BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent, Midwest Generation, LLC's Response to Complainants' Post-Hearing Brief, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: August 30, 2018

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service and Respondent, Midwest Generation, LLC's Response to Complainants' Post-Hearing Brief was filed on August 30, 2018 with the following:

Don Brown, 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 emailed on August 30, 2018 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' POST-HEARING BRIEF

Complainants have not met their burden of proving by a preponderance of the evidence that Midwest Generation, LLC ("MWG") caused or allowed water pollution or open dumping. Complainants focus their brief on only one fact, that there are constituents in the groundwater at the MWG Stations. That fact, combined only with Complainants' theories and speculations, is insufficient to find a violation. First, Complainants have not met their burden to establish that bottom ash in the ponds is a source. Complainants make the assertion, but then proceed to ignore MWG's evaluations and investigations of the ash ponds, MWG's actual viewing of the condition of the ash ponds, MWG's sampling of the bottom ash in the ponds (and outside the ponds), and MWG's expert evaluation showing that MWG's ponds are not leaking. MWG has shown through testimony and records that the ponds were always in good condition, before and after MWG's relining projects, and that MWG took extensive precautions to ensure their integrity over the years. Second, Complainants have not met their burden to establish that historic ash outside of the ponds is a cause of water pollution – rather, MWG has shown with data and analysis that the historic ash

outside the ponds is not leaching constituents to groundwater. Further, groundwater monitoring around a known former ash area at the Powerton Station shows no coal ash constituents in groundwater above the Class I groundwater standards. As MWG's evidence and data is unrebutted, Complainants do not meet their burden.

In addition to failing to reach their burden, Complainants cannot establish that MWG caused or allowed water pollution or open dumping. MWG has shown that the groundwater poses no risk, and thus, there is no water pollution. Complainants admit that they cannot determine a source of constituents in groundwater, and without a source to control, MWG did not allow water pollution or open dumping. Moreover, there is no liability because MWG has been diligent, active, and has taken extensive precautions to prevent water pollution and open dumping. Complainants present speculation and theories, but *no evidence* to rebut MWG's facts and conclusions.

The Illinois Pollution Control Board ("Board") has the authority to end this now. As MWG detailed in its Post-Hearing Brief, there is no other reasonable action left to be taken at any of the Stations. MWG's Post-Hearing Brief, pp. 64-67. All of MWG's actions over the years, including its pond relining program, testing of coal ash in ponds and fill areas, implementation of Environmental Land Use Controls ("ELUCs") and Groundwater Management Zones ("GMZs"), cooperation with Illinois Environmental Protection Agency ("Illinois EPA"), and continued monitoring, show that MWG has properly addressed conditions at the Stations to Illinois EPA's satisfaction. It is undisputed that there is no risk from the Stations. In fact, Joliet 29 has no coal ash constituents in groundwater that are above Class 1 standards and Joliet 29 has since converted to natural gas. MWG is complying with requirements of the Federal Coal Combustion Residual ("CCR") Rules at all the Stations. Even if the Board were to find a violation of the Illinois

Environmental Protection Act ("Act"), which it should not, no penalty or other response is warranted, and no further proceedings are warranted.

I. COMPLAINANTS HAVE NOT CARRIED THEIR BURDEN

Complainants have failed to carry their burden to prove by a preponderance of the evidence that there are violations of water pollution or open dumping at the MWG Stations. In an enforcement proceeding, the burden of proof is by a preponderance of the evidence and the complainant has the burden of proving violations of the Act. *Rodney v. Kane County*, PCB 94-244, 1996 Ill. ENV LEXIS 509 (July 18, 1996), *10; *see also Illinois EPA v. Trilla Steel Drum Corp.* PCB 86-56, 1987 WL 56111 (June 25, 1987), * 2. ("Given that the burden is on the Agency to present proof of a violation, absent such finding, no violation can be found."); *Northern Illinois Anglers' Assoc. v. Kankakee Water Co., Inc.*, PCB 81-127, 1981 WL 21931 (September 24, 1981), *1 ("Complainant … bears the burden of proof of the alleged violation...); 415 ILCS 5/*et seq*.

Within the preponderance of the evidence standard there are two burdens: the burden of persuasion and the burden of evidence. *Arrington v. Walter E. Heller International Corp*., 30 Ill. App. 3d 631, 639 (1st Dist. 1975). Once the Complainant presents sufficient evidence to make a *prima facie* case, the burden of going forward shifts to the respondent to present evidence to disprove the propositions. *Rodney*, PCB94-244, *11. However, the burden of persuasion never shifts. *Arrington v. Walter E. Heller International Corp.*, 30 Ill. App. 3d at 639. In other words, "the burden of producing evidence, which is sometimes called the burden of going forward, shifts from party to party during the course of a trial, but the burden of persuasion is always firmly allocated to one of the parties and does not shift." *Bd. Of Trade of Chi. V. Down Jones & Co.*, 108 Ill. App. 3d 681, 686 (1st Dist. 1982). Here, Complainants have the burden of producing a *prima facia* case, and if they do, then the burden to go forward shifts to MWG. Regardless though, Complainants *always* have the burden of persuading the Board that there is a violation of the Act.

a. Complainants Have Not Presented a *Prima Facia* Case

As shown at the Hearing, in MWG's Post-Hearing Brief, and summarized below, Complainants have failed to shoulder their burden to make a *prima facia* case. Instead, Complainants simply state that because there are constituents in the groundwater, there must be a violation, while speculating as to the cause. Complainants' Post-Hearing Brief, pp. 34, 36, 46, 50, 59-60. Throughout their Post-Hearing Brief, Complainants consistently use speculative language such as "may", "possibly", and "perhaps." It is well established that speculative theories are insufficient to support a finding of violation by a preponderance of the evidence. *Rodney Nelson v. Kane County*, PCB 94-244, at *14-15.

In *Rodney Nelson*, the Board rejected the complainant's claims that a landfill was causing water pollution, because even complainant stated at the hearing that the constituents in the groundwater could be from the landfill leachate, but there were "many potential explanations." *Id*. Similarly, in *Citizens Against Hampton Township Landfill v. David R. Bledsoe et al*, PCB 81-155, 1984 Ill. ENV LEXIS 553 (Nov. 21, 1984), the Board declined to find a violation because the complainants only presented theories of violation without supporting evidence. In *Citizens Against Hampton Township Landfill*, the complainant claimed that the respondents' landfill was causing or allowing water pollution due to mining and subsidence at the landfill site and the surrounding area. *Id.* The complainant relied upon an expert witness to support its claims that subsidence was occurring; however, at the hearing complainant's expert "found no direct evidence of mining on the Bledsoe property" and stated that "it was 'possible' that the landfill site had been undermined." *Id* at 26. The complainant's expert then gave a "very general hypothetical discussion of what *would* happen if there was subsidence beneath the landfill and the resultant leachate migration." *Id*. The Board found that a possibility was not enough and that "the scarcity of evidence does not relieve the

complainant of its burden." *Id* at 27-28. The Board concluded that the complainant failed to prove by a preponderance of the evidence that the respondents caused or threatened water pollution. *Id* at 27-28.

Here, Complainants rely exclusively on the presence of constituents in the groundwater as proof of a violation of the Act. Complainants' Post-Hearing Brief, pp. 29, 39, 52, 63. Yet, throughout the Hearing and encapsulated in their Post-Hearing Brief, the best Complainants can do is make suppositions and conjecture as to the source of the constituents in the groundwater. As detailed below, Complainants have failed to meet their burden that MWG caused or allowed water pollution and open dumping.

b. MWG has Carried its Burden of Evidence and Complainants have no Response

Even assuming *arguendo*, that Complainants have presented a *prima facie* case merely by making conclusory statements, MWG answered Complainants' case with specific data and analysis to disprove Complainants' propositions. *See* MWG's Post-Hearing Brief. Throughout the Hearing and summarized in MWG's Post-Hearing Brief, MWG identified specific evidence, unrebutted by Complainants, that coal ash constituents in the groundwater were not leaching from the coal ash inside or outside of the ash ponds, and that, in any event, MWG has taken extensive precautions to prevent any release. Following MWG's detailed evidence, the burden of going forward shifted back to Complainants. Both at Hearing and in their Post-Hearing Brief, Complainants did not respond. Below, MWG identifies how Complainants only claim possibilities, which is insufficient to carry their burden of proof. *Citizens Against Hampton Township Landfill*, PCB 81-155, *27-28. Consequently, Complainants have failed to carry their burden of going forward and ultimately their burden of persuasion.

i. Complainants Failed to Carry their Burden that Ash in the Ponds is a Source

At Joliet 29, Complainants appear to have abandoned their efforts to argue that the Joliet 29 ash ponds are a source of constituents in the groundwater. Instead, Complainants focus only on two historic coal ash areas at the Station as a "possible" source. Complainants' Post-Hearing Brief, pp. 33-35. This change in focus is no doubt due to the fact that the key constituents of coal ash, boron is below Class I standards at all monitoring wells around the Joliet 29 ponds. MWG's Post-Hearing Brief, pp. 31-35; MWG Ex. 908.[1] With regards to the ash ponds at the Powerton, Waukegan and Will County Stations, Complainants only speculate that the ash ponds are a "potential" source, or a "likely" source, or "may" be a source "if" the ponds were leaking. Complainants' Post-Hearing Brief, pp. 41, 42, 59, 67. Yet, Complainants have not and cannot establish that the ponds were leaking. As described above, merely speculative theories presented at hearing are insufficient to support a finding of violation. *Rodney B. Nelson v. Kane County Forest Preserve, et al*, PCB 94-244 (July 18, 1996).

Compared to Complainants' unsupported suppositions that the ash ponds are a "potential" source, MWG conducted a detailed analysis. As explained at the Hearing and in MWG's Post-Hearing Brief, actual sampling data from the MWG Stations shows that the ash in the ash ponds is *not* a source of the constituents in the groundwater. MWG's Post-Hearing Brief, pp. 6-8, 49-51, and Table 1. MWG also presented evidence of the pond relining process and presented documentation of the quality of the liner installations that Complainants' expert had *never seen*. 10/27/17 Tr. p. 169:1-18; MWG Post-Hearing Brief, pp. 24-26, 43-45. MWG's witnesses testified to proper dredging procedures that protect the liners based on discussions with dredgers, not based

[1] As described in MWG Ex. 908, sulfate has been detected in only one well above Class I standards at Joliet 29. However, Complainants' expert agreed that no overall site conclusions can be made based solely on one well. 1/29/18 Tr. p. 65:3-9

on speculation. MWG Post-Hearing Brief, pp. 24-26, 45-47. Moreover, MWG established that there are many ponds that do not contain ash and are infrequently emptied, if ever. MWG's Post-Hearing Brief, Tables 3-6. MWG's data and analysis, and all of MWG's extensive measures taken related to the ash ponds, shows by a preponderance of the evidence, that the ash in the ash ponds is not contributing to the constituents in the groundwater. Complainants did not present evidence in rebuttal.

ii. Complainants Failed to Carry their Burden that Ash Outside the Ponds is a Source

Instead of presenting actual evidence that ash outside the ponds is a source, Complainants improperly attempt to shift their burden onto MWG. Complainants repeatedly argue that *MWG cannot prove* that alleged ash areas outside the ponds at each of the MWG Stations are *not* a source because there are no samples, leach tests, or groundwater monitoring wells near the areas. Complainants' Post-Hearing Brief, pp. 34, 36, 48, 56, 68-69. In addition to being factually incorrect, this is the same argument Complainants made in their failed Partial Motion for Summary Judgment. Complainants claim, without support, that the coal ash outside the ash ponds must be a source of groundwater impact simply because ash-related constituents are in groundwater in monitoring wells that are located around the ash ponds. Complainants then claim that MWG should have to prove the alleged ash areas are *not* the source. Complainants' Post-Hearing Brief, pp. 34, 36, 48, 56, 68-69.

Complainants' argument turns the law and the legal system on its head. In the six years of this matter, MWG disclosed over 60,000 pages of documents and presented eight witnesses related to all of the Stations. Complainants have had every opportunity during discovery to make the appropriate inquiries and all of the requested information related to the coal ash at the Stations has been revealed. MWG actually conducted an investigation into the ash areas outside the ash ponds

and showed that the ash outside the ponds is not a source. MWG Post-Hearing Brief, pp. 40-42, 51-52. Without any contrary evidence, Complainants simply dismiss MWG's investigation by intentionally disregarding how MWG conducted and the investigation and evaluated the results. Complainants' Post-Hearing Brief, pp. 34, 48, 68-69. Instead, Complainants attempt to paint MWG's investigation as individual samples corresponding to a specific location at a Station and not representative of the other areas of historic coal ash outside the ponds. *Id.* There is no evidence to support Complainants' attempt to limit the data. In fact, the only evidence in the record is that MWG's expert evaluated and compared leaching data from 43 soil boring samples of historic coal ash outside of the ponds from unique locations at three of MWG's Stations. MWG's expert then concluded with a reasonable degree of scientific certainty that those areas were representative of historic ash at the four MWG Stations. MWG's expert's opinion is scientifically supported because the four MWG Stations burned the same coal in the same manner. MWG's Post-Hearing Brief, Table 2, pp. 5-8; 2/1/18 Tr. pp. 269:5-270:10, 275:1-277:24. The leaching data from the historic ash outside the ponds found that concentrations of metals in the ash were below the Class I groundwater standards. MWG's Post-Hearing Brief, Table 2. MWG's expert also assessed monitoring wells downgradient of the known historic ash area at the Powerton Former Ash Basin. Again, he found no impact from a known historic ash area. MWG's Post-Hearing Brief, Sec. pp. 40-42, 47-52. Moreover, U.S.EPA's own investigation in preparation of the CCR rules concluded that ash located outside ash ponds, such as in inactive CCR landfills, did not pose a risk to the environment. Comp. Ex. 406, 80 Fed. Reg. 21342; 2/1/18 Tr. 225:2-8. Based upon those facts and coupled with the absence of a plume from any of the Stations, MWG's expert concluded that the historic ash is not contributing to the groundwater constituents at the four sites MWG's Post-Hearing Brief, Table 2, pp. 5-8, 35-38, 40-42, 47-52.

Complainants have not disputed MWG's data or analysis, and yet present *no* additional evidence to carry their burden. Complainants cannot now be allowed to state that because they have no information to respond to MWG's evidence about the ash outside the ponds that they have shouldered their burden of proof. If so, all litigation would be turned on its head and a complainant would be able to make blind factual statements, without any proof or support, and demand the respondent present proof to deny the alleged fact. Complainants have the ultimate burden of persuasion that there is groundwater pollution and open dumping at the MWG Stations from the historic coal ash areas, and Complainants cannot twist Illinois law to force MWG to keep presenting evidence.

iii. Complainants' Speculation and Possibilities Regarding Each Station are Insufficient to Meet Their Burden

1. Complainants' Joliet 29 Speculations

As MWG explained in its Post-Hearing Brief and clearly presented in MWG Ex. 908, there are no concentrations of constituents related to coal ash above the Class I groundwater standards in the groundwater at Joliet 29. MWG's Post-Hearing Brief, pp. 31-35; MWG Ex. 908.[2] Nevertheless, Complainants claim that there are violations of the Act and regulations at the Joliet 29 Station by arguing that constituents in the groundwater, *which are below the Class I groundwater standards*, are from two areas of historic coal ash at the Joliet 29 Station, away from the ponds. Complainants' Post-Hearing Brief, pp. 33-37. Remarkably, Complainants acknowledge that there are no monitoring wells close to the two historic areas, and yet ask the Board to speculate that the historic ash areas area a source. Complainants' Post-Hearing Brief, p. 34. Complainants' speculation is not sufficient. As described herein, Complainants do not (and cannot) counter

[2] Sulfate has been detected in only one well above Class I standards at Joliet 29, but as MWG's expert described in his report, Joliet 29 is surrounded by industrial uses. MWG's Ex. 904, p. 13. Moreover, Complainants' expert agreed that no overall site conclusions can be made based solely on one well. 1/29/18 Tr. p. 65:3-9.

MWG's data and analysis of the ash areas outside the historic ash ponds showing that ash outside the ponds is not a source of constituents in the groundwater. *See* Sec. I.b.ii. and II.b.ii*; See also* MWG's Post Hearing Brief, pp. 31-35, 49-53. In fact, fifteen borings from a historic ash area at Joliet 29 confirm that the material is not leaching constituents to groundwater. MWG Ex. 901; SOF 141-148.

2. Complainants' Powerton Speculations

Complainants make two conjectures related to the Powerton Station, with little evidence to support either. First, Complainants claim that there are issues related to the active ash ponds based upon "concerns" by an MWG employee. Complainants' Post-Hearing Brief, p. 42. Complainants further theorize that water entering the Secondary Ash Basin during the relining, "could" push the liners, and there was a "possibility" of water damaging a liner, "if" a basin were to be emptied. *Id* at 42, 46. The evidence Complainants rely upon does not support their claims. The two emails Complainants cite do not show a concern or state that water could damage a liner. Comp. Ex. 107 and 108.[3] The only "concerns" identified by MWG employees was when the Station was relining the Secondary Ash Basin, a basin that only holds *de minimis* amounts of ash because it is a finishing pond. SOF 192-194, 198. Both Comp. Ex. 107 and 108 are emails written during the relining project when the river water was high, and MWG's consultant was "concerned" about the "possibility" of the new liner being pushed up by water during cleaning. SOF 605, Comp. Ex. 107. Thus, in response to the "concerns" identified in the emails, MWG implemented an engineered solution, which was an underdrain system that both experts agreed solved any "concerns" related to the liner. SOF 606-610. Mr. Kelly, who was present for the Secondary Ash Basin relining and

[3] Complainants rely upon Comp. Ex. 107 and Comp. Ex. 714 to support their speculative conclusions. Yet, Comp. Exhibits 107 and 714 are identical, so citing to both is duplicative and cumulative and the Board should disregard Comp. Ex. 714. Ill. R. Evid. 403; *People v. Cotell*, 298 Ill. 207, 216, 131 N.E. 659, 662 (1921).

copied on Exhibit 107, testified that upon completion of the relining there has not been an issue with the HDPE liner in the Secondary Ash Basin. SOF 616-617. Complainants also guess that the rips and tears in the liners "may" have contributed to the constituents in the groundwater. *Id* at 42. But, the testimony Complainants rely upon clearly states that the tears in the liner were at the top of the pond, above the water line, and the liner below the water line was in good condition. 1/31/18 Tr. p. 85:2-12; 105:11-15; 164:5-12; 181:14-17.

Second, Complainants claim that "potential sources" of constituents in the groundwater are the coal ash in the ash ponds and/or the coal ash outside the ponds. Complainants' Post-Hearing Brief, p. 41, 46. Complainants speculate that the water levels at Powerton periodically increasing due to flooding from the Illinois River "could" carry ash constituents into the groundwater. *Id* at 46. Complainants further their speculation by stating "perhaps the most likely source" of the constituents is the ash outside the ash ponds. *Id* at 43. Complainants state that their expert believed that the Powerton ash ponds "may" be a source, but he testified at Hearing that it was impossible to distinguish between the potential sources. 10/27/17 Tr. p. 189:15-24. Quite simply, the speculative nature of Complainants' theories is insufficient to support a finding of water pollution or open dumping, particularly in response to MWG's data and analysis showing that the coal ash at the Stations is not a source. *See Supra* Sec. I.b.ii.[4]

3. Complainants' Waukegan Conjectures

Complainants theorize about potential sources of constituents in the groundwater at the Waukegan Station, while entirely ignoring the contaminated property directly adjacent and upgradient to the Waukegan Station and a known source. Complainants speculate that the alleged "Former Slag/Fly ash Storage Area" "appears to be" a source and also "possibly" the active ash

[4] Further discussion on how Complainants mischaracterize the evidence they rely upon is in Section IV herein.

ponds are a source. Complainants' Post-Hearing Brief, p. 54, 59. Notably, the only "evidence" Complainants cite to showing that the alleged "Former Slag/Fly ash Storage Area" may contain ash is a map that uses that title in a report prepared for another company. That same report also concluded that there was no requirement "…to further investigate or remediate" the property. Comp. Ex. 19D, MWG13-15_45801. At Hearing, MWG witnesses testified that they did not know if there was even ash in the area. *See infra* Sec. IV.b. The "possibility" that the area contains coal ash is insufficient to prove a violation. With regards to the Waukegan ash ponds, Complainants state twice that "if" the ponds were leaking in 2012, then the ponds are "almost certainly" still leaking now. Complainants' Post-Hearing Brief, pp. 59, 60. Further, Complainants speculate that the structural ash in the berms of the ash ponds are "likely" leaching. *Id*. Again, Complainants rely upon their expert who could only state that the source "could" be the ash outside the ponds "and/or" the ash areas. Complainants' Post-Hearing Brief, pp. 60-61; *see also* 10/26/17 Afternoon Tr. p. 84:21-4, 109:19-24; 10/27/17 Tr. p. 26:4-9, 45:8-13. Complainants' expert acknowledged that he could not identify the source and it would be impossible to tell. 10/27/17 Tr. p. 189:15-24. Complainants' speculations, and the speculations of their expert, are insufficient to show a violation of the Act.

4. Complainants' Will County Suppositions

Finally, just like their theories related to the prior Stations, Complainants can only state, without evidence, that the ash ponds at the Will County Station are "likely" leaking coal ash constituents and "likely" a source. Complainants' Post-Hearing Brief, pp. 67, 69. Complainants, however, place supposition upon supposition. Their claim that the ponds are a "likely" source is based on "if's" and "could." Complainants suppose that "if" there are cracks in the 36-inches of poz-o-pac at the Will County Station, water "could" flow through. Complainants' Post-Hearing

Brief, pp. 66-67. Complainants make this unsupported conclusion despite the repeated and unanswered testimony of MWG's witnesses that testified the poz-o-pac was in excellent condition, and a core of the poz-o-pac taken from the ponds was solid through the core. SOF 386, 454-455, 561, 621. Complainants continue to theorize and state that groundwater flows "potentially" through Pond 1N which "may" be leaking, seemingly relying only upon a February 2011 report showing the groundwater elevations compared to the pond. Complainants' Post-Hearing Brief, p. 69. Complainants are speculating, without a citation to evidence, that water is "potentially" flowing through two 36-inch layers of poz-o-pac, with no evidence that the poz-o-pac is damaged and in fact with contrary evidence that the similarly lined ponds at Will County were in excellent condition. SOF 386, 454-455, 561, 621.

Regarding the boring logs at Will County, after identifying coal ash in boring logs, Complainants speculate that there "may" be fly ash in the boring logs, even though it is not actually described in the logs. Complainants' Post-Hearing Brief, p. 69 ("The material in the boring logs may include, for example, fly ash."). The relevance of Complainants' speculation is unclear. The historic areas on MWG's Stations may have also contained fly ash in the past, and those samples have established that the areas are no leaching. MWG's Post-Hearing Brief, Table 2.

Ultimately, the speculative nature of Complainants' theories are insufficient to crest their burden to show by a preponderance of evidence violations of the Act. Similar to the *Citizens Against Hampton Township Landfill* case, the scarcity of data, the lack of evidence that the coal ash inside the ponds and out are sources of the constituents in the groundwater, and the agreement by the experts that there is no known source area at the Stations operates against the Complainants. *Citizens Against Hampton Township Landfill*, PCB81-155 *28. Thus, similar to *Citizens Against*

Hampton Township Landfill, simply by having insufficient evidence, Complainants have not met their burden and the Board cannot find a violation of the Act. *Id*.

II. MWG DID NOT CAUSE OR ALLOW WATER POLLUTION

Complainants conclude, based solely on the fact that MWG owns and operates the Stations and that there are constituents in the groundwater, that the Board must find that MWG has caused or allowed water pollution. Complainants' Post-Hearing Brief, pp. 37, 49, 60, 70. Despite conceding that they cannot identify the actual source of the constituents in the groundwater, Complainants suggest that the Board should find liability because there "must be" a source, somewhere, on each of the properties. This would be a radical departure from the law in Illinois because the Act does not operate under a theory of strict liability. *People of the State of Illinois v. William Charles*, PCB 10-108, 2011 WL 1049280, March 17, 2011 at 8, *citing People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793 (5th Dist. 1993).

In Illinois, to find that a person violated 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 or so as to violate regulations or standards. 415 ILCS 5/12(a), *People of the State of Illinois v. State Oil Co.*, PCB 97-103, April 4, 2002, 2002 WL 560904 at slip op 10. That means that the Board must find that there was a "physical, thermal, chemical or biological alteration of a water that will or is likely to create a nuisance or render the waters harmful such that the waters are 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. No such harm exists in this case.

The Board must also find that a respondent caused the release from a source, or allowed a release by controlling the source. Complainants seek to hold MWG strictly liable solely because

MWG controls the Stations. Complainants, however, misstate the law. Illinois cases hold that a party is responsible if a source is determined and a party has control over the source.[5] The clear logic is that a party in control of a known source has the ability to act – to resolve the source. MWG found no Illinois case holding that mere ownership/control of a site, without control over a known source, is enough. Here, all parties agree there is no specific known source – only possibilities and speculation.

Finally, the Board has clearly stated that there is no liability for water pollution or open dumping when a respondent takes extensive precautions to prevent contamination. Even if there are constituents in the groundwater, MWG took great care over the years to prevent any potential release from each of its Stations. From initial pond evaluations, to a relining program, to careful dredging practices, MWG's actions preclude a finding of liability.

a. The Constituents Are Not Creating a Risk or Nuisance

To find water pollution, the Board must find that the water has been rendered harmful or detrimental to public health or the environment. 415 ILCS 5/3.545. The mere presence of a constituent "is insufficient to establish that water pollution has occurred or is threated." *Environmental Site Developers, Inc. v. White & Brewer Trucking*, PCB 96-180, 1997 Ill. ENV LEXIS 649, *16 (Nov. 20, 1997), *citing Bliss, Inc. v. Illinois EPA*, 138 Ill. App. 3d 699, 704, 485

[5]*See Allaert Rendering, Inc. v. Ill. Pollution Control Bd.*, 91 Ill. App. 32 153, 155-56 (3rd Dist. 1980) (Contaminants in wastewater lagoon that threatened river was source); *Freeman Coal Mining v. Illinois Pollution Control Board*, 21 Ill.App.3d 157 (1974) (The source of the contamination was the mine refuse pile); *Tri-County Landfill Co. v. IPCB*, 41 Ill. App. 3d 249 (Leachate from a landfill was the source of 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 source of groundwater pollution); *People v. John Chalmers*, PCB 96-111, 2000 Ill. ENV LEXIS 4, (Jan. 4, 2000) (Board found releases of livestock waste into a stream was source of water pollution); and *People v. State Oil*, PCB 97-103, 2002 Ill. ENV LEXIS 196 (April 4, 2002) (Gasoline contained in USTs seeping into a creek was source of water pollution). *Compare with Harold Craig and Robert Craig v. The Pollution Control Board*, 59 Ill.App.3d 65 (4th Dist. 1978) (Court held violation could not be found because State did not prove the respondent's waste was the source) and *Lonza, Inc. v. Illinois Pollution Control Board*, 21 Ill. App.3d 468 (3rd Dist. 1974) (Court vacated a Board opinion because the source of the odors could not be identified).

N.E.2d 1154 (5th Dist. 1985). Rather, a party must show that the particular quantity and concentration of a constituent is "likely to create a nuisance or render the waters harmful, detrimental, or injurious." *Id.* In *Environmental Site Developers, Inc.*, the complainant moved for summary judgment claiming that statements made by the respondent in a federal case were admissions that established violations of the Sections 12(a), 12(d), 12(f), and 21(d)(1) of the Act. *Environmental Site Developers*, 1997 Ill. ENV LEXIS 649, *1-2. In the federal matter, the respondent stated that surface water and groundwater contained manganese, sulfate, boron and total dissolved solids. *Id,* *13-14. The Board declined to find that the admissions in the federal complaint established violations of the Act. *Id,* *17-18. Rather, the Board concluded that simply showing the presence of constituents was insufficient to establish whether water pollution occurred or was threatened. *Id*, *16. The Board clarified that "it must also be shown that the particular quantity and concentration of the contaminant in question *is likely to create a nuisance or render the waters harmful, detrimental, or injurious*." *Id*. Thus, while the federal complaint established the presence of sulfate, boron, manganese and TSS in the groundwater, the federal complaint did not establish that the concentrations created a nuisance or rendered the waters harmful, detrimental or injurious. *Id*, at *16-17. Without any facts to support whether the constituents in the groundwater created a nuisance or rendered the groundwater harmful, the Board concluded that the complainant had not met its burden to establish a violation of Sections 12(a), 12(d) or 21(d)(1) of the Act.[6] *See also Bliss, Inc. v. Illinois EPA*, 138 Ill. App. 3d at 704 (Court held that it must be shown that the quantity and concentration of a constituent was likely to create a nuisance or render the waters harmful to find a violation of Sections 12(a) and 12(d) of the Act).

[6] The parties voluntarily dismissed their lawsuit without any further conclusions by the Board regarding the allegations of violations. *Environmental Site Developers, Inc. v. White & Brewer Trucking*, PCB 96-180 (December 20, 2001).

Here, as established at the Hearing and unrebutted by Complainants, the constituents in the groundwater are not creating a nuisance or rendering the groundwater harmful, detrimental or injurious. MWG's expert explained that at each of the Stations there is no risk to the surface waters and the levels of constituents that could reach surface water are below the water quality standards or water quality criteria that are considered to be protective of human health and the environment. MWG Ex. 903, App. B, and MWG Ex. 907. Complainants did not present any evidence to rebut MWG's expert. Instead, Complainants falsely argue that MWG "acknowledged risk" by simply relining the ponds. Complainants Post-Hearing Brief, p. 18. Complainants' argument, which is not evidence, fails for three reasons. First, following Complainants' logic would mean that any preventative measures would be an admission of risk. This is a circular argument given that preventative measures are expressly encouraged by the Board to avoid liability under the Act. Second, Complainants' argument that MWG acknowledged risk by relining the ponds only relates to the ponds, not the historic ash areas. Under Complainants' logic, because historic ash areas were not relined, there is no risk from historic ash areas. Yet, Complainants do not accept that corollary. Complainants' assumption that there is acknowledged risk also ignores the testimony that the pond liner systems were designed for dredging and operational convenience to allow the beneficially useful coal ash to be removed. 2/1/18 Tr. p. 262:3-16. Third, actual data disputes *any* risk from the Stations. MWG's expert explained at Hearing that he conducted a risk assessment by reviewing the groundwater data and comparing those concentrations as if the concentrations were exposed to surface water receptors. He concluded that there was no risk to the surface water environment at each of the MWG Sites. Feb. 2, 2018 Tr. p. 279:2-24. As Complainants have not put forth any contrary evidence, MWG's expert's opinions regarding the lack of risk to human health and the environment are undisputed.

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. The Board need go no further in its analysis. As it stated in *Environmental Services*, merely showing that constituents are present is not enough – the Complainants must also show that the quantity and concentration is likely to create a nuisance or render the groundwater harmful, and they have failed to do that.[7]

b. <u>Complainants Did Not Show That MWG Caused or Allowed Groundwater Pollution</u>

Regardless of whether Complainants have crested their burden that the groundwater was rendered harmful, to find a violation of Section 12(a) of the Illinois Environmental Protection Act ("Act") the Board must also find that a person caused *or* allowed a discharge so as to cause water pollution. 415 ILCS 5/12(a).

i. MWG Did Not Cause Groundwater Pollution

The first part of the analysis is whether a person "caused" a discharge. The Act does not define "cause", and in the absence of a statutory definition, "cause" should be given its plain and ordinary meaning. *People ex rel. Ryan v. McFalls*, 313 Ill. App. 3d 223, 226-27, 245 Ill. Dec. 795, 798, 728 N.E.2d 1152, 1155 (2000), *citing Moran Transportation Corp. v. Stroger*, 303 Ill. App. 3d 459,

[7] Complainants cite to two cases to support their claim that the mere presence of constituents above the Class I groundwater levels equates to groundwater pollution. Complainants' Post-Hearing Brief, p. 9. Both cases are easily distinguished because the Board first found a specifically identified source before determining that the respondents' actions caused the Class I exceedances. *People v. John Prior*, PCB 97-111, 1997 Ill. ENV LEXIS 655, (Nov. 20, 1997), is actually about the respondents' failure to follow their landfill permits by failing to install and monitor groundwater monitoring wells around the landfills. *Id* at *19-20. The Board also found that the landfills were the source of constituents in the groundwater. *Id* at *20. Similarly, in *International Union, et al v. Caterpillar Inc.*, PCB 94-240, 1996 WL 454961, (Aug. 1, 1996), the respondent admitted to a release of dry cleaning chemicals that was the source of groundwater impact. *Id* at *28-29. Only after finding that the respondent was responsible for the source of the dry-cleaning chemicals in the groundwater, did the Board conclude that the respondent was also in violation of Section 12(a) of the Act because the constituents in the groundwater from the dry-cleaning operation were above the Class I standards. *Id* at *29. Considering *Environmental Site Developers, Inc. v. White & Brewer Trucking*, PCB 96-180, 1997 Ill. ENV LEXIS 649, *16 (Nov. 20, 1997) was decided at the same time, clearly having an identifiable source is a fundamental requirement to find a violation.

708 N.E.2d 508, 236 Ill. Dec. 922 (1999). 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, to have *caused* water pollution a person must bring the alteration of the harm to the water into effect.

There is no dispute in this matter that MWG did not "cause" coal ash or its constituents to be discharged into the groundwater. MWG placed coal ash in the lined coal ash ponds at its Stations, removed ash for beneficial use, and there is no evidence showing that the ash ponds ever leaked. As established at Hearing, when the original liners were eventually revealed during the relining projects, the liners were in excellent condition. Appendix A to MWG's Post-Hearing Brief, Statement of Facts ("SOF") Nos. 437, 454-455, 536-537, 548-550, 561, 582-583, 604, 621-622. Following relining of the ponds with HDPE liners and before the ponds were placed back into service, MWG conducted thorough QA/QC procedures to ensure that the installed HDPE liners did not have any leaks. SOF Nos. 333-347, 440-444, 458-460, 463, 467, 570-573, 587-592, 611-613, 623, 625, 629. MWG's expert testified that the QA/QC measures conducted at MWG's ash ponds, particularly the electronic leak location tests, ensured that the theoretical leaks described by academic papers (and Complainants' expert) would not occur. 2/1/18 Tr. p. 258:1-259:8. Illinois EPA agreed that the ponds at Waukegan – the oldest replaced liners – were not a source of the constituents in the groundwater. SOF Nos. 348-352. Complainants' expert failed to review relevant construction documents for the ponds, never analyzed the complete relining or dredging procedures, and merely speculated that the ponds "might" have leaked. MWG's Post-Hearing

Brief, pp. 59-60; 10/27/17 Tr. 130:19-131:2; 168:2-169:9.[8] MWG did not "cause" discharge from historic ash areas because MWG did not place the ash. In sum, MWG has shown through its exhibits and testimony at Hearing and its Post-Hearing Brief, that it did not "cause" water pollution, and none of MWG's facts are refuted or rebutted by Complainants.

ii. MWG did not Allow Water Pollution

The second part of the analysis under Section 12(a) of the Act is whether a person "allowed" a discharge of water pollution. 415 ILCS 5/12(a). To allow a discharge, it must be shown that a person has the capability of control over the source of the pollution. In addition, whether a source is known (or even assumed), there is no liability if the facts show that a respondent took extensive precautions to prevent a release. *People of the State of Illinois v. William Charles*, PCB 10-108, 2011 Ill. ENV LEXIS 86, March 17, 2011 at *25-27, *citing People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 793 (5th Cir. 1993), *Perkinson v. Pollution Control Bd.*, 187 Ill. App. 3d 689, 693 (3rd Dist. 1989), and *Phillips Petro. Co. v. Pollution Control Bd.*, 72 Ill. App. 3d 217 (2nd Dist. 1979).

1. There is No Liability Without an Identifiable Source

In the first part of the "allow" analysis, it must be shown that a party has control over an identifiable source. *Id*. In fact, in each of the cases cited by Complainants evaluating whether a person allowed a release by having control, a specific source was identified. 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. In *Meadowlark*,

[8] Complainants appear to now agree that there is no risk of hydrostatic uplift at any of the ash ponds. Although Complainants' expert initially speculated that there could be hydrostatic uplift on pond liners that could cause leaks in the liners, he later admitted that it was a pond-by-pond analysis and the only pond he analyzed (Powerton Secondary Ash Basin) would not be subject to uplift. MWG's Post Hearing Brief, p. 38-40. Throughout Complainants' Post-Hearing Brief, there is no mention of "hydrostatic uplift" or even "uplift.

the source was the iron pyrite pile draining into a creek. *Meadowlark Farms, Inc. v. Illinois Pollution Control Board*, 17 Ill.App.3d 851, 308 N.E.2d 829, 861 (5th Dist. 1974). In *People of the State of Illinois v. William Charles*, PCB 10-108, the source was the eroded soil and sediment from a real estate development.[9] As more fully explained in MWG's Post-Hearing Brief, when a source cannot be identified the Board cannot find a party "allowed" a violation. MWG's Post-Hearing Brief, pp. 47-49 *citing*, *Harold Craig and Robert Craig v. The Pollution Control Board*, 59 Ill.App.3d 65 (4th Dist. 1978) and *Lonza, Inc. v. Illinois Pollution Control Board*, 21 Ill. App.3d 468 (3rd Dist. 1974).

Here, no one has identified a specific source for the constituents in the groundwater. Instead, Complainants claim that the *entire Station* is a source of the constituents in the groundwater. Complainants' Post-Hearing Brief, pp. 37, 49, 60, 70. Claiming that an entire site is a source is beyond the boundaries of Illinois law. Complainants have not identified, and MWG has not found, a single case where a person was found liable for constituents in the groundwater (or any other medium for that matter), when no specific source could be identified. If the Board were to agree with Complainants, then the Board is stating, in effect, that Illinois operates under strict liability and that merely owning or operating a property results in liability. Such a position would be contrary to Illinois law (this is not a CERCLA case) and contrary to precedent. *People of the State of Illinois v. William Charles*, PCB 10-108, *25-27; *People v. A.J. Davinory Contractors*. MWG showed through its witnesses, documentation and expert witnesses that there are no identifiable

[9] *See also Allaert Rendering, Inc. v. Ill. Pollution Control Bd.*, 91 Ill. App. 32 153, 155-56 (3rd Dist. 1980) (Contaminants in wastewater lagoon that threatened river was source); *Freeman Coal Mining v. Illinois Pollution Control Board*, 21 Ill.App.3d 157 (1974) (The source of the contamination was the mine refuse pile); *Tri-County Landfill Co. v. IPCB*, 41 Ill. App. 3d 249 (Leachate from a landfill was the source of 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 source of groundwater pollution); *People v. John Chalmers*, PCB 96-111, 2000 Ill. ENV LEXIS 4, (Jan. 4, 2000) (Board found releases of livestock waste into a stream was source of water pollution); and *People v. State Oil*, PCB 97-103, 2002 Ill. ENV LEXIS 196 (April 4, 2002) (Gasoline contained in USTs seeping into a creek was source of water pollution).

sources of the constituents at the Stations,[10] and Complainants' expert agreed that he could not identify the source. 10/26/17 Afternoon Tr. p. 84:22-85:12; 10/27/18 Tr. p. 45:8-47:10, 180:2-18. Complainants' speculations of "possible" sources in its Post-Hearing Brief are not enough.

a. Complainants Have Not Proven the Ash Ponds are a Source

As discussed herein, Complainants have only presented speculations that the ash ponds are a "potential" source, which are insufficient to support a finding of violation. *See* Sec I.b.i; *Rodney B. Nelson v. Kane County Forest Preserve, et al*, PCB 94-244 (July 18, 1996). In comparison, MWG conducted an analysis of the ash in the ponds, which shows that the ponds are not a source. MWG's Post-Hearing Brief, pp. 6-8, 49-51, and Table 1. Moreover, MWG showed that the pond liners were always in good condition, that MWG uses careful and proper dredging procedures, and that MWG relined the ash ponds through a systematic relining program as part of the operation and maintenance of the Stations. MWG Post-Hearing Brief, pp. 24-26, 43-51, Tables 1, 3-6.

b. Complainants Did Not Prove the Ash Outside the Ponds is a Source

Regarding the coal ash outside the ponds, Complainants, without any basis or discussion, reject MWG's analysis of the coal ash outside the ponds and reject U.S.EPA's analysis in the CCR rulemaking that such historic ash areas are not a concern. Comp. Ex. 406, 80 Fed. Reg. 21342. Complainants appear to concede that the former ash areas that MWG sampled are not a source because Complainants dropped any claims concerning those sampled historic ash areas from their Brief. Instead, Complainants argue, without evidence, that any former ash area that was ***not*** sampled must be a source. Without discussion or testimony, Complainants simply reject MWG's

[10] At Waukegan, there is an identifiable upgradient source of the constituents in the groundwater from the Griess-Pfleger Tannery Site and the General Boiler Property. SOF 263-28. MWG does not control that site. SOF 263.

expert's conclusions that because each Station burns the same coal in the same method, the sampled coal ash outside the ponds is representative of the historic ash areas.

When discussing Joliet 29, Complainants claim that the northeast area and the southwest area are possible sources of constituents in the groundwater. Complainants no longer claim the coal ash in the northwest area, that MWG sampled and analyzed, is a source. Complainants' Post-Hearing Brief, p. 34. Complainants only state, without any basis, that the analyzed coal ash does not include all historic ash in other parts of the Stations. *Id*. Similarly, at Will County, Complainants only claim the coal ash used as structural fill in the soil borings is a source, and do not claim that the sampled historic coal ash located outside the Will County ponds is a source. Complainants' Post-Hearing Brief, p. 68. Obviously, Complainants have decided to withdraw their claims that the historic sampled coal ash is a source because the analysis shows that the ash *is not* a source. MWG Post-Hearing Brief, Table 2. Complainants have no basis, however, to argue that the historic coal ash samples are not representative of historic ash areas across the Stations.

As MWG explained at the Hearing and in its Post-Hearing Brief, because the MWG Stations burned the same coal using the same burning method, MWG's expert concluded that the coal ash outside the ponds is not contributing to the groundwater constituents at the four sites and not adversely impacting the groundwater. MWG's Closing Brief, pp. 40-42, 51-52. Complainants cannot simply ignore the fact that a total of 43 soil borings from areas at three of the Stations revealed that the historic ash meets standards for coal combustion by-products, such that it is not leaching to the groundwater. The type of historic ash in these sampled areas is unknown, so Complainants' suggestion that these areas are somehow unrepresentative of other historic ash is speculation, at best. [11] Complainants' Post-Hearing Brief, p. 34, 68. Complainants then completely

[11] Remarkably, Complainants attempt to distinguish the sampled coal ash from the coal ash observed in the soil borings by claiming that they are not described exactly the same. Complainants' Post-Hearing Brief, p. 68. Yet, just thirteen

ignore the additional data provided by the groundwater monitoring results from the Powerton Former Ash Basin, a known historic ash area. MWG's Post-Hearing Brief, pp. 40-42.[12] The groundwater monitoring results in the monitoring wells downgradient of the Former Ash Basin show, and Complainants' expert agreed at Hearing, that the constituents in the groundwater downgradient of the Former Ash Basin are below the Class I standard and even at times below Complainants' expert's alleged background concentration. SOF 248-251; Comp. Ex. 260O; 10/27/17 Tr. p. 204:9-210:22.

In short, Complainants have no evidence that the coal ash outside the ash ponds is actually a source of the constituents in the groundwater. In comparison, MWG has data and analysis of the coal ash outside the ponds, as well as groundwater sampling results from the downgradient known ash area, the Former Ash Basin, all of which show that the historic ash areas are not causing the constituents in the groundwater. MWG's Closing Brief, pp. 7, 40-43, 51-52, Table 2. As MWG posited in its Post-Hearing Brief, "When the source area is unknown, what did MWG 'allow' that caused water pollution?" MWG's Closing Brief, p. 47. In other words, without a source, MWG has nothing to control. Under *A.J. Davinroy Contractors* and the long line of Illinois cases establishing the requirement of control of a source, MWG could not have "allowed" water pollution.

2. MWG Did Not Allow Water Pollution Because MWG Took Extensive Precautions

There is no liability for "allowing" water pollution if a party took extensive precautions to prevent the release. *People v. A.J. Davinory Contractors*, 249 Ill. App. 3d 788; *Perkinson v.*

pages before, Complainants state that "'slag' is a form of coal ash." *Id* at FN 52. Moreover, it is stunning that Complainants are attempting to distinguish the two coal ash descriptions, and then in the next sentence speculate that the coal ash "may include…fly ash" even though none of the borings contain that description. *Id* at 69.

[12] Inexplicably, Complainants still claim that the Former Ash Basin at Powerton is a source of the constituents in the groundwater. Complainants' Post-Hearing Brief, pp. 49-50.

Pollution Control Bd., 187 Ill. App. 3d 689; *People of the State of Illinois v. William Charles*, PCB 10-108. For instance, in *Perkinson v. Illinois Pollution Control Board*, 187 Ill.App.3d 689, 691 (3rd Dist. 1989), the Board found that the respondent "allowed" a discharge because respondent had not taken reasonable precautions to prevent the vandalism that allowed a release. *Id* at 694-695. In *County of Jackson v. Taylor*, AC89-258, 1991 Ill. ENV LEXIS 18 (Jan. 10, 1991), the Board found that the respondent failed to take extensive precautions because he did not take specific actions to prevent fly-dumpers on his property. *Id* at 15-16. Similarly, in *People of the State of Illinois v. John Prior et al*, PCB02-177, 2004 Ill. ENV LEXIS 259 (May 6, 2004), the Board found that the respondent allowed a discharge of oil from his tank farm because he failed to take reasonable measures to prevent sabotage such as installing a fence or other measures to control access. *Id* at 55-56.

In all of the above cases, the respondent was found to have allowed the release because they failed to take extensive precautions. In the *City of Chicago v. Speedy Gonzalez Landscaping, Inc*, the Board defined how a person did not "allow" a release by taking extensive precautions. *City of Chicago v. Speedy Gonzalez Landscaping, Inc.* AC06-39, AC06-40, AC06-41, AC07-25, 2009 Ill. ENV LEXIS 115 (March 19, 2009). In *Speedy Gonzalez*, the City of Chicago alleged that the respondents caused and allowed open dumping due to the accumulation of soil, construction debris, and fly-dumped waste. *Id* at 11-13. There were two types of fly-dumped waste at the site: fly-dumped waste that had been at the site for over 15 months, and new fly-dumped waste. *Id* at 25-26. With regards to the new fly-dumped waste, the Board found respondents did *not* "allow" contamination because respondents took extensive precautions. *Id* at 26. Since purchasing the site, respondents had erected a locking gate and fence across the single entrance to the site. *Id*. The fly-dumpers repeatedly knocked down the gate by pulling the gate off its hinges and cutting the lock,

and respondents repeatedly repaired and improved the gate following the vandalism. *Id*. Noting that the Act does not impose strict liability and a property owner may not be liable where the owner had undertaken extensive precautions to prevent a release, the Board found that the respondents did not "allow" open dumping. *Id*. In other words, the Board found that as long as the respondents continued to respond to the conditions at the site by installing controls to prevent further releases, the respondents were taking extensive precautions.

Similarly, in *People v. Lincoln, Ltd.*, 2016 IL. App. (1st) 143487, 70 N.E.3d 661 (1st Dist., 2016), the Court held that a property owner did not "allow" open dumping because the property owner actively pursued the operator of the landfill on its property. The Court rejected the People's claim that simply because the property owner owned the property it "allowed" open dumping. *Id* at ¶34, ¶54. The Court found that the property owner was diligent and active in its efforts to prevent the pollution placed on its property. *Id* at ¶54. The Court concluded that the property owner was not "…passive or inactive in its efforts to remedy the waste…" at the property and made "concerted efforts" to have the operator clean up the property. *Id* at ¶55.[13]

Here, MWG did everything it could with regards to the ash at its Stations, and was neither "passive" nor "inactive". Since MWG took over operations at the Stations, MWG has taken extensive measures and precautions at the Stations even before MWG had any knowledge that there were any constituents in the groundwater. MWG's Post Hearing Brief, pp. 42-47. First, since 1977 the ash ponds at the Stations had concrete-type liners and those liners were found to be in excellent condition when the ponds were emptied for relining. MWG's Post Hearing Brief, pp. 43; SOF 437, 453-455, 536, 548-549, 568, 583, 604. Second, MWG implemented a comprehensive relining program of the MWG Station coal ash ponds simply for maintenance purposes and without

[13] Only when the property owner was finally successful in its efforts against the operator, and yet still did remediate the property, was the property owner found to be in violation of the Act. *Id*.

any compulsion by a State or Federal regulatory agency. MWG's Post Hearing Brief, pp. 24-26, 44-45. As MWG's expert explained, the relining procedures met the industry standard of practice and had QA/QC measures, including electric leak location surveys to confirm that the HDPE liner did not have any small holes before the ponds were placed back into service. *Id* at p. 45. Third, since taking over the operations of the Stations, MWG conducted daily, often more than one time per day, inspections of the ash ponds, again long before there was any regulatory requirement. *Id* at pp. 24, 45. On the rare occasion that MWG detected an issue with an ash pond liner, MWG implemented its procedure to promptly repair any issue. *Id* at p. 46. Fourth, when MWG removes the coal ash for beneficial reuse, which is part of routine operations at many of its ponds, MWG has procedures to take specific care to prevent damage to the liners. *Id* at pp. 24, 46-47. The procedures include using rubber-tired machines inside the ponds and the machine operators working very carefully, methodically, and deliberately in the ponds to avoid damaging the liners. *Id*. Fifth, following MWG's sampling and discovery of constituents in the groundwater, MWG worked with Illinois EPA to implement corrective actions and establish institutional controls at each of the Stations, including ELUCs and GMZs to further prevent any access to the groundwater (even though there were no potable wells downgradient of any of the ponds). *Id* at 28-29. Sixth, MWG's analysis of the historic ash outside the ponds showed that the historic coal ash outside the ponds was not a source. *Id* at 40-42, Table 2. All of these measures are extensive precautions taken at the MWG Stations related to the coal ash inside the ponds and the coal ash outside the ponds.

Complainants repeatedly argue that MWG "should have" conducted monitoring or sampling of historic ash areas (i.e. p. 36 of Complainants' Brief), and that the remedies MWG took as part of the Compliance Commitment Agreements ("CCAs") was somehow not enough. Again, Complainants conveniently ignore the facts. Since 2004 and 2005, MWG had results of historic

ash samples from ash areas at Joliet 29 and Will County. MWG's Post-Hearing Brief, Table 2. Those samples already told MWG that the historic ash areas were not of concern. MWG also had coal ash samples from its ponds beginning in 2004, confirming that MWG's ash did not pose a risk. MWG's Post-Hearing Brief, Table 1. While pointing to 1998 Phase I and Phase II reports to try to show MWG "knew" of old historic ash areas, (pp. 26-27 of Complainants' Brief), Complainants ignore the conclusion of the reports that there was no requirement "…to further investigate or remediate this property." SOF 84, 162-165, 272, 369-370; Comp. Ex. 17D, MWG13-15_3277; Comp. Ex.18D, MWG13-15_5723; Comp. Ex. 19D, MWG13-15_45801; Comp. 20D, MWG13-15_23324. Knowing an old area exists in theory is very different than knowing it is a source of a groundwater impact. MWG had no reason to sample even more historic areas when the conclusions of the historic reports and its own samples from three different Stations told MWG the areas were not at issue. MWG's Post-Hearing Brief, Tables 1-2.

Finally, Complainants' references to the CCAs as inadequate again reveal Complainants' limited analysis. After MWG voluntarily conducted groundwater sampling and detected constituents of coal ash, Illinois EPA issued of Violation Notices ("VNs"). Complainants incorrectly state that the VNs were a "finding" of violation. In fact, a VN is simply an unadjudicated notice, like a complaint. *People of the State of Illinois v. Lincoln, Ltd*, 70 N.E.3d 661, 674 (1st Dist. 2016) (*emphasis added*) (An Illinois EPA "notice of violation is merely a notice of potential liability and is 'a preliminary step in [IEPA's] investigation of *possible* violations of the Act.'"); *See also infra* Sec. IV.a. Complainants then quote the language of the CCAs to suggest that MWG somehow agreed the VN was not "alleged". Complainants' Post-Hearing Brief, p. 25. This is, yet again, misleading, at best. The language of the CCAs as quoted by Complainants clearly states that Illinois EPA "contends" there are violations. MWG Ex. 626, MWG13-15_572;

MWG Ex. 636, MWG13-15_553; MWG Ex. 647, MWG13-15_566; MWG13-15_656, MWG13-15_560. Complainants are grasping at straws.

The reality of the VNs and CCAs are as follows:

- When Illinois EPA issued the VNs, Illinois EPA was fully aware of historic ash areas, as evidenced by the fact that the Illinois EPA issued an NDPES permit for the Joliet 29 historic ash area. SOF 125. Illinois EPA had also received the boring logs for the Station investigations and was aware of ash in some of the borings.
- While knowing of historic ash areas, Illinois EPA did not issue VNs for those areas and did not request sampling of the historic ash areas.
- The CCAs resolved, to Illinois EPA's satisfaction, the groundwater issues at each of the Stations. 1/30/18 Tr. p. 31:7-22; SOF 657-661.

Truly, there is nothing more that MWG could do in response to the constituents in the groundwater. Complainants have not identified, and MWG has not found, a single case where a party took reasonable measures in response to constituents at a site, without identifying the source, and yet still was found in violation of the Act. Because MWG was diligent and active in its efforts to prevent pollution, the Board cannot find that MWG "allowed" water pollution. *People v. Lincoln, Ltd.*, 2016 IL. App. (1st) 143487, ¶54.

III. MWG DID NOT CAUSE OPEN DUMPING

In their attempt to establish a violation of Section 21(a) of the Act at Powerton, Waukegan and Will County Stations, Complainants rely almost exclusively on their allegations that the groundwater sample results were above the Federal MCLs. In support of their claims, Complainants attach a new table ("Appendix B") that was not introduced or discussed at Hearing. Complainants' Post-Hearing Brief, Appen. B. Complainants should not be permitted to attach a new demonstrative exhibit after the Hearing that was not entered into the record. MWG has no opportunity to have a witness or its expert review, rebut or even discuss the data in the tables, and there is no way to confirm whether the data in Complainants' Appendix B is accurate. This is particularly important considering the number of errors in Complainants' table of constituents

presented at the Hearing and located in Comp. Ex. 411. 1/29/18 Tr. p. 11:10- 26:4. Moreover, a review of the data in Appendix B shows that it is irrelevant. The only constituents listed in the table are arsenic and selenium, which were not analyzed by their expert or identified as an indicator throughout the Hearing. Complainants' Post-Hearing Brief, pp. 51, 62, 72. At the Hearing and in their Brief, Complainants focus on boron and sulfate as the coal ash indicators, and there is no explanation as to why those two constituents are absent from Appendix B. Complainants' Post-Hearing Brief, pp. 19-21; 10/26/17 Afternoon Tr. p. 34:3-11. Instead, Complainants include in Appendix B two constituents not analyzed by their expert or identified as an indicator throughout the Hearing. Moreover, the Illinois Class I groundwater standard for selenium is 0.05 mg/l, which is lower than the MCL of 0.01 mg/l. 35 Ill. Adm. Code 640.410. The difference in the standard values, and the fact that selenium was only detected above the Class I groundwater standard seven times from 2011 through 2017 at all four Stations, shows that the tables attached to Complainants' Post-Hearing Brief are meaningless.[14] The Board should disregard Appendix B attached to Complainants' Post-Hearing Brief and all claims based upon the Appendix, or at the very least give the attachment no weight.

Even if the Board does not disregard Appendix B, Complainants did not establish a violation of Section 21(a) of the Act. 415 ILCS 5/21(a). As MWG explained in its Post-Hearing Brief, MWG's coal ash is not a waste because it is beneficially reused – it is not cast aside or abandoned. MWG's Post-Hearing Brief, pp. 54-56. The Board found similarly in *Illinois EPA v. Michael Gruen and Jon Eric Gruen, d/b/a Jon's Tree Service,* AC 06-49, 2008 Ill. ENV LEXIS 22 (Jan. 24, 2008). In *Illinois EPA v. Michael Gruen,* Illinois EPA claimed that wood stored on the respondent's site for more than two years was open dumping. *Id* at 24. The respondents showed

[14] Similarly, Complainants attach a new Appendix A to their Brief. As described in Sec. IV.b. below, both appendices should be disregarded in their entirety.

that the wood was brought to the site for processing and sale as firewood. *Id*. The logs were cut and stacked for seasoning, which takes approximately nine months to a year, so some of the wood was present on the property for up to two years. *Id*. The respondents presented receipts documenting the sale of the firewood, and showed that logs that could not be sold were given away for use elsewhere. *Id*. Based on those factors, the Board found that the wood was not "discarded" within the meaning of the term "waste" and thus was not a violation of the Act. *Id*. *See also City of Chicago v. Speedy Gonzalez Landscaping, Inc.* 2009 Ill. ENV LEXIS 115, *74-77 (Board held that complainants had not established that a water tanker on the site was "discarded" because it was not clear whether the tanker was in the process of being timely returned to the economic mainstream).

Here, the coal ash is just like the wood. As established at Hearing, there is a market for the reuse of coal ash, and MWG's fly ash and bottom ash are beneficially reused in different manners including structural fill. SOF 43-45. Thus, similar to the wood, the coal ash is not "discarded" within the meaning of "waste". As the coal ash is not a waste, MWG cannot have open dumped the coal ash. *See also,* MWG's Post-Hearing Brief, pp. 55-56.

Moreover, MWG did not "allow" open dumping because it took extensive precautions. The analysis of "allow" for groundwater pollution applies equally to open dumping. *See supra* Sec. II.b.ii. MWG took extensive precautions at its Stations to prevent open dumping and has not been passive in its response to the coal ash at its Stations. MWG conducted numerous analysis of the coal ash inside and outside the ponds, all of which show that the ash is not a source of the constituents in the groundwater. MWG's Post-Hearing Brief, Tables 1 and 2, pp. 37-38, 47-52, 56-57. MWG conducted a scientific and systematic evaluation of its ash ponds to upgrade the ash pond liners, executed the upgrades, conducts daily inspections of the ash ponds, and has policies

and procedures to safely remove the coal ash from the ponds. *Id* at pp. 24-26, 42-47, 56-57. Further, MWG has implemented GMZs and institutional controls on its Stations. SOF 274-275, 636-656; MWG's Post-Hearing Brief, pp. 28-29. There is truly nothing reasonably more that MWG could do.

IV. MISCHARACTERIZATIONS AND FALSEHOODS

Throughout Complainants' Post-Hearing Brief, Complainants state numerous inaccuracies, mischaracterizations and falsehoods relating to Illinois law and facts established at Hearing. Individually, the misrepresentations may not seem significant, but the numerous inaccuracies and misrepresentations have a cumulative effect and add up to an inaccurate picture. The result is that Complainants' arguments have little basis.

a. Complainants Mischaracterize Illinois Law

In Complainants' Post-Hearing Brief, Complainants appear to deliberately mischaracterize the Illinois environmental law. As discussed above, Complainants falsely claim that the Illinois EPA violation notices issued to MWG in 2012 show that Illinois EPA "determined" a violation of the groundwater standards. Complainants' Post-Hearing Brief, p. 24. As the Board and Complainants know, violation notices are allegations – not findings. An Illinois EPA "notice of violation is merely a notice of potential liability and is 'a preliminary step in [IEPA's] investigation of *possible* violations of the Act.'" *People of the State of Illinois v. Lincoln, Ltd*, 70 N.E.3d 661, 674 (1st Dist. 2016) (*emphasis added*), *quoting National Marine, Inc. v. Illinois EPA*, 159 Ill. 2d 381, 389 (1994). Illinois EPA has the burden of proving the violations of the Act alleged in the violation notice before the Board or a circuit court, and Illinois EPA does not adjudicate the allegations. *Id, citing National Marine*. Additionally, a violation notice is a merely the "preliminary stage in the administrative process, and it is not clear whether the Agency will ever

initiate a cost-recovery/enforcement proceeding before the Board or the circuit court against the alleged violator." *Id, quoting National Marine.*

Here, the Illinois EPA violation notices only *alleged* groundwater violations. In fact, that is the exact language Illinois EPA used on the first page of the violation notices in which Illinois EPA states that it was providing "notice of ***alleged*** violations…" and repeatedly described the violations as "alleged." Comp. Exs. 1A, MWG13-15_328, 2A, MWG13-15_333, 3A, MWG13-15_342, and 4A, MWG13-15_348. Notably, Illinois EPA did not pursue the alleged violations to adjudication and instead agreed to resolve the allegation through its administrative process. MWG's Post-Hearing Brief, pp. 28-29.

Additionally, Complainants wrongfully claim that *People v. ESG Watts*, PCB 96-233, 1997 Ill. ENV LEXIS 100 (March 6, 1997) and 1998 Ill. ENV LEXIS 43 (Feb. 5, 1998) is support for the notion that a party may be liable for threatening a discharge when a party does not properly monitor the groundwater. Complainants' Post-Hearing Brief, p. 8. Even a cursory reading of the *ESG Watts* opinions shows that the case is entirely inapplicable here. In *ESG Watts,* ESG Watts owned a landfill permitted by the Illinois EPA, and he was required to install a groundwater monitoring network under that permit. 1997 Ill. ENV LEXIS 100 at *3. In fact, the quote Complainants pulled from the Feb. 5, 1998 opinion is merely dicta and is quoting from the Board's March 6, 1997 order granting the People's motion for summary judgment. In the March 6, 1997 Order, the Board clearly states that ESG Watts was in violation of Section 21(d)(1) for failing to "file the groundwater reports or install the monitoring devices as required *as a condition of its permit*." *People v. ESG Watts,* PCB 96-233, 1997 Ill. ENV LEXIS 100, March 6, 1997 at p. 13. Complainants are wrong to claim that the *ESG Watts* opinions stand for the proposition that anyone is liable under the Act by not monitoring the groundwater. Regardless, here, MWG voluntarily

installed wells directly upgradient and downgradient of their ash ponds with the review and approval of the Illinois EPA, despite no regulatory nor permitting requirement. SOF 489-502.

Further, Complainants falsely claim that *Allaert Rendering, Inc. v. Ill. Pollution Control Board,* 91 Ill. App. 3d 153, 414 N.E.2d 492 (3rd Dist. 1980) supports the statement that a party may be liable for a threat of water pollution when there is no actual contamination. Complainants' Post-Hearing Brief, p. 8. A review of the entire *Allaert Rendering* opinion shows that the snippet quoted by Complainants is not an accurate description of the opinion. In *Allaert Rendering,* Allaert Rendering merely claimed that Illinois EPA's complaint was insufficient because it did not allege water pollution. *Allaert Rendering, Inc. v. Ill. Pollution Control Board,* 91 Ill. App. 3d at 156. However, as described in the opinion, at the hearing, Illinois EPA introduced evidence that showed actual contamination due to flooding of the Rock River. *Id* at 155-156. Thus, the Board found that there was actual contamination and that Allaert Rendering violated the Act by threatening water pollution. *Id*. Here, MWG should not be held liable for a "threat" because MWG took extensive precautions to prevent contamination at its four Stations. *See supra* Sec. II.b.ii.2

Finally, Complainants' mistakenly rely on *People v. Texaco Refining and Marketing, Inc.* to support their claims that the GMZs at the Stations do not resolve a claim of water pollution. *People v. Texaco Refining and Marketing, Inc*. PCB02-03, 2003 Ill. ENV.LEXIS 665 (Nov. 6, 2003); Complainants' Post-Hearing Brief, p. 9. In *Texaco*, the People moved to strike Texaco's eighth affirmative defense that the groundwater standards did not apply when the GMZ was established. *Id* at 22-23 Although the Board agreed that compliance with <u>*another*</u> regulatory program, RCRA, would not shield Texaco from liability under the water regulatory program, the Board did not dismiss Texaco's GMZ defense. Thus, the Board did not decide in *Texaco* whether establishing a GMZ pursuant to the groundwater quality rules provides exemption from liability

under the water pollution section of the Act, 415 ILCS 5/12(a). *Id* at 22-23. If Complainants' claim were true and a GMZ resolves only a regulatory liability for water pollution, but not a statutory claim under Section 12(a) of the Act, then a party's liability would never be resolved. In other words, if a GMZ does not protect a party from liability under Section 12(a) of the Act, there is no reason to even create a GMZ. Under Complainants' theory, Illinois EPA could file a claim on one day for alleged liability under 35 Ill. Adm. Code 620, and a respondent could resolve it with a GMZ. The next day the Illinois EPA could file another claim for the same water pollution event under Section 12(a) of the Act. Complainants' theory makes no sense and again, Complainants seek to turn the law on its head. Here, MWG resolved its liability for groundwater pollution with Illinois EPA at each of the Stations through the CCAs, including GMZs at the Joliet 29, Powerton, and Will County Stations. To allow Complainants' Section 12(a) claim to circumvent the GMZs is not supported by the law and makes no logical sense. In any case, with the CCAs and GMZs in place, Illinois EPA has already determined that no additional action is required regarding the groundwater at the Stations.

b. <u>Factual Fabrications</u>

Complainants Post-Hearing Brief is riddled with mischaracterizations and errors in factual statements. At the Hearing, MWG was compelled to reveal to the Board the many errors and inadequacies in Complainants' expert's reports and opinions. MWG's Post-Hearing Brief, pp. 57-60. MWG is similarly compelled to describe Complainants' many misstatements in their Post-Hearing Brief. The most notable error in Complainants' Post-Hearing Brief is their claim related to the monitoring wells and monitoring well results at Waukegan. Complainants falsely claim that MW-8 and MW-9 at Waukegan are "both screened in coal ash." Complainants' Post-Hearing Brief, p. 57, *citing* Comp. Ex. 203. They make the claim to argue that an area near MW-8 and

MWG 9 is a "likely" source of groundwater impact. *Id.* Complainants' claim is simply not true. MW-8 contains soil, silt, sand, peat, clay and two thin layers of slag mixed with silt.[15] Comp. Ex. 203. It is not "screened in coal ash." Similarly, although MW-9 has some ash, its screen is much longer than the limited area of ash in the boring log. Comp. Ex. 203. Complainants know this because they asked Mr. Gnat about the boring logs at the Hearing. 10/25/17 Tr. p. 53:5-20. By stating that both wells are "screened in coal ash," Complainants falsely suggest there is some large quantity of ash in the area.

Complainants then claim that MW-6 and MW-11 through MW-14, the upgradient wells at Waukegan, have boron levels between 1 to 4 mg/l. Complainants' Post-Hearing Brief, pp. 57-58. Yet, the groundwater monitoring results show that the boron levels in those upgradient wells are much higher. MWG's Ex. 811. This is significant because the higher levels of boron show that boron in the wells located at the upgradient property boundary is migrating from the neighboring site and impacting the Waukegan Station, as MWG's expert testified. 2/2/18 Tr. p. 102:12-21, MWG Ex. 901, p. 56-57. MW-12, located upgradient to the west of the Waukegan Station, has had boron levels higher than 4 mg/l, with levels at 10 mg/l, 8.4 mg/l, 4.9 mg/l, 18 mg/l, and 16 mg/l. MWG Ex. 811, p. 19. Further, MW-11, located northwest of the ash ponds, also has boron at levels above 4 mg/l, with levels at 5.1 mg/l, 5.0 mg/l, 4.4 mg/l, and 5.2 mg/l. MWG Ex. 811, p. 18. MW-6 also has levels above 4 mg/l, including as high as 10 mg/L, 5.8 mg/l, and 8.9 mg/l. MWG Ex. 811, pp. 11-12. Moreover, MW-8, which is upgradient, has boron levels between 19-32 mg/l. MWG Ex. 811, p. 15. The real data actually supports the fact that there is an upgradient source of boron at the Waukegan Station – the Griess-Pfleger Tannery Site and the General Boiler

[15] As Mr. Gnat explained during the hearing, when KPRG describes the boring log, the first part of the description in a layer is the main part of the matrix observed followed by smaller and smaller parts of the matrix. 10/26/17 Morning Tr. p. 7:11-23.

Site. Both of these upgradient sites have coal and coal ash placed in the ground. SOF 265, 268. Moreover, MWG's expert established that there is a plume of constituents from the Griess-Pfleger Tannery Site and the General Boiler Site migrating onto the Waukegan Station. SOF 263-281.

In addition to mischaracterizations in their Brief, Complainants attach a *new and different* table of constituents to their Post-Hearing Brief as Appendix A. Complainants' Post-Hearing Brief, Appen. A. Similar to the table of MCL data in Appendix B, Appendix A was not presented at the Hearing as a demonstrative exhibit and is not part of the evidence admitted over ten days of Hearing testimony. MWG has no opportunity to respond to the table through a witness or expert analysis. Because Appendix A is new information that was never entered at Hearing and MWG has had no opportunity to address, the Board should disregard the table in Appendix A and all claims Complainants make in reliance on the table. At the very least, Appendix A should be given no weight.

The table in Appendix A appears to be a revised version of the table Complainants presented as Exhibit 411 at the Hearing. Comp. Ex. 411. MWG's analysis of Exhibit 411 revealed that the table has little value. Primarily, the table in Comp. Ex. 411 was riddled with errors. 1/29/18 Tr. p. 11:10- 26:4. Complainants' expert admitted to the many errors during his testimony. *Id*. In addition to the numerous errors, the table in Exhibit 411 was meaningless because it did not consider or distinguish whether the monitoring wells are up gradient or downgradient. 10/27/17 Tr. p. 229:24-230:6. As a result, no useful conclusions can be drawn from the data. MWG's expert testified that there are no groundwater plumes at the Stations and the results are temporally and spatially erratic. MWG Ex. 903, pp. 15, 18, 21, 23, 41, 53, 69; 2/2/18 Tr. p. 73:18-76:15, 93:22-94:14; MWG's Post-Hearing Brief, p. 37. Complainants ignore these conclusions by only providing limited data results, without context. Moreover, the table in Comp. Ex. 411 included the results from wells

within the GMZs established at the Stations. 10/27/17 Tr. p. 234:4-13. The Class I standards no longer apply to wells within the GMZs. MWG's Post-Hearing Brief, p. 54. Also, as established at Hearing, the total number of results in the table in Comp. Ex. 411 was simply a function of sampling frequency. 10/27/17 Tr. p. 236:14-17. In fact, Complainants' expert admitted that if all the sampling events and constituents were counted at the Stations, the Class I exceedances total only approximately 11% of all data collected. 10/27/17 Tr. p. 237:19-239:23. The vast majority of samples at the Stations are ***not*** above the Class I groundwater standards.

Even though MWG has not had an opportunity to directly rebut the information in Appendix A, the same criticisms of the table in Ex. 411 apply equally to Appendix A of Complainants' Post-Hearing Brief. First, and notably, Complainants changed the parameters included in their table, removing numerous constituents from their table that were in Comp. Ex. 411, including nitrogen, vanadium, and chloride. Complainants' Post-Hearing Brief, Appen. A. This significantly reduces the number of "alleged exceedances" as compared to the numbers Complainants used at the Hearing, revealing the arbitrary nature of both documents, particularly since the "alleged exceedances" are simply a function of the sampling frequency. Comp. Ex. 411; Complainants' Post-Hearing Brief, Appen. A. Moreover, just like Comp. Ex. 411, Appendix A does not consider or account for whether the groundwater monitoring wells are upgradient or downgradient. Appendix A does not consider whether the monitoring well results are within the GMZs established at the Stations. Also, Appendix A does not consider the total number of sampling events of each monitoring well nor the times when a constituent was detected below the Class I groundwater standard. Similar to the analysis of Comp. Ex. 411, the data in Appendix A needs to be placed in context. Without subtracting the many constituents sampled within the GMZs, Complainants allegedly identified 1,314 constituents above Class I standards in Appendix A.

Considering the total number of sampling events of those parameters since monitoring began (12,710), only approximately 10% of the sampling events are actually above the Class I groundwater standard. In other words, 90% of the sampling results for the parameters identified in Complainants' Appendix A are *below* the Class I groundwater standards.

Additionally, Complainants choice of maps attached to their Post-Hearing Brief is telling. Instead of attaching the most recent groundwater contour maps for each of the Stations, all of which are available in MWG Ex. 901, Complainants unscientifically use a different type and date of map for each Station. For the Joliet 29 Station, Complainants do not even attach a groundwater contour map of the Station, but instead simply attach a site map. Complainants' Post-Hearing Brief, Appen. C. Had Complainants attached a groundwater contour map, it would be evident that the groundwater flows to the southwest, towards the Des Plaines River. SOF 77; MWG Ex. 901, p. 20. Thus, the groundwater contours at Joliet 29 refute Complainants' claims that either of the alleged historic ash areas to the northeast and southwest could be the source of constituents in the groundwater. For both the Waukegan and Will County Maps, Complainants use contour maps from 2014 and 2016 respectively, neither of which show an accurate groundwater contour because neither shows and considers all the groundwater wells. Complainants' Post-Hearing Brief, Appen. E, F. Complainants could have easily used the most recent groundwater contour maps for both stations available in MWG Ex. 901 at pages 49 and 63 respectively. The second Waukegan map attached at Appendix E to Complainants' Post-Hearing Brief should be disregarded because it has no exhibit number, no date, no identified source, and is incomplete. Interestingly and without explanation, Complainants attach the most recent Powerton groundwater contour map only for the gravelly sand unit, but not for the silt and clay unit. Complainants' Post-Hearing Brief, Appen. D. As Mr. Gnat explained at Hearing, at Powerton there are two distinct and hydraulically connected

groundwater flow units. SOFs 157-159. Again, the most recent groundwater contour maps for both units is available in MWG Exhibit 901 at pp. 34-35, and it is mysterious why Complainants would not use both to provide the Board with a complete picture.

There are additional mischaracterizations and unsupported claims in Complainants' Post-Hearing Brief that cannot go uncontested. The following chart identifies Complainants' errors and describes the correction, including a citation to the record:

Comp. Post-Hearing Brief Page No.	**Complainants' Claim**	**Correction**
18	Complainants claim that Illinois EPA prohibits the use of unlined areas for placement of ash, citing MWG Ex. 636.	Complainants cite only to the Powerton CCA to support this broad statement. MWG Ex. 636. The CCAs for the other Stations do not have a similar prohibition of placement of ash, and Complainants have not identified, and MWG has not found, an Illinois EPA prohibition on the placement of ash on unlined areas. MWG Ex. 626, 647, 656; SOF 563. In fact, MWG presented evidence that most coal ash ponds operated in Illinois do not have liners; MWG's Stations are the exception. 1/29/18 Tr. p. 188:4-188:19.
21, 30, 40, 53, 64	At all Stations, Complainants improperly claim that MWG's expert stated that groundwater data greater than the 90th percentile value from community water levels is above background.	Complainants pull half a sentence from MWG's expert, Mr. Seymour's, three-page discussion on how Complainants' expert's use of community wells as a background value is incorrect. 2/1/18 Tr. p. 31:15-33:17. Mr. Seymour clearly testified that Complainants' expert's use of community water levels as background was wrong because the data was not site specific, and there are no community wells near the sites. 2/1/18 Tr. p. 31:17-24. As Mr. Gnat explained, establishing background depends on the site and the purpose of the study. 2/1/18 Tr. p. 100:3-12. Mr. Gnat further explained that in an old industrial area, the upgradient wells need to be close to the unit to be evaluated to show the groundwater approaching the unit, and he would not use a municipal drinking water well as a background value because the wells are developed and screened completely differently. 2/1/18 Tr. p. 100:13-12

Comp. Post-Hearing Brief Page No.	Complainants' Claim	Correction
28	Complainants claim that there are "periodic" exceedances of the Class I groundwater standards for coal ash constituents at the Joliet 29 Station.	Complainants fail to point out that the "periodic exceedances" are not the key indicators of coal ash. In fact, there are no concentrations of boron above the Class I groundwater standards in the groundwater at Joliet 29. MWG's Post-Hearing Brief, p. 32-35. Boron has not been above the Class I groundwater standards at Joliet 29 other than in 2011. MWG's Ex. 908. Sulfate is found above Class I in only one well, which is insufficient to make any overall site conclusions. 1/29/18 Tr. p. 65:3-9. MWG Exhibit 908 presents a pictorial summary of the boron and sulfate concentrations at Joliet 29, and a comparison to Class I groundwater standards, as well as Kunkel's "eyeball" opinion of the generally decreasing trends. MWG Exhibit 908 attached to MWG's Post-Hearing Brief, Attachment 2.
31	Complainants assume that there is coal ash in the southwest area of the Joliet 29 Station, citing only to a map at MWG13-15_23339 and copied on MWG13-15_25149.	There is insufficient evidence to support the conclusion that the southwest area has coal ash. Complainants only rely upon 1998 maps that were not prepared for MWG. As Ms. Race stated at the Hearing, she does not know that the area to the southwest has ash, and Mr. Gnat stated similarly. 1/30/18 Tr. p. 273:13-22; 2/1/18 Tr. p. 197:17-19. Regardless, the southwest area at Joliet 29 has an institutional control, an ELUC, that was established based upon constituents that had migrated onto the MWG property from the neighboring site to the west. SOF 136-140. In any case, a nearby area of historic ash at Joliet 29 was sampled and found not to be leaching constituents. Comp. Ex. 247.
42, 46	Complainants cite to three MWG employees' emails (Comp. Ex. 107, 108, & 714) regarding relining the Powerton Secondary Ash Basin to suggest that there were issues with the active ash ponds.	Complainants' claims are not supported by the emails. First, Comp. Exhibits 107 and 714 are identical, so citing to both is duplicative and cumulative and the Board should disregard Comp. Ex. 714. Ill. R. Evid. 403; *People v. Cotell*, 298 Ill. 207, 216, 131 N.E. 659, 662 (1921). Second, the only "concerns" identified by MWG employees was when the Station was relining the Secondary Ash Basin, a finishing pond that holds *de minimis* ash. SOF 192-194, 198. Both Comp. Ex. 107 and 108 are emails written during the relining project when the river water was high, the basin was empty, and water seeping in was preventing the new HDPE liner to be lain.

Comp. Post-Hearing Brief Page No.	Complainants' Claim	Correction
		SOF 605. In response to the "concerns" identified in the emails, MWG implemented an engineered solution, which was an underdrain system that both experts agreed solved any "concerns" related to the liner. SOF 606-610. As Mr. Kelly testified, upon completion of the relining, there has not been an issue with the HDPE liner in the Secondary Ash Basin. SOF 616-617.
42	Complainants wrongfully claim that the Powerton Bypass Basin needed to be relined due to damage to the liner, citing Comp. Ex. 716.	Comp. Ex. 716 does not support Complainants' claim because it does not state that the Bypass Basin was damaged. Instead, Mr. Kelly clearly testified at Hearing that the condition of the Bypass Basin "was still good" and that the reason he wanted to reline the basin was because "they're giving us the money to reline the basin…" 1/31/18 Tr. p. 217:23-218:6, SOF 531-533.
42	Complainants falsely claim that the rips and tears in Powerton ash pond liners may have caused constituents in the groundwater.	All of testimony Complainants cite state that the rips and tears were "above the water line" or "around the top of the basin, or "across the top". 1/31/18 Tr. p. 85:2-12 (Ash Surge Basin); 105:11-15 (Bypass Basin); 164:5-12 (Secondary Ash Basin); 181:14-17 (Bypass Basin). The liners below the water line was in good shape. 1/31/18 Tr. p. 85:2-12; 105:11-15. Thus, no coal ash constituents would have leaked from the ash ponds.
42	Complainants wrongfully claim that the Powerton East Yard Runoff Basin had "rips and tears," implying it contained ash.	Complainants wrongfully claim that Mr. Kelly testified about rips at tears in the East Yard Runoff Basin. 1/31/18 Tr. p. 181:14-17. In the testimony Complainants cite, Mr. Kelly was clearly discussing the Bypass Basin and not the East Yard Runoff Basin. 1/31/18 Tr. p. 181:5-13. The East Yard Runoff Basin is used for stormwater runoff, is not a part of the ash sluicing flow system, and does not contain ash. SOF 231-233.

Comp. Post-Hearing Brief Page No.	Complainants' Claim	Correction
47, 52, 60	Complainants suggest, citing to MWG's expert, that the groundwater at Powerton, Waukegan, and Will County was getting worse.	First, Complainants concede that the groundwater at Joliet 29 is improving by simply omitting any reference to the concentration trends in the groundwater at the Station. Complainants' Post-Hearing Brief, p. 29-30. MWG's expert concluded, and Complainants' expert agreed, that Joliet 29 was, in fact, improving. MWG Ex. 901, p. 25; MWG Ex. 908; 10/27/17 Tr. p. 246:4-254:6. Second, MWG's expert specifically found through a linear regression analysis, that the groundwater at the Powerton, Waukegan and Will County Stations was stable, and not getting worse. 2/2/18 Tr. p. 124:7-11; MWG's Post-Hearing Brief, p. 37-38.
49	Complainants imply that MWG's plans, pursuant to the Federal CCR rules, to close the Powerton Former Ash Basin is insufficient.	Complainants ignore the sections of the CCR rules that are inconvenient to their theory. MWG is closing the Former Ash Basin pursuant to the CCR rules, and pursuant to the rules will move the ash from the north side of the basin to the south side of the basin. 1/30/18 Tr. p. 102:13-103:23; 40 CFR 257.102. Complainants' discussion of the Former Ash Basin is misleading because, as described below, groundwater monitoring shows it is not a source. *See also supra* Sec. II.b.ii.2.
51	Complainants claim the Former Ash Basin at Powerton is a source of the constituents in the groundwater.	The Former Ash Basin is not a source of constituents in the groundwater. Complainants' own expert agreed that there are no coal ash constituents in the groundwater downgradient of the Former Ash Basin above the Class I groundwater standards. 10/27/17 Tr. p. 204:9-210:23. Moreover, Complainants' expert agreed that the concentration of boron in the three most recent sampling results were below his own estimates of background. 10/27/18 Tr. p. 207:1-5.
52-62, Appen. A	At Waukegan, Complainants claim that constituents in the groundwater, particularly arsenic, are only from the Waukegan Site.	There is a plume of constituents migrating from the properties located adjacent to the west of the Waukegan Station. SOF 263-281. MWG's review of the groundwater results from the Griess-Pfleger Tannery Site and the General Boiler property shows that arsenic, iron, manganese and TDS concentrations continue to be high at those offsite upgradient properties. SOF 278-281. Moreover, as described above, the boron concentrations in the upgradient wells are above the Class I standards,

Comp. Post-Hearing Brief Page No.	Complainants' Claim	Correction
		further contributing to the boron concentrations in the groundwater at Waukegan.
52	Complainants claim, with little evidence in support, that the area west of the Waukegan Ash Ponds is a "coal ash storage area."	There is insufficient evidence to support the conclusion that the area west of the Waukegan ash ponds contains coal ash. Complainants only rely upon a caption on 1998 maps that were not prepared for MWG. 10/23/17 Tr. p. 100:5-10. As Ms. Race testified, MWG does not know that there is ash buried in the area. 1/30/18 Tr. p. 261:24-262:2. Similarly, Mr. Veenbaas testified that he does not know if ash storage is there, rather it is used to land helicopters. 2/1/18 Tr. p. 10:12-21. Regardless, the entire area is subject to an institutional control, an ELUC, that was established due to constituents that had migrated onto the MWG property from the neighboring site to the west, and also with the review and approval of the Illinois EPA. SOF 274-276, 651-653.
52	Complainants claim, without support or citation to the record, that boron and sulfate at the Waukegan Station are not naturally occurring.	Complainants do not cite to, because there are no facts in the record to claim, that boron and sulfate are not naturally occurring. The Board should disregard this claim because allegations of fact must be supported by the record. *Seegers Grain Co. v. Kansas City Millwright Co.*, 230 Ill. App. 3d 565, 569, 595 N.E.2d 113, 116 (1992); *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."). The Board should take judicial notice of the fact that boron and sulfate are naturally occurring elements. Ill. R. Evid. 201. "Boron is a widely occurring element in minerals found in the earth's crust. It is the 51st most common element found in the earth's crust and is found at an average concentration of 8 mg/kg….Boron concentrations in groundwater can be as high as 300 mg/L in areas with natural boron-rich deposits." (U.S. Agency for Toxic Substances and Disease Registry (ATSDR Nov. 2010 CAS #744-42-8). https://www.atsdr.cdc.gov/PHS/PHS.asp?id=451&tid=80. Similarly, "sulfate is a naturally occurring ion found in combination with metals in the form of salts." (USEPA Fact Sheet-Sulfate; EPA 811-f-94-006, Nov. 1994)

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59	Without support, Complainants' claim that the Waukegan ash ponds are "substandard," and could be leaking.	Soon after MWG installed the new HDPE liners, MWG had a contractor conduct a third-party review and inspection of the liners in the both Waukegan ash ponds to ensure the liners were functioning properly. SOF 333-336. The liner expert concluded that the liner system was installed correctly and in accordance with the specifications and industry standards. SOF 337-347. MWG's expert came to the same conclusion. 2/1/18 Tr. p. 244:4-6. Moreover, Illinois EPA clearly concluded that the Waukegan ash ponds are not a source of the constituents in the groundwater. SOF 351-352. Complainants have no contrary evidence.
63, 65	Complainants mischaracterize the 2005 and 2006 NRT memos (Comp. Ex. 34 and MWG Ex. 606) to claim that the Will County ash ponds were in "poor" condition.	Comp. Ex. 34 and MWG Ex. 606 do not show that the ash ponds were in poor condition. As Ms. Race explained, the 2005 and 2006 NRT memos, Comp. Ex. 34 and MWG Ex. 606, were prepared as part of MWG's scientific method to evaluate the station impoundments to determine the order of relining the impoundments. SOF 412-414, 422. NRT did not actually look at the liners, but instead made conservative assumptions based only on the age of the liners. SOF 416. Ultimately, when the poz-o-pac liners at Will County were revealed, MWG found the pond liners were in excellent condition. SOF 453-457, 621.
65-66	Complainants misinterpret Ms. Maddox's notations from a stormwater inspection report and incorrectly claim that there was a "crack" in the Pond 3S poz-o-pac at Will County.	Ms. Maddox explained that the water she observed and described in the Oct. 1, 2009 Stormwater Construction Site Inspection Report, Comp. Ex. 303, was rainwater because she conducted the evaluation during a storm event. 10/24/17 Tr. p. 257:1-11; 266:23-267:1. She also testified that she did not recall actually seeing a crack, 10/24/17 Tr. p. 269:4-7, and when she walked on the poz-o-pac before the HDPE liner was placed when it was dry she did not see a crack. 10/24/17 Tr. p. 258:11-22. Further, Mr. Veenbaas testified that he walked on the Pond 3S and observed that the poz-o-pac was in in "beautiful shape" and had no cracks. SOF 454-455.

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66	Complainants incorrectly state that MWG "employees" at Will County expressed concerns about the HDPE liners to support Complainants' claim that the liners might be damaged, citing only to Comp. Ex. 306.	Comp. Ex. 306 is an email written by a single employee, Ms. Maddox, long before Pond 3S was relined. Ms. Maddox testified that she knew little about liners and was raising questions *before* the Will County ash ponds were relined. Comp. Ex. 306; MWG's Post-Hearing Brief, Table 6. As Ms. Maddox explained at Hearing, she discussed her concerns during a meeting and she would not have let her concerns just drop, but instead would resolve the questions before moving forward. 10/24/18 Tr. p. 262:9-19. Complainants' expert agreed that Ms. Maddox's email in Comp. Ex. 306 (located at MWG13-15_48612) did not contain any statements about leaks or poor ash pond construction, retirement, or maintenance. 10/27/18 Tr. p. 175:16-176:14.
66	Complainants imply that hairline cracks detected in the core sample of poz-o-pac from Will County (Comp. Ex. 286) show that the poz-o-pac was cracked.	The poz-o-pac core sample did not show cracks through the poz-o-pac. Rather, as Mr. Gnat explained at the Hearing, hairline cracks appearing on the end of the core were caused by the coring bit, simply by the action of the drilling, and were merely superficial. 10/26/17 Morning Tr. p. 68:19-69:22. Mr. Gnat further explained that the sampling result showed no discoloration through the length of the core, indicating that there were no fractures through the core. 10/26/17 Morning Tr. p. 69:23-70:2.
66	Complainants' characterization of the Will County 1N and 1S pond liners as insufficient is misleading.	The Will County ash ponds had at least 36-inches of a poz-o-pac liner system, and Ponds 1N and 1S still have that liner system in place. SOF 403. As MWG explained at the Hearing, the same poz-o-pac liners in Ponds 2S and 3S were in excellent condition when they were ultimately revealed, and there is no basis to suggest that the poz-o-pac underlying Ponds 1N and 1S is different. SOF 453-457, 621. Moreover, as Mr. Veenbaas explained, Ponds 1N and 1S were finishing ponds and only collected the bottom ash fines, whereas the bulk of the bottom ash landed on a retention pad. SOF 400-401.

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66	Complainants misinterpret the Will County Field Change request (Comp. Ex. 302) to claim that there was a crack in the poz-o-pac liner for Will County Pond 3S.	The Oct. 29, 2009 Field Change Request, Comp. Ex. 302, does not state that groundwater is leaking through the poz-o-pac. Instead, it clearly states that the source of the water is "unknown." Comp. Ex. 302, MWG13-15_28850. As Ms. Maddox explained, and shown in MWG Ex. 507, water under the liner was from runoff pushed into the area when placing the warning layer. SOF 464-466.
66 at FN69	Complainants claim that MWG's expert stated that poz-o-pac can crack.	MWG's expert was answering a hypothetical question that theoretically poz-o-pac could crack depending upon the conditions. 2/2/18 Tr. p. 148:16-21. There is no evidence in the record that the poz-o-pac in the liners actually cracked, and the coring of the Will County poz-o-pac and witness testimony showed that it was in excellent condition. Comp. Ex. 286; SOF 453-457, 621.
15, 43, 49, 59, 66	Complainants rely on the CCR rules to claim that the ash ponds are insufficient, and yet ignore the sections of the Federal CCR rules that do not suit their theory.	Complainants rely heavily on the CCR Federal rule section which states ash ponds must be over five feet from the groundwater levels. First, the 2015 CCR Rules were not in place when these ponds were constructed or relined and did not apply at that time. 40 CFR 257; MWG's Post-Hearing Brief, Tables 3-6. Mr. Seymour explained the CCR rules were not the industry standard, and that MWG's ponds were exceptional in that they were lined. 2/1/18 Tr. pp. 229:14-230:1, 240:16-241:1, 244:10-21. Second, Complainants fail to cite to the entire rule. 40 CFR 257.60(a) states that coal ash impoundments be located at least five feet above the groundwater *or* demonstrate that there is not a hydraulic connection. Third, Complainants ignore other sections of the CCR rules that allow for the CCR landfills to be closed with ash in place, as MWG is closing the Former Ash Basin at Powerton. 40 CFR 257.102. Fourth, Complainants ignore that the CCR rules do not apply to Ponds 1N and 1S at Will County, nor any other alleged historic ash areas. 40 CFR 257.53. Fifth, nothing in the CCR rules allow Complainants to claim that the pond liners leaked. Simply being within five feet of the groundwater levels is meaningless without any evidence that there is a leak or other issue. Sixth, MWG's expert testified to the groundwater levels at each of the ponds and determined

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		there were no concerns because either the groundwater did not impact the pond, or the liner systems protected the ponds. MWG's Post-Hearing Brief, pp. 38-40.

Complainants' numerous mischaracterizations and inaccuracies collectively show that the Board cannot rely upon Complainants' Post-Hearing Brief to accurately describe the MWG Stations, the ash ponds, or the coal ash. Moreover, the Board cannot rely upon the conclusions Complainants present because the conclusions are not based on accurate facts.

V. CONCLUSION

Complainants have failed to prove with a preponderance of evidence that MWG caused or allowed water pollution or open dumping. Complainants' speculations and theories on possible sources of the constituents in the groundwater are not enough to carry their burden. Moreover, Complainants Post-Hearing Brief is riddled with errors and mischaracterizations of the evidence and record. Based simply upon the speculations and errors, the Board cannot find that Complainants proved by a preponderance of the evidence that MWG caused or allowed a violation of the Act.

Nevertheless, in response to Complainants' allegations, MWG met its burden of going forward. Despite the differences between the four MWG Stations, the complexity of the coal ash operations, and the hydrogeology at each of the Stations, there is no doubt that since it began operating, MWG has taken extensive precautions and measures to maintain and upgrade its Stations to protect the groundwater in compliance with the Illinois Environmental Protection Act and its underlying regulations. It is undisputed that the constituents in the groundwater cause no risk or harm to public health or the environment, and MWG has already completed the necessary

actions at the Stations - through investigations, inspections, relinings GMZs, ELUCs, Station closures and pond closures – and no further action is warranted.

Based upon the record the Board should hold:

1) MWG did not cause water pollution at Joliet 29 because the indicator parameters for coal ash are not present above the Class I groundwater standard in the Joliet 29 groundwater. MWG's Post-Hearing Brief, pp. 32-34. Complainants did not allege open dumping at Joliet 29.

2) The undisputed evidence from MWG's expert is that the constituents in the groundwater are not creating a risk or nuisance at any of the Stations. Because the waters are not rendered harmful, there is no water pollution. MWG Post-Hearing Brief, pp. 29-30, 52-54.

3) MWG did not cause water pollution from the lined ash ponds because the original pond liners were observed to be in good condition, the new liners were installed with thorough quality control methods, there is no plume in the groundwater from the ponds, and there is no risk of hydrostatic uplift. MWG's Post-Hearing pp. 24-26, 35-40.

4) MWG did not cause groundwater impacts from the ash outside the ponds because MWG did not place the ash in those historic locations and the analysis of the coal ash outside the ponds shows that it is not a source of the constituents in the groundwater. MWG's Post Hearing Brief, pp. 40-42.

5) MWG did not allow groundwater impacts because after extensive sampling and monitoring, neither party can identify a source, and without a specific source there is nothing to control. MWG Post-Hearing Brief, pp. 47-52.

6) MWG did not allow groundwater impacts because it has taken extensive precautions to prevent any releases by installing, maintaining and updating the ash pond liners before any requirement by a State or Federal agency, conducting inspections of the coal ash ponds, having policies and procedures to carefully remove the coal ash without damaging the liners, sampling its coal ash and historic ash areas, and implementing institutional controls on the Stations' property. MWG Post-Hearing Brief, pp. 24-26, 28-29, 42-47.

7) It is undisputed that MWG beneficially reuses its ash. As a result, the coal ash is not a "discarded" material, and is not a "waste", thus MWG cannot have open dumped the coal ash at Powerton, Waukegan or Will County. MWG Post-Hearing Brief, pp. 55-56.

8) MWG did not cause or allow open dumping of the coal ash because the ash ponds are not a disposal site, the coal ash is sold for reuse, and MWG has taken extensive precautions to prevent any release. MWG's Post-Hearing Brief, pp. 56-57.

The Board should enter an order finding that MWG has not violated the Illinois Environmental Protection Act as claimed, and, in any case the Board should end this matter by finding that MWG has taken all necessary actions and nothing further needs to be done. MWG Post-Hearing Brief, pp. 64-67.

Respectfully submitted,
Midwest Generation, LLC

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