uses when discussing the source of the coal ash contamination: "I'm thinking something old and historic, but not something current." Memo Ex. E5, Seymour Dep. Tr. 47:3-4.

irrelevant to liability. *People v. Fiorini*, 143 Ill. 2d 318, 346 (1991) ("[I]ntent is not an element to be proven for a violation under Illinois Environmental Protection Act").

What is both clear and relevant is that MWG was aware that a leachable waste – namely, historic coal ash – was present at the Plants, yet did nothing to either remove or contain the ash, or even to perform targeted groundwater monitoring to evaluate the extent of leaching from that ash. *See* MWG Response Brief at 2 and App. A, Response to SOF 68-73 (Waukegan), 78-86 (Will County), 90-98 (Joliet 29), and 105-11 (Powerton). Illinois precedent holds that a party with control over the premises or source of pollution cannot avoid liability unless that party has taken "extensive precautions" to prevent the pollution. *See, e.g., Gonzalez*, 960 N.E.2d at 779; *Perkinson*, 187 Ill. App. 3d at 694-95. Since MWG was aware of leachable waste that can cause groundwater contamination, and as of 2010 aware of actual groundwater contamination, it could not sit idly by and take no action. Yet that is exactly what it did. MWG did not remove the Historic Coal Ash; it did not install liners under the ash to prevent groundwater from rising into it or leachate from percolating through it; and it did not installed impermeable caps over it to prevent precipitation from leaching through it. The failure to take those actions makes MWG liable for groundwater contamination under 12(a) of the Act. *See Gonzalez.*, 960 N.E.2d at 779 (holding that Respondent did not take sufficient precautions to prevent contamination when Respondent was aware of a source of contamination on its property but did not remove that source); *Wasteland, Inc. v. Pollution Control Bd.*, 118 Ill. App. 3d 1041, 1049 (Ill. App. 3rd 1983) (When a material that is likely to leach was present, and Respondent controlled the source of pollution but failed to install liners to retain leachate or monitoring wells "built to track" contamination, Respondent did not take sufficient precautions to avoid liability under § 12(a)).

A separate, independent basis for 12(a) liability is found in the fact that MWG did not

even conduct groundwater monitoring specifically designed to evaluate the extent of contamination from those Historic Ash Areas. *See, e.g.,* MWG Response Brief, App. A., Response to SOF 79 and 90). *See People v. ESG Watts*, PCB 96-233, Slip Op. at 2, 1998 Ill. Env. Lexis 43, *4-5 (Feb. 5, 1998) (holding Respondent landfill operator liable for threatening a discharge which would tend to cause water pollution under 12(a) when it knew the landfill contained leachable waste but failed, for three years, to conduct groundwater monitoring to detect contamination from that waste). If MWG had investigated whether Historic Coal Ash was contributing to groundwater contamination from the outset, it could have identified that contamination, and potentially acted to control it, years ago.

In summary, none of MWG's attempts to wriggle out of liability for 12(a) violations succeed. As the owner/operator of the four plants, MWG controls an undisputed source of the groundwater pollution: the Historic Ash Areas. And, although MWG was aware that coal ash was on its properties as early as 1998, and aware of groundwater contamination as early as 2010, MWG has not taken precautions to prevent that ash from leaching into and contaminating groundwater at the plants. Accordingly, MWG is liable for violations of 12(a) at all four plants.

b. **MWG is liable for open dumping violations**.

In its response to Citizen Groups' Open Dumping claims, MWG misconstrues several aspects of the relevant case law and site history, and demonstrates the same disregard for the law of this case that it accuses Citizen Groups of demonstrating. MWG has violated the Act's open dumping provisions for some of the same reasons explained above: it controlled the sites where historic coal ash contributed to groundwater pollution and took no precautions to stop it. Citizen Groups offer the following corrections to MWG's misrepresentations in its response brief.

i. Citizen Groups Have Not Violated the Law of the Case Doctrine Because They Are Not Asserting Violations of Federal Law

MWG first attempts to discredit Citizen Groups' use of definitions laid out in the Resource Conservation and Recovery Act (RCRA) in determining whether any of the coal ash impoundments at issue qualify as a "sanitary landfill" under the Act. In so doing, MWG relies on a fundamental mischaracterization of Citizen Groups' arguments and the law of this case. MWG is correct that the Law of the Case Doctrine "bars re-litigation of an issue previously decided in the same case," MWG Response Brief at 45, *citing Krautsack v. Anderson*, 223 Ill. 2d 541, 552, 861 N.E.2d 633, 642 (2006). However, the October 3, 2013 Board opinion explicitly supports Citizen Groups' use of RCRA definitions when, as here, compliance with state law terms that explicitly reference RCRA is at issue. In particular, MWG cites to page 24 of the Board's Order for the proposition that violations of federal regulations may not be enforced under state laws. Again, Citizen Groups agree that this was the ruling in that Order. But on the very next page, the Board made clear that it "does not, however, exclude the possibility that an exceedance of the MCLs at one or more power plants may be evidence tending to show a violation of Section 21(a) of the Act." *Id.* at 25. This describes exactly what Citizen Groups have done here: Citizen Groups are referencing MCL (and by extension RCRA) violations only as part of the scope of evidence that demonstrates that the coal ash impoundments at issue do not qualify as "sanitary landfills," and therefore that MWG violated the open dumping provisions at Section 21(a) of the Act. MWG already tried to remove all references to RCRA, and they lost per the October 3, 2013 Order. In attempting to preclude Citizen Groups from using this evidence for a second time, MWG is itself contravening the Board's Order.

ii. <u>MWG Provides No Competent Evidence That Historic Coal Ash is Not Waste.</u>

MWG continues to argue that coal ash is not a waste, even after losing on this issue in the

same October 3 Board opinion. In that opinion, after thoroughly examining Citizen Groups' allegations (all of which have now been supported by facts in the record, in Citizen Groups' main brief), the Board concluded that those allegations were sufficient to establish that the historic ash areas at Powerton, Waukegan, and Will County qualify as waste disposal sites within the meaning of Section 21(a), noting that "an area on which waste is deposited can be a 'disposal site' if the waste deposition is conducted in a manner that allows waste material to enter the environment, including groundwater." *Id.* at 26. Citizen Groups established in their initial brief that this is the case, and MWG did not introduce any evidence that suffices to create a dispute concerning the presence of coal ash at the various sites in circumstances allowing that coal ash to leach into the groundwater. Coal ash is thus, under the Board's Order, a waste, and the Historic Ash Areas "disposal sites," for the purposes of the Act's open dumping provisions.

Even ignoring the Law of the Case Doctrine, however, MWG does not offer a convincing reason to question that the historic coal ash qualifies as waste under the Act. MWG's main argument against defining the historic coal ash as waste hinges on its claim that the ash has been used as "structural fill." MWG is apparently referencing the following section of the Act:

> [Combustion waste constitutes coal combustion byproducts when it is] 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.

415 ILCS 5/3.135(8). Unpacking that definition, to qualify as structural fill, coal ash must be designed according to a specific ASTM standard or state specifications; and it must be used in an engineering application or combined with another material to produce a fill material at least one foot below ground (with some exceptions).

The record contains no evidence that the coal ash at issue meets the requirements of 415

ILCS 5/3.135(8)*,* so it is MWG's burden to produce some such evidence. *See, e.g., Levine*, 94 Ill. App. 2d at 55 ("one need not prove a negative averment, the burden of proof being on the party who asserts the affirmative"). MWG has not done so. Although MWG alludes to "the record" at large as supporting its assertion that the coal ash qualifies as structural fill, MWG Response Brief at 46, such a vague reference does not satisfy MWG's burden of production. A generic citation to the entire record cannot constitute sufficient evidence to meet one's evidentiary burden at the summary judgment stage, because it does not allow either the trier of fact or the opposing party to review the factual claims. *Rehkemper & Son Bldg. Co. v. Illinois Workers' Comp. Comm'n*, 2015 IL App (5th) 140481WC-U, ¶ 4 fn. 1 ("providing general citations in support of factual assertions . . . leaves a great deal of ambiguity as to what portion of the record is being relied upon. If [the court is] unable to identify where in the record support for a factual claim resides, it is [its] practice to disregard the assertion.").

Moreover, in the instances in which MWG alleges that particular historic coal ash is structural fill, MWG does not present evidence, or even claim, that that coal ash was designed according to an ASTM standard or was used in combination with another material and placed at least a foot below ground. In short, MWG fails to provide any affirmative evidence that the coal ash qualified as structural fill, instead relying solely on conclusory statements describing the ash as such. Conclusory statements do no suffice to create a genuine dispute of material fact. *See, e.g., Northrup*, 610 N.E.2d at 812. For these reasons, MWG has failed to create a genuine dispute of material fact as to whether any Historic Coal Ash meets the requirements set forth in 415 ILCS 5/3.135(8).

Furthermore, even if there were evidence that some historic coal ash qualified as structural fill, MWG would need to prove that *all* of the historic coal ash qualified to avoid

liability on this claim. Because MWG provides no evidence to support their claim that any Historic Ash Areas qualify as structural fill, and therefore do not constitute waste, its argument should be rejected as unsupported by the evidence.

iii. MWG Is Liable for Open Dumping Violations

MWG also restates many of its previous arguments claiming that somehow it should not be held responsible for its management of the four sites over the entire relevant timeline. For the reasons already explained above and in Citizen Groups' Memo, none of these arguments are supported by the facts or the law. Thus, MWG is liable for violations of the open dumping prohibitions of Section 21(a) of the Act.

V. Conclusion

The facts of this case are essentially uncontested. MWG owns or operates four coal plants where historic coal ash is buried in the ground, and coal ash indicator contaminants have been found in every single groundwater monitoring well at all four plants, often in concentrations exceeding Illinois' groundwater standards. Despite knowledge that the historic ash was present at all four sites, MWG has taken no action to prevent that ash from leaching contaminants into the groundwater, nor has it even designed a groundwater monitoring program specifically aimed at detecting contamination from that historic ash. Accordingly, MWG has repeatedly violated both Section 12(a) and Section 21(a) of the Act.

Dated: September 2, 2016

Respectfully submitted,

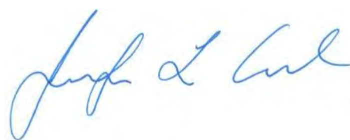

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Exhibit 1: Excerpt of Deposition Testimony of Citizen Groups' Expert James Kunkel

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1 that showed the soil borings because I didn't 11:44:37
2 make that stuff up. 11:44:39
3 Q. So, in fact, you must have had it at 11:44:40
4 the time you wrote this? 11:44:42
5 A. I must have had it at the time I wrote 11:44:43
6 this and it just didn't get into the list. 11:44:44
7 Q. And it is not in your citations either? 11:44:46
8 A. It is not in the citations, and it is 11:44:48
9 incorrectly referenced, that's correct. 11:44:51
10 Q. Now, you are not suggesting the 11:44:52
11 presence of historic ash is causing -- 11:44:55
12 A. Yes, I am, completely. 11:44:58
13 Q. Okay. Okay. 11:44:58
14 A. The mere presence is part of the 11:45:00
15 problem at all of the sites. 11:45:02
16 Q. And that would mean at any site that 11:45:03
17 contains coal ash, you would have the same 11:45:07
18 opinion? 11:45:10
19 A. Where it was used as a construction 11:45:10
20 material or a leveling material, and it's, yes, 11:45:12
21 absolutely available for leaching. 11:45:14
22 Q. Now, you identified all of the areas 11:45:17
23 outside of the ponds that have ash in your 11:45:20
24 Table 6, right? 11:45:23

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ELECTRONIC FILING** and **COMPLAINANTS' REPLY IN SUPPORT OF COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** was served electronically to all parties of record listed below, on September 2, 2016.

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