BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	PCB No-2013-015
Complainants,	)	(Enforcement – Water)
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondents	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' OPPOSITION TO MIDWEST GENERATION'S MOTION FOR RECONSIDERATION**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

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Dated: October 14, 2019

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COMPLAINANTS' OPPOSITION TO MIDWEST GENERATION'S MOTION FOR RECONSIDERATION

I. INTRODUCTION

At the outset, Complainants note that Midwest Generation's ("MWG's") Motion for Reconsideration ("Motion") is silent about the Waukegan site in its entirety and silent about historic ash areas at Will County. The Board's June 20, 2019 Order ("Order" or "June 2019 Order") with respect to these areas is unchallenged, and there is no reason that the case should not proceed immediately to remedy phase on these claims.

With respect to other areas, MWG's Memorandum in support of its Motion ("Memo" or "Memorandum") raises no new evidence, change of law, or any other argument that should lead the Board to conclude that its Order was erroneous. As a result, the Board should deny Midwest Generation's Motion.

II. THE BURDEN ON A MOTION FOR RECONSIDERATION

MWG's burden on this motion for reconsideration is high. In *Illinois v. American Waste Processing*, the Board stated that:

> [T]he intended purpose of a motion for reconsideration is to bring to the court's attention newly-discovered evidence which was not available at the time of the hearing, changes in the law, or errors in the court's previous application of the existing law.

PCB 98-37, 1997 WL 796658, at *1 (Dec. 18, 1997) (citing *Korogluyan v. Chicago Title & Trust Co*., 572 N.E.2d 1154 (Ill. App. 1st Dist. 1992)). The movant seeking reconsideration "must establish due diligence and demonstrate that real justice has been denied." *City of Quincy v. Ill. Environmental Protection Agency*, PCB 08-86, 2010 WL 2547531, at *8 (June 17, 2010) (quoting *Patrick Media Group, Inc. v. City of Chicago*, 626 N.E.2d 1066, 1072 (Ill. App. 1st Dist. 1993)).

III. THE BOARD CORRECTLY APPLIED THE LAW CONCERNING GROUNDWATER MONITORING ZONES

A. MWG Was Not Deprived of Due Process When the Board Relied on the Expiration of the GMZs as a Legal Basis for Its Decision.

The Board did not deprive MWG of due process when the Board correctly found that the GMZs at Joliet 29, Will County, and Powerton had expired. Although MWG argues that "[t]he Board's *sua sponte* determination that the GMZs expired violates due process of law and MWG's fundamental right of notice of the issues," MWG Memorandum at 4, MWG's argument is without merit because the Board's GMZ finding was not a new "issue" that MWG needed notice of.

The overarching issue in this case has always been whether MWG violated groundwater quality standards and the Illinois Environmental Protection Act. One factor in the question of whether MWG violated groundwater protection standards was whether GMZs were in place negating those violations. Expiration of the GMZs was a relevant consideration in the Board's determination on groundwater protection standard violations. The Board may proffer any legal basis for its decisions, even those not argued by the parties to a case. *Tim Thompson, Inc. v. Vill.*

of Hinsdale, 617 N.E.2d 1227, 1244–45 (Ill. App. 2d Dist.1993) (stating that it is within the power of a court to decide a case on the basis of any legal grounds which have factual support in the record, even when such grounds were not raised) (citing *Sheldon v. Colonial Carbon Co*., 452 N.E.2d 542, 546 (Ill. App. 1st Dist. 1983); *In re Marriage of Miller*, 438 N.E.2d 939, 941 (Ill. App. 4th Dist. 1982); *Ogden Group, Inc. v. Spivak*, 416 N.E.2d 393, 394 (Ill. App. 2d Dist. 1981)).

B. Any Claim by MWG that It Was Deprived of Due Process Is Cured by Consideration of Its Concerns on Reconsideration.

Even were there a basis to complain about due process though, MWG has already taken the first step to cure its own claim of insufficient due process, simply by filing this Motion and ensuring that it is given due process to present (and be heard on) its legal arguments on the GMZ issue. Because the Board must respond to the Motion, it will consider MWG's arguments. Thus, MWG's due process rights will be satisfied so long as the Board entertains its Motion. And this would not be the first time due process claims have been nullified by supplemental briefing: in similar circumstances, the Board has already held consideration of issues in a motion for reconsideration to be a sufficient opportunity to give a party its due process right to notice and an opportunity to be heard on those issues. *Smith v. City of Champaign*, PCB 92-55, 1992 WL 315763, at *3 (Oct. 16, 1992) ("In any event, petitioners have had the opportunity, in their motion for reconsideration, to raise their arguments . . . . .").

Under Illinois law, if a court gives a party an opportunity to be heard on a decision, even if it is after a decision, that is sufficient to meet due process requirements. *Schwarzbach v. City of Highland Park*, 403 N.E.2d 102, 105 (Ill. App. 2d Dist. 1980). "In this instance the trial court, after announcing its decision, offered the City ample time to raise legal arguments on the issues." *Id.; see also Reyes v. Court of Claims of State of Ill.,* 702 N.E.2d 224, 231 (Ill. App. 1st Dist.

1998) (finding that Plaintiff was not deprived of due process because Court of Claims entertained Plaintiff's motion for reconsideration). Not only did MWG have the opportunity to make legal arguments regarding the expiration of the GMZs in its reconsideration motion, but MWG has also submitted new evidence (Exhibits 1 and 2) attached to its reconsideration motion for the Board to consider. *See* MWG Memorandum at 6, Exs. 1 and 2. Since the Board will consider and render a decision on MWG's motion for reconsideration, MWG's due process rights will be satisfied.

Even MWG's own citations in support of its lack of due process underscore the possibility for courts to cure claims for due process. MWG relies on both *Niles Twp. High Sch. Dist. 219 v. Ill. Educ. Labor Rels. Bd.* and *Peterson v. Randhava* to argue that the Board's decision that the GMZs had expired deprived the Respondent of due process and the fundamental right to notice of the issues. *Niles Twp. High Sch. Dist. 219 v. Ill. Educ. Labor Rels. Bd.*, 859 N.E. 2d 57 (Ill. App. 1st Dist. 2006); *Peterson v. Randhava*, 729 N.E.2d 75 (Ill. App. 1st Dist. 2000). Both of these cases are distinguishable from the present case because the courts in those cases were specifically cited as giving parties no chance whatsoever to raise arguments opposing the courts' actions.

In *Niles*, the Appellate Court pointed out that "the District had no notice that the ALJ was contemplating dismissal of its petition on an untimeliness basis and the District had no opportunity to be heard or make arguments as to the issue." *Niles Twp. High Sch. Dist. 219, Cook Cty.*, 859 N.E.2d at 65. In *Peterson*, the Appellate Court's ruling was based upon the party's lack of opportunity to receive notice and respond to a dispositive motion:

> Section 2–1005 of the Code of Civil Procedure does not authorize the trial court to *sua sponte* summarily grant summary judgment, but allows the nonmoving party time to respond to the summary judgment motion. 735 ILCS 5/2–1005 (West 1998). Equally important are the basic principles of our system that a party

receive notice and an opportunity to respond to a potentially dispositive motion. *Peterson*, 729 N.E.2d at 83.

In both of those cases, the aggrieved party had no notice and no opportunity to make *any* arguments on the issue. In the present case, however, MWG, through its motion for reconsideration, has been provided notice and opportunity to argue whether GMZs are active or expired. Furthermore, MWG had an opportunity during the hearing and during post-hearing legal briefing to argue about how the GMZs affect the ultimate issue of whether it violated groundwater quality standards and the Illinois Environmental Protection Act. MWG's current situation is fundamentally different than those in *Niles Twp. High Sch. Dist. 219 v. Ill. Educ. Labor Rels. Bd.* and *Peterson v. Randhava.* As a result, the Board did not deprive MWG of due process when the Board found that the GMZs at Joliet 29, Will County, and Powerton had expired.

C. The Parties Did Not Stipulate to the Duration of the GMZs.

Any stipulations made by Complainants addressed *the effect* of GMZs, not *the duration* of GMZs. MWG overreaches when it argues that "[t]he parties proceeded with the hearing on the agreement and assumption that once the GMZs were established, and monitoring and natural attenuation were ongoing, the Class I standards did not apply to groundwater within the GMZs." MWG Memorandum at 4. There was no agreement, assumption, or stipulation as to the duration of GMZs, when they expired, monitoring or natural attenuation, or any effect of monitoring and natural attenuation on the applicability of Class I standards. The so-called "stipulation" at the hearing only represents an understanding that, when an active GMZ is in place, there cannot be a violation of the groundwater standards. "We all understand that in a groundwater management zone, there are no violations...." 10/26/17 Afternoon Tr. 87:22-23. Similarly, the testimony of

Complainants' expert only indicated that when a GMZ is in place, Class I standards do not apply. "Q: You're aware that once a GMZ is established, the Class I standards in Illinois do not apply within the GMZ, correct? A: Correct." 1/31/18 Tr. p. 15:19-23. None of this goes to the duration of the GMZs, or to the existence of violations after the expiration of the GMZs.

D. The Board's Ruling on When the GMZs Expired Is Consistent with State Regulations and Legal Precedent.

In its Memorandum, MWG broadly argues that the Board's June 2019 Order contained an "error of law," MWG Memorandum at 2, and that the legal error was a misinterpretation of the plain language of the regulations governing GMZs. MWG Memorandum at 7-15. In support of this broad argument, MWG makes four arguments, each of which is without merit.

1. The Board's June 2019 Order Correctly Applied 35 Ill. Adm. Code 620.250(a)(2) to MWG's GMZs

MWG's first argument, that the Board "mistakenly applied" 35 Ill. Adm. Code 620.250(a)(2) to an agency-approved corrective action process under 35 Ill. Adm. Code 620.250(a)(1), MWG Memorandum at 8, is inconsistent with the facts in this case. Although MWG goes to great lengths to argue that its purported GMZs at Joliet 29, Will County, and Powerton were established pursuant to 35 Ill. Adm. Code 620.250(a)(1), MWG's actual GMZ applications filed with the Agency show otherwise: at the top of the first page of each GMZ application, it reads "Confirmation of an Adequate Corrective Action ***Pursuant to 35 Ill. Adm. Code 620.250(a)(2)***." Hearing Ex. 242 at MWG13-15_672 (Joliet 29 GMZ Application) (emphasis added)[1]; Hearing Ex. 254 at MWG13-15_729 (Powerton GMZ Application); Hearing Ex. 276 at MWG13-15_627 (Will County GMZ Application). Because MWG's own GMZ applications show that they were filed "pursuant to 35 Ill. Adm Code 620.250(a)(2)," MWG's

[1] Whenever an exhibit has a Bates stamp, the citations will refer to the Bates number that appears at the bottom of the page in the exhibit.

position to the contrary is without merit and finds no support in the record.

2. The Board's June 2019 Order Correctly Applied 35 Ill. Adm. Code 620.250(c) to Determine That MWG's GMZs Expired upon Completion of the Remedies Outlined in MWG's GMZ Application.

MWG's next argument, that the Board needed to make a finding as to whether MWG had attained "applicable standards as set forth in Subpart D," fails because it relies on the incorrect assumption that the GMZs had "applicable standards." Given that the GMZs failed to set applicable groundwater standards, the Board correctly applied Section 620.250(c) to determine when MWG's GMZs expired. MWG's argument to the contrary amounts to nothing more than an attempt to create a circular logic trap.

As MWG correctly notes, when there is a GMZ in place, the "applicable standards" for purposes of Section 620.250(c) are typically found at Section 620.450(a). MWG Memorandum at 11 ("In this case, the applicable 'standard set forth in Subpart D' refers to the Groundwater Quality Standards in section 620.450(a) of the Board's rules.") Section 620.450(a)(4) requires one of two groundwater standards to apply in a GMZ:

> (A) The standard as set forth in Section 620.410, 620.420, 620.430, or 620.440, if the concentration as determined by groundwater monitoring of such constituent is less than or equal to the standard for the appropriate class set forth in those Sections; or
>
> (B) The concentration as determined by groundwater monitoring, if such concentration exceeds the standard for the appropriate class set forth in Section 620.410, 620.420, 620.430, or 620.440 for such constituent, and:
>
> > (i) To the extent practicable, the exceedence has been minimized and beneficial use, as appropriate for the class of groundwater, has been returned; and
> >
> > (ii) Any threat to public health or the environment has been minimized.

35 Ill. Adm. Code 620.450(a)(4)(A)-(B).

However, although Under Section 620.450(a)(5), the Agency was required to develop

and maintain a list of concentrations pursuant to 620.450(a)(4)(B), it never actually adopted these standards at any of the three GMZs. MWG has argued that Section 620.450(a)(4)(B) nonetheless applies to MWG's GMZs because there were exceedances of groundwater quality standards found in Section 620.410, 620.420, 620.430, or 620.440 at the time of the original GMZ application. *See generally* MWG Memorandum at 16-18 (MWG arguing that Section 620.450(a)(4)(B) is the relevant standard). As a result, it argues, the Board had to make a finding whether MWG had attained these standards before terminating the GMZ. As an initial matter, even under MWG's own interpretation of the law, the GMZs would have expired because MWG has not minimized exceedances to the extent practicable as required by 35 Ill. Adm. Code 620.450(a)(4)(B)(i), or minimized the threat to public health or the environment as required by 35 Ill. Adm. Code 620.450(a)(4)(B)(ii).

More importantly, however, MWG's interpretation stretches Section 620.450(a)(4)(B) to the point of meaninglessness. Because the Agency never adopted standards pursuant to Section 620.450(a)(4)(B), there *are* no "applicable standards as set forth in Subpart D" for the Board to apply at the three GMZs. The Board simply cannot make a finding regarding "applicable standards" when no such standards exist. Thus, when applying Section 620.250(c), the Board only needed to find that the remedial action taken pursuant to Section 620.250(a) had been completed. Because the Board found that MWG had completed the remedial actions, the GMZs expired. And as a result, the Board did not commit a legal error by not making a finding as to whether MWG attained such "applicable standards."

Given the circumstances, the Board's actions are defensible regardless of the standard of review. First, the Board's interpretation of Section 620.250(c) to not require a finding of the "attainment of applicable standards as set forth in Subpart D" when no such applicable standards

exist is not clearly erroneous. "An administrative agency's interpretation of its own rules will not be overruled unless it is clearly erroneous, arbitrary or unreasonable." *Kinsella v. Bd. of Educ. of City of Chicago*, 27 N.E.3d 226, 232 (Ill. App. 1st Dist. 2015). Clearly erroneous means "contrary to the clear language of the provision." *Dusthimer v. Bd. of Trustees of Univ. of Illinois*, 857 N.E.2d 343, 350 (Ill. App. 4th Dist. 2006). The clear language of Section 620.250(c) does not provide for situations such as the one in this case where there are no "applicable standards" to apply. Therefore, the Board's interpretation and application is permissible and not clearly erroneous.

Second, the Board's interpretation of Section 620.250(c) is entitled to deference because Section 620.250(c) is ambiguous regarding situations where there are no "applicable standards" to apply, such as in the present case. An agency's "interpretation of their own rules and regulations enjoys a presumption of validity." *McDonald v. Illinois Dep't of Human Servs*., 952 N.E.2d 21, 26 (Ill. App. 4th Dist. 2010) (internal quotes removed). Courts grant "substantial weight to the agency's opinion about an ambiguous statute or regulation." *Stone St. Partners, LLC v. City of Chicago Dep't of Admin. Hearings*, 12 N.E.3d 691, 700 (Ill. App. 1st Dist. 2014), *aff'd*, 88 N.E.3d 699 (Ill. 2017). The Board's interpretation of Section 620.250(c) resolves the ambiguity by finding that, in situations where there are no "applicable standards," the Board only needed to find that MWG completed the remedial actions required by Section 620.250(a).

Third, the Board's interpretation of Section 620.250(c) is the only one that reaches a commonsense result. An agency's rule must be read to reach a "common-sense result." *Kinsella*, 27 N.E.3d at 232 ("[T]he Board's rule must be read to reach a common-sense result."); *see also People v. Chicago Title & Tr. Co*., 389 N.E.2d 540, 546 (Ill. 1979) ("The words of a statute must be read in light of the purposes it seeks to serve" and "words must be read to reach a common-

sense result."); *Platform I Shore, LLC v. Vill. of Lincolnwood*, 17 N.E.3d 214, 218 (Ill. App. 1st Dist. 2014) (finding that "common sense" dictated Plaintiff's interpretation).

In the present case, there are no "applicable standards" for purposes of Section 620.250(c). Therefore, there are only two possible interpretations: the one offered by the Board and the one offered by MWG. MWG's interpretation would require the Board to find that MWG's plants attained "applicable standards" – even when there are no "applicable standards" to attain. MWG's interpretation would result in a perpetual GMZ in situations, such as the present case, where there are no "applicable standards" to apply. A never-ending GMZ is an absurd result that conflicts with common sense.

The Board's interpretation of Section 620.250(c) avoids the absurd result of a perpetual GMZ in situations where the Agency never promulgated "applicable standards" pursuant to Section 620.450(a)(4)(B) and (a)(5), such as the present case. In fact, the result of the Board's decision is the sensible outcome that after all remedial actions identified in a GMZ application have been taken, assuming there are no ongoing remedial activities or standards, the GMZ must expire. Thus, only the Board's interpretation reaches a "common-sense result." In sum, the Board's ruling is not legal error or clearly erroneous, is entitled to deference, and in any event, is the only interpretation of Illinois law that avoids an absurd result.

3. The Board Correctly Found That, Because the Remedy in the GMZs and CCAs Are Identical, CCA Compliance Statements Suffice to Show That the GMZ Remedies Were Complete.

MWG's next argument relies on a meaningless distinction it tries to draw between CCA compliance and GMZ compliance. Specifically, it challenges the Board's determination that MWG's CCA compliance statements were equivalent to the documentation, required by Section 620.250(c), of completion of a corrective action process—but the Board was correct to do so because MWG's GMZ applications tie the GMZ's remedy directly to the CCA's remedies.

In each of the three GMZ applications at issue, the first question in Part III of the application required MWG to "[d]escribe the selected remedy" for the GMZ. Hearing Ex. 242 at MWG13-15_682 (Joliet 29 GMZ Application); Hearing Ex. 254 at MWG13-15_738 (Powerton GMZ Application); Hearing Ex. 276 at MWG13-15_637 (Will County GMZ Application). In response to the first question in Part III, MWG stated that the "agreed upon remedy" is specified in "Item 5(a) through (h) of the executed Compliance Commitment Agreement (CCA)" which was attached to the GMZ applications as Attachment 2C. Hearing Ex. 242 at MWG13-15_682 (Joliet 29 GMZ Application); Hearing Ex. 254 at MWG13-15_738 (Powerton GMZ Application); Hearing Ex. 276 at MWG13-15_637 (Will County GMZ Application). In other words, the remedy selected in the GMZ was the same as required by the CCA.

Therefore, when MWG filed its CCA compliance statement with the Agency, certifying that it completed the remedial activities required by the CCA, MWG was also certifying its completion of the remedy in the GMZ because the remedies in the GMZ were the same as those required in the CCA. *See* Hearing Ex. 630 at 1 ("[A]ll Compliance Commitment Agreement (CCA) measures have been successfully completed.") (Joliet 29 CCA Compliance Statement; see also Hearing Ex. 630 at 1 (Powerton CCA Compliance Statement); Hearing Ex. 661 at 1 (Will County CCA Compliance Statement). The Board did not, as MWG argues, confuse CCA compliance statements with completion of the corrective action under Section 620.250(c) because, in this case, they were the same.

4. The Board Correctly Found That Ongoing Groundwater Monitoring and Natural Attenuation Is Not Itself a Remedy for Purposes of the GMZs and Section 620.250(c).

Finally, MWG argues that ongoing groundwater monitoring and natural attenuation prevents the Board from finding that MWG completed "the action taken pursuant to subsection (a)," as required by Section 620.250(c). MWG Memorandum at 12. To the contrary, because

neither ongoing groundwater monitoring nor natural attenuation are an "action taken pursuant to" Section 620.250(a), the Board did not err. Again, MWG's own GMZ Applications foil MWG's legal position because (i) they do not include groundwater monitoring as part of the intended remedy; and (ii) they do not include natural attenuation as part of the intended remedy.

i. MWG's GMZ Applications Show That Ongoing Groundwater Monitoring Was Not Itself a Remedy.

In each of the three GMZ applications at issue, the tenth question in Part III asks: "How will groundwater at the facility be monitored *following completion of the remedy* to ensure that groundwater standards have been attained." Hearing Ex. 242 at MWG13-15_684 (Joliet 29 GMZ Application) (emphasis added); *see also* Hearing Ex. 254 at MWG13-15_740 (Powerton GMZ Application); Hearing Ex. 276 at MWG13-15_639 (Will County GMZ Application). The question was specifically asking for the actions that would be taken *after* the remedy identified in the GMZ application was complete. In describing what action it would take "following completion of the remedy" in the Joliet 29 GMZ application, MWG said there are currently "11 monitoring wells," that "these wells will continue to be monitored on a quarterly basis," and that "the monitoring data will be reported to IEPA within 30 days of the end of each quarter." Hearing Ex. 242 at MWG13-15_684 (Joliet 29 GMZ Application). MWG included similar post-remedy monitoring in its other two GMZ applications. Hearing Ex. 254 at MWG13-15_740 (Powerton GMZ Application); Hearing Ex. 276 at MWG13-15_639 (Will County GMZ Application).

All three of MWG's GMZ applications stated that groundwater monitoring would be continued "following completion of the remedy" selected in the GMZ. For this reason, MWG's argument that groundwater monitoring is itself a remedy that has not been completed is without merit. The Board did not err in treating ongoing groundwater monitoring as a separate activity

that continued after MWG completed the remedies in the CCA and GMZ.

ii. MWG's GMZ Applications Show That Natural Attenuation Was Not Itself a Remedy.

MWG's GMZ applications also distinguish natural attenuation from their intended remedies. In each of the three GMZ applications at issue, the fourth question in Part III asks: "Describe how the selected remedy will accomplish the maximum practical restoration of beneficial use of groundwater." Hearing Ex. 242 at MWG13-15_682 (Joliet 29 GMZ Application); Hearing Ex. 254 at MWG13-15_738 (Powerton GMZ Application); Hearing Ex. 276 at 16, MWG13-15_637 (Will County GMZ Application). In answering this question in the Joliet 29 GMZ application, MWG stated that "[a]ny residual groundwater impacts potentially associated with prior ash pond leakage will naturally attenuate through the groundwater system…" Hearing Ex. 242 at MWG13-15_683 (Joliet 29 GMZ Application). MWG made similar statements in the other two GMZ applications. Hearing Ex. 254 at MWG13-15_738-39 (Powerton GMZ Application); Hearing Ex. 276 at MWG13-15_637-38 (Will County GMZ Application).

It is clear from MWG's answers to question number four in its GMZ applications that natural attenuation is the aspirational consequence of the remedy selected in the responses to question number one in Part III, and not a remedy itself. The same is true for MWG's identical statements in response to question number six in Part III, which asks "Describe how the selected remedy will result in compliance with the applicable groundwater standards." *See* Hearing Ex. 242 at MWG13-15_683 (Joliet 29 GMZ Application); Hearing Ex. 254 at MWG13-15_739 (Powerton GMZ Application); Hearing Ex. 276 at MWG13-15_638 (Will County GMZ Application). Thus, there is no valid argument that natural attenuation was ever intended by MWG to be part of its remedy at any of the three GMZ sites.

iii. Board Precedent Does Not Demand That Natural Attenuation Be Treated as a Remedy in All Circumstances.

MWG argues that natural attenuation should be considered part of the remedy here because the Board has previously agreed that natural attenuation is an appropriate remedy and cites to *Central Illinois Light Co. (Duck Creek Station) v. IEPA*, PCB 99-21 (Dec. 17, 1998). MWG Memorandum at 19. However, that argument is irrelevant here because MWG did not identify natural attenuation as a remedy under the CCAs or in response to the first questions in Part III of the GMZ applications. Simply because natural attenuation can be a GMZ remedy does not mean it must be treated as such.

MWG's reliance on *Central Illinois Light Co*. is also misplaced because, in that case, the underlying cause of the exceedances had been remedied. Central Illinois Light Co ("CILCO") petitioned the Board for a variance from its groundwater quality standard for boron. *Central Illinois Light Co. (Duck Creek Station)*, PCB 99-21, Order at 1. CILCO argued that it could not meet the boron standards due to the undue hardship of other potential remedies and because natural attenuation was the only financially feasible remedy. *Id*. at 4. Both CILCO and the Agency agreed that the cause of the exceedances were overflows and, since the overflows had been stopped, the cause of the exceedances had been remedied.

Unlike in *Central Illinois Light Co*., the cause of MWG's groundwater pollution has not been remedied. Therefore, that natural attenuation was used as a justification for granting the CILCO variance request to suspend boron standards for 5 years is irrelevant to MWG's circumstances until MWG remedies the causes of its ongoing groundwater pollution.

E. The Board's Order Does Not Conflict with the Board's Decision in *Illinois v. Heritage Coal Company*.

MWG also argues that the Board erred in taking a position that runs counter to its own

precedent. MWG Memorandum at 21. However, the only case cited by MWG – *Illinois v. Heritage Coal Company* – is wholly unrelated to the question of when a GMZ ends or whether it is active or not. PCB 99-134, 2012 WL 4024868 (Sept. 6, 2012). In that case, the Board was adjudicating a motion for summary judgment, and that motion only covered the period of time until the GMZ was established. "The pertinent time frame is from November 25, 1991 (the effective date of the Part 620 standards) until December 6, 2006 (when a groundwater management zone was established)." *Heritage Coal Company*, PCB 99-134, 2012 WL 4024868, at *1. In that case, the Board did not examine or rule on the expiration of the GMZ or whether it was active. *Illinois v. Heritage Coal Company* is simply not relevant to or precedent on the question of when a GMZ expires.

F. The Board Properly Applied Its Regulations and Did Not Replace Regulations with Policy.

Finally, MWG offers three procedural arguments that amount to collateral attacks on the ability of the Board to draw conclusions in this case. First, it argues that the Board replaced regulations with policy, without explaining what it means to replace regulations with policy. MWG Memorandum ta 18. However, it is unclear what distinction between policy and regulation MWG is making here, or how MWG's understanding of this distinction results in the Board having committed legal error. In the absence of a more coherent argument on this point, Complainants simply note that the Board's interpretation and application of its own regulations are consistent with their plain language, as explained above section II.B.

Second, MWG argues that the Board's opinion strips GMZs of any purpose. MWG Memorandum at 19. This argument is demonstrably false: GMZs serve a purpose during the implementation of corrective measures; and when there are "applicable standards" set pursuant to Section 620.450(a)(4), the GMZ must remain in effect until those standards are met. However,

as explained above, GMZs cannot serve any useful purpose where, as here, all active corrective measures have been taken and there are no applicable standards set by the Agency pursuant to section 620.450(a)(4)(B).

Third, MWG argues that the Board disregarded the Agency's "discretion" to determine the terms and conditions in the CCAs, MWG Memorandum at 19, but MWG fails to explain how the Agency's power to determine terms and conditions of CCAs is relevant to whether a GMZ ended or remains in effect. In the absence of such an explanation, this argument also fails.

IV. MWG'S CORRECTIVE ACTIONS AND GMZS HAVE FAILED TO REMEDIATE THE THREE SITES.

MWG argues that natural attenuation and monitoring are part of the corrective action and the GMZs stay in place until the corrective action is complete. MWG Memorandum at 14-15. Without source control, however, natural attenuation will never work. Under MWG's theory, natural attenuation would need to continue indefinitely and potentially infinitely and, therefore, so would the GMZs, an absurd result.

Neither MWG's corrective actions nor the GMZs have successfully addressed onsite groundwater contamination at any of the three sites where they exist. As an initial matter, this should not be at issue in this stage of the proceedings: as the Board has already explained, the adequacy of the CCAs is a question for the remedy phase of these proceedings, not the liability phase. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 20 (Oct. 3, 2013) ("[T]he implications of CCAs are 'appropriate for consideration in determining penalties' rather than grounds for dismissing an enforcement action brought by the People or a citizen's group.") (internal citations omitted). Nevertheless, MWG is also wrong on the facts.[2]

MWG tries to argue that GMZs, groundwater monitoring, and natural attenuation are

[2] Since MWG raised the adequacy of the CCAs and GMZs, Complainants feel obliged to respond.

"corrective action." *See, e.g.*, MWG Motion at 2-3, MWG Memorandum at 3. Where the Board has relied on natural attenuation, it is only when other appropriate steps have been taken as the remedy to enable natural attenuation to be effective. *Central Illinois Light Co. (Duck Creek Station)*, PCB 99-21, Order at 4. MWG implicitly concedes that the "active remedial work is completed," MWG Memorandum at 19, and, as noted by the Board, MWG has also certified that all active remedial work has been completed. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 82 (June 20, 2019). MWG, however, has not created the right conditions for monitored natural attenuation to occur. For monitored natural attenuation to work, one has to begin by removing the source of groundwater contamination. MWG concedes this point, stating that monitored natural attenuation "following source control and removal" is an accepted practice. MWG Memorandum at 20.[3] However, MWG has not "controlled" or "removed" large sources of coal ash causing groundwater contamination, including most of the coal ash fill areas identified by Complainants. Therefore, Respondent cannot credibly argue that monitored natural attenuation would be successful while MWG has left multiple sources of contamination in place. Nothing will attenuate if the source is not addressed.

MWG also asks the Board to find that the GMZs are working, in part because "the exceedances have been minimized to the extent practicable." MWG Motion at 4, 7; MWG Memorandum at 18, 44. Again, this is not plausible. The Board correctly held that MWG has largely failed to exercise control over the sources of pollution at its sites. The list of "practicable" steps that MWG could have taken to minimize exceedances, but failed to take, is very long. MWG failed to investigate (through soil borings, leach tests, groundwater monitoring, or

[3] *See also* MWG Memorandum at 3 (stating that the GMZ applications "specifically required both a source control action (i.e., the relining action) and an ongoing monitored natural attenuation process.") The CCAs in this case focused exclusively on ash ponds and made no reference to other sources of coal ash contamination, so there was no "source control action" for those sources.

otherwise) two coal ash landfills at Joliet 29. *See* Complainants' Post-Hearing Brief at 35 (July 20, 2018). MWG failed to remove, cap or line the coal ash landfills at Joliet 29. *Id*. MWG failed to investigate, remove, cap, or line coal ash fill areas at Powerton. *Id*. at 48. At Will County, MWG has left ash in two inactive ash ponds that may be leaking, with no cap, and has failed to investigate, remove, cap, or line areas of coal ash fill. *Id*. at 69-70. The same can be said about the Waukegan site, though that is not relevant to the Motion for Reconsideration. *Id*. at 56, 59-60. In short, as the Board correctly found MWG "is not undertaking any further actions to stop or even identify the specific source" of persistent contamination. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 79 (June 20, 2019).

Finally, MWG tries to argue that the GMZs and groundwater monitoring are "having the desired effect." MWG Memorandum at 12. However, even MWG's expert concedes that groundwater quality is not improving at Powerton or Will County (or Waukegan, though Waukegan has no GMZ), five years after MWG completed the corrective actions outlined in the CCAs. *See* Complainants' Post-Hearing Brief at 47, 52, 70; 2/2/18 Tr. at 77, 96, 123-124. If the corrective actions had worked, we would know by now: MWG itself cites the case of Dyengy's Wood River Station, where "reductions of constituents were expected to begin approximately one year after completion of the cover system." MWG Memorandum at 6 (internal citations omitted).

The "desired effect" of monitored natural attenuation is, to state the obvious, attenuation, which means reduction. The only site with any evidence of attenuation is Joliet 29, though this says nothing about groundwater quality beneath the unmonitored coal ash landfills at that site. At Powerton, Waukegan and Will County, the levels of coal ash constituents are simply not attenuating, as MWG's expert acknowledges. *See* Complainants' Post-Hearing Brief at 47, 52,

70; 2/2/18 Tr. at 77, 96, 123-124. The GMZs are not having the desired effect, in large part because they were too narrowly focused on MWG's coal ash ponds and failed to recognize other onsite sources of coal ash.

V. THE BOARD CORRECTLY APPLIED ILLINOIS'S RULES REGARDING BURDEN OF PROOF TO RESOLVE THE QUESTION OF WHETHER HISTORIC ASH AREAS WERE CONTRIBUTING TO CONTAMINATION.

MWG argues that they should not have been required to provide evidence disputing Complainants' initial demonstration that certain historic ash areas at Joliet and Powerton contributed to groundwater contamination. The apparent basis for this contention is the true, but simplistic, observation that, as an initial matter, "it is well established in Illinois that a plaintiff bears the burden of producing evidence sufficient to establish each element of the claim." MWG Memorandum at 23 (citing *Nolan v. Weil-McLain*, 910 N.E.2d 549, 556 (Ill. 2009).

MWG has made two legal errors of omission, each of which undermines its argument. First, before Complainants are given the ultimate burden of proof to demonstrate their case, and after Complainants have met their "burden of production" to provide the minimum sufficient evidence to support its claims, MWG must meet its own "burden of production" to provide some evidence disputing Complainants' evidence. Second, the burden of proof is a broad and undefined weighing of facts and may take into account the absence of exculpatory evidence. These two errors are explained below.

The first error MWG makes is to ignore a crucial step in the shifting of proof: After Complainants satisfied their burden of production, which required simply that Complainants offer "some evidence which, when viewed most favorably to the plaintiff's position, would allow a reasonable trier of fact to conclude the element to be proven, *Thacker v. UNR Indus., Inc.*, 603 N.E.2d 449, 454 (Ill. 1992), MWG was then obligated to provide countervailing evidence to dispute that presumption. Once the complainant presents sufficient evidence to make a prima

facie case, the burden shifts to the respondent to disprove the propositions. *Rodney Nelson v. Kane County*, PCB 94-244, 1996 WL 419472, at *4 (July 18, 1996). In the two subsections below, *infra* section V.A and V.B, there are open questions about whether MWG provided *any* evidence that actually contradicts the evidence Complainants provided to show that those areas are contributing to groundwater contamination.

The second error MWG makes is to overstate the burden of proof Complainants bore in this case. In an enforcement proceeding, the burden of proof is by a preponderance of the evidence. *Nelson v. Kane County*, PCB 94-244, 1996 WL 419472, at *4. A proposition is proved by a preponderance of the evidence when it is more probably true than not. *Id*. A complainant in an enforcement proceeding thus simply has the burden of proving violations of the Act by a preponderance of the evidence. *Id*. As part of this process, it is well within the Board's authority and discretion to identify crucial areas where MWG failed to provide sufficient exculpatory evidence. And in reviewing these decisions, Illinois appellate courts must uphold the Board's conclusions so long as they are supported by the "manifest weight of the evidence." *Incinerator, Inc. v. Pollution Control Bd.*, 319 N.E.2d 794, 796-97 (Ill. 1974); *see also Processing & Books, Inc. v. Pollution Control Bd.*, 351 N.E.2d 865 (Ill. 1976) (clarifying the *Incinerator* decision and upholding a Board order that was based on "sufficient evidence").

As the following two subsections demonstrate, applying the actual standard for what is required for Complainants to meet their burden of proof, Complainants have provided the Board with ample evidence to support a conclusion that the historic ash areas at Joliet 29 and Powerton contributed to groundwater contamination, and as the Board noted, MWG did not provide sufficiently compelling counter-evidence to prevent Complainants from meeting their burden.

At both Joliet 29 and Powerton, Complainants provided evidence that there was coal ash,

including at historic ash fill areas, that was insufficiently shielded from leeching into groundwater; that the groundwater was in fact contaminated; and that there were no other potential sources of that contamination. And at both sites, MWG failed to provide sufficient evidence disputing Complainants' demonstrations. It was, therefore, reasonable for the Board to conclude that the historic ash areas contributed to groundwater contamination at both sites. MWG may be dissatisfied with the factual conclusions the Board reached, but MWG's dissatisfaction does not rise to the level of any legal error the Board must correct.

A. The Board Appropriately Balanced Available Evidence Regarding Joliet's Historic Ash Areas.

MWG's complaints about how the Board evaluated the available evidence at Joliet focus on three main claims: that the Board did not summarily dismiss Complainants' concerns on the basis that the landfill areas qualified as "*historic* ash fill areas," MWG Memorandum at 23 (emphasis in original); that the Board considered other available evidence in the absence of actual groundwater monitoring data near these areas; and that the Board was not wholly convinced by MWG's testing for compliance with the Act's rules on beneficial reuse. MWG Memorandum at 23-24. Without restating the ample additional evidence Complainants provided, each of these arguments can be dismissed as overlooking or mischaracterizing evidence and/or the applicable burden-of-proof standards.

First, although it emphasizes that the Joliet ash fill areas are "historic," MWG offers no evidence that "*historic* ash fill areas" are incapable of contaminating groundwater. Instead, MWG cites the U.S. Environmental Protection Agency's federal coal ash rulemaking, in which the Agency stated that it was "not aware of damage cases associated with inactive CCR landfills." MWG Memorandum. at 23 (citing 80 Fed. Reg. 21342; 10/27/17 Tr. p. 191:19-193:14, 199:12-200:9). This is not evidence of whether ash fill areas at Joliet are causing water

pollution and violations of groundwater protection standards. Complainants are seeking to enforce Illinois's prohibition against water pollution, which also protects Illinois's fresh groundwater resources. 415 ILCS § 5/12. MWG concedes that "unlined areas that contain coal ash pose a risk," and then fails to provide a rational distinction between "unlined areas that contain coal ash" and the historic coal ash sites. MWG Memorandum at 23. In fact, the historic coal ash sites are "unlined areas that contain coal ash." *Id.* The Board thus properly concluded that there was no issue.

Second, MWG's argument that the Board lacked specific evidence to conclude that the historic ash areas were more likely than not to be contaminating groundwater rests on a self-serving interpretation of what constitutes sufficient evidence. Complainants do agree with MWG that groundwater monitoring closer to the historic ash areas at Joliet 29 would provide even better evidence that historic ash areas are contributing to groundwater contamination, but the absence of perfect evidence does not invalidate the significant evidence and analysis Complainants have already provided in the record. *See* Complainants' Post-Hearing Brief at 29-37. The rule MWG advocates for here would effectively provide respondents in similar enforcement cases an easy way to avoid liability in enforcement actions—simply refuse to gather the most relevant evidence for a given claim.

Third, MWG's argument that the Board trusted Complainants' evidence regarding the Northeast Ash Landfill and Southwest Ash Landfills despite MWG having tested the *northwest* landfill material fails for similar reasons. As MWG concedes, it has not conducted leachate testing at the northeast or the southwest landfills. MWG Memorandum at 24. MWG goes on to rely on that absence of testing and ignore the groundwater and expert evidence Complainants compiled to argue that the Board should not reach any conclusion at all with respect to those

areas' likely contribution to groundwater contamination. As with its arguments relating to groundwater testing, MWG is attempting to benefit from its own omissions at the site and seeks to fabricate a non-existent evidentiary rule that the absence of perfect evidence requires the Board to dismiss the meaningful evidence that Complainants submitted. Again, this is an absurd result that would hamstring enforcement of Illinois environmental standards.

In sum, Complainants have provided significant evidence that historic ash fill areas are likely contributing to groundwater contamination—and in response, MWG has offered its complete lack of evidence to argue that Complainants did not meet their burden of proof. MWG has arguably failed even to meet its burden of production on the issue; but even shifting the burden of proof back to Complainants, the Board was well justified in concluding that the balance of evidence was in Complainants' favor.

B. The Board Appropriately Balanced Available Evidence Regarding Powerton's Historic Ash Areas.

For the same reasons as articulated above, MWG continues to misstate the evidentiary record and applicable standards in its critique of the Board's conclusions at the Powerton site. First, it argues that the Board improperly relied on actual exceedances of Illinois Class I Groundwater Standards in the vicinity of the East Yard and Limestone Run-off Basins to conclude that those two Basins (which are the nearest known impoundments) are likely contributing to those exceedances. MWG argues that evidence it submitted suggesting that those two Basins are empty renders invalid the Board's conclusion to the contrary; but the Board was well within its rights to weigh countervailing evidence and reach a conclusion as to that evidence, even if the conclusion was not MWG's preferred conclusion.

MWG attempts to suggest that, because the coal ash at the Former Ash Basin is similar to coal ash found elsewhere, the Board's determination that Former Ash Basin contamination was

not proven necessitates a determination that coal ash at other sites doesn't contaminate groundwater. MWG Memorandum at 27. This does not logically follow. First, the Board did not find that the Former Ash Basin did not contaminate groundwater, just that that wasn't proven. Second, it is not clear that all of the coal ash in the various areas is identical, and in any case, the same coal ash can present a contamination risk in one location and not in another. In fact, this concept forms the basis for determining what remedy is appropriate in this case: moving coal ash somewhere else can reduce its impact on groundwater quality.

VI. THE BOARD APPROPRIATELY WEIGHED THE FACTS REGARDING THE MWG STATIONS.

MWG did not point to any newly discovered evidence unavailable at the time of the hearing at any of the three power plants identified by MWG. The Board has repeatedly found that the purpose of reconsideration is to bring to the Board's attention "newly discovered evidence which was not available at the time of hearing, changes in law," and errors in the Board's previous application of existing law. *Jersey Sanitation Corp. v. Illinois EPA*, PCB 00-82, Order at 2 (Sept. 20, 2001); *see also County of Macon v. Tim Walker*, PCB 07-21, Order at 2 (May 3, 2007); *Peoria Disposal Co. v. Peoria County Bd.*, PCB 06-184, Order at 2 (Feb. 15, 2007).

While reconsideration could be permissible in the event the Board overlooked a fact, reconsideration under such a circumstance must be premised on that fact being relevant and determinative. If a fact is not relevant and determinative, then overlooking it is not an error worthy of reconsideration. As highlighted in the following sections, MWG fails to explain how the facts at any of the three power plants it claims the Board "overlooked" are relevant and determinative.

A. The Board Appropriately Weighed the Facts Regarding Joliet.

1. The Board Appropriately Found That the Poz-O-Pac Liners at Joliet 29 Were Cracked.

The Board appropriately found "that the Environmental Groups established that both poz-o-pac and HDPE liners at Joliet 29 can and do crack or become damaged on occasions" because MWG did not point to any newly discovered evidence unavailable at the time of the hearing. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 26 (June 20, 2019).

MWG claims, incorrectly, that "[t]he only evidence the Board relies on related to the Joliet 29 Stations is, as the Board describes it, an 'assumption' that the poz-o-pac was in poor condition." MWG Memorandum at 28 (citing Order at 25.). MWG distorts the Board opinion, which cites numerous pieces of evidence, not "only" one. *See Sierra Club v. Midwest Generation*, PCB 13-15, Order at 25 (June 20, 2019) (citing 2/2/18 Tr. at 148; Hearing Ex. 303, Hearing Ex. 286 at 2; 10/24/18 Tr. at 215; 10/26/17 p.m. Tr. at 34-35 (Kunkel Test.)).

In addition, MWG takes the term "assumption" out of the context in which the Board used it to suggest that the Board agreed that it was an assumption that the poz-o-pac was in poor condition. That is not what the Board stated at all. The Board indicated that MWG's basis for relining the ponds was *MWG's* "assumption" that the liners were in poor condition: "MWG relined the ponds on the assumption that they were in a 'poor' condition." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 25 (June 20, 2019) (citing Hearing Ex. 34 at MWG13-15_23614); Hearing Ex. 606 at MWG13-15_23647); *see also* 10/23/17 Tr, at 16; 10/24/17 Tr. at 12-13. The Board merely pointed out that MWG relied on what *MWG* viewed as an assumption.

MWG also ignores the need for the Board to consider the credibility and weight of the evidence. *See, e.g., Emanuel v. 1000 Liquors, Inc.*, No. 14-3683, 2016 WL 3579493, at 12 (Ill. App. 1st Dist. 2016) (citing *Spiros Lounge, Inc. v. State of Ill. Liquor Control Com.*, 423 N.E.2d

1366, 1369 (Ill. App. 1st Dist. 1981).). MWG relies exclusively on Maria Race's testimony for the claim that the poz-o-pac was in good condition when the ponds were emptied to be relined in an attempt to discredit the findings of its own consultant, NRT. MWG Memorandum at 29. The Board relied on the two reports from NRT indicating that the poz-o-pac was in poor condition. *See Sierra Club v. Midwest Generation*, PCB 13-15, Order at 25 (June 20, 2019). Consequently, there are competing and conflicting pieces of evidence in the record. The Board's emphasis on the NRT report in its Order suggests that the Board found the report credible and gave it some weight. *Id*. This is both reasonable and appropriate.

MWG attempts to similarly discredit evidence of cracks in poz-o-pac: it challenges both the hairline cracks in Hearing Exhibit 286 (the core sample), and evidence of cracks in the Will County liners in Hearing Exhibit 303. MWG Memorandum at 29-30. MWG disregards the fact that the liners at Will County were made of the same material and installed within one year of the poz-o-pac liners at Joliet in its effort to dismiss Exhibit 286 as irrelevant. 1/30/18 Tr. at 191:20-23. MWG relies exclusively on Richard Gnat's testimony for the claim that the cracks in the poz-o-pac core sample at Will County are not evidence that poz-o-pac liner can and do crack. MWG Memorandum at 29-30. The Board's reliance on Hearing Exhibits 286 and 303 in its Order suggest that the Board found the exhibits credible evidence that poz-o-pac liners can and do crack. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 25 (June 20, 2019). Again, this was both reasonable and appropriate.

On neither of these points did the Board "overlook" evidence. MWG presumes to take over the Board's role as finder of fact when MWG weighs which evidence was most convincing. MWG may not like how the Board weighed conflicting evidence, but this is not grounds for reconsideration.

2. The Board Appropriately Found that the HDPE Liners in the Ash Ponds at the Joliet 29 Station can Crack and Become Damaged.

The Board appropriately found "that the Environmental Groups established that both poz-o-pac and HDPE liners at Joliet 29 can and do crack or become damaged on occasions." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 26 (June 20, 2019). MWG argues that "[t]here is also no basis to support the Board's finding that the HDPE liners at the Joliet 29 Station were cracked or damaged." MWG Memorandum at 30 (citing Board's June 2019 Order at 26, para. 1.). This is not true.

First, MWG argues, without any legal basis, that the Board is not permitted to make generalized findings. "The Board fails to consider the ash ponds individually but makes broad generalizations about the ash ponds for which there is no support." MWG Memorandum at 30. The Board did make a finding about HDPE liners that was supported by the evidence generally as to all the HDPE-lined ponds at all the locations. "An HDPE liner, however, can be damaged during the pond dredging process by the heavy equipment." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 25-26 (June 20, 2019) (citing as *See e.g.* Hearing Ex. 306; Hearing Ex. 307; 10/26/17 p.m. Tr. at 35 (Kunkel Test.).) But once again, MWG manufactures a Board rule that does not exist.

Second, MWG argues that the Board should consider the construction documentation of the liners at Joliet as evidence of the condition of the liners. MWG Memorandum at 31. MWG, however, ignores that construction documentation is evidence of the condition of the liners *at the time of installation* and not over time and after being subjected to both use and the dredging process by heavy equipment on a repeated basis.

Third, MWG points out that the Board relied on Hearing Exhibit 306, an email from Rebecca Maddox, which expresses serious concerns over the liners at Will County. MWG

Memorandum at 30. MWG claims that the Board failed to consider Ms. Maddox's hearing testimony when Ms. Maddox attempted to completely disavow this email. *Id*. MWG once again ignores the need for the Board to consider the credibility and weight of the evidence. *See e.g., Emanuel v. 1000 Liquors, Inc.*, No. 14-3683, 2016 WL 3579493, at 12 (Ill. App. 1st Dist. 2016) (citing *Spiros Lounge, Inc. v. State of Ill. Liquor Control Com.*, 423 N.E.2d 1366, 1369 (Ill. App. 1st Dist. 1981).). Again, while the Board must consider all evidence, part of this review includes deciding how compelling conflicting evidence is. The Board's reliance on Hearing Exhibit 306 over Ms. Maddox's disavowal of her previous statements suggests that the Board found Hearing Exhibit 306 to carry more weight than Ms. Maddox's testimony on this point.

Third, MWG argues that "Hearing Exhibit 307 provides no support to the Board because it too is about Will County ("3S Ash Pond Liner Damage – Will County.") (emphasis added). Hearing Exhibit 307 has nothing to do with the Joliet 29 Station or the HDPE liners in any of the Joliet 29 ash ponds." MWG Memorandum at 31. In so arguing, though, MWG ignores the similarities between the ponds at Will County and Joliet stations. Will County's 3S Ash Pond was relined with 60 mil HDPE in 2009 while the Joliet Ponds were relined with the same exact material 1-2 years earlier. 1/30/2018 Tr. 206:10-18, 208:24-209:2; 1/29/18 Tr. 234:9-12. The same company installed the liners (NRT). Hearing Ex. 510; Hearing Ex. 610. Finally, the same company, LaFarge, handled the dredging of the ponds and ash removal for Joliet and Will County. 1/29/18 Tr. 172:25-173:5. Finally, MWG also disregards that the Board cited expert witness testimony on this point too. Thus, the Board appropriately considered the analogies between the liners at Will County and at Joliet when it relied on Hearing Exhibits 306 and Hearing 307 as evidence of the condition of the liners at Joliet. In sum, the Board appropriately weighed the evidence, and its findings as to the poz-o-pac liners at Joliet have ample support in

the evidence.

3. The Board Appropriately Found that There is an Active Source of Coal Ash Contamination at Joliet 29 Station.

As for ash under the liner at Pond 3 at Joliet, MWG claims, incorrectly, that "[i]t appears that the Board also assumed, without any basis, that MWG placed coal ash below the HDPE liner during construction to support its conclusions that Ash Pond 3 was a source of contamination." MWG Memorandum at 31-32. Once again, MWG mischaracterizes the Board's decision and reasoning by claiming that the Board's evidence-based conclusion is an assumption; and in any event the Board did not state that Ash Pond 3 was a conclusive source of contamination but held in the alternative that it *may* be coal ash between the layers at Ash Pond 3 *or coal ash deposited outside the pon*ds. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 33 (June 20, 2019) (emphasis added).

Regarding ash under the liner, the Board relied on Hearing Exhibit 22 in which indicates an agreement between MWG's consultant NRT and Maria Race that ash should be left between the old poz-o-pac and new liner when relining the ponds at Joliet. Hearing Ex. 22. This was not just a suggestion, as claimed by MWG: Maria Race agreed to this plan stating "It is fine to leave the ash there." Hearing Ex. 22 at MWG13-15_13734. NRT went on to even confirm after Ms. Race's affirmative reply: "Just to clarify - there is 4-6 of bottom ash ABOVE the Poz-o-Pac. However, this will make an excellent bedding layer for the geomembrane." *Id.* Relying on Hearing Exhibit 22 to be factually accurate does *not* constitute an assumption: it is a measured weighing of evidence. As MWG points out, other evidence suggests that ash was not left below the liner during the relining project. Hearing Ex. 610. But the Board did not commit an error by relying on Hearing Exhibit 22 in weighing the evidence and making a determination of contested facts. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 25 (June 20, 2019).

As MWG points out, later in its opinion the Board stated "MWG experts admitted that they considered leaving coal ash between layers when relining some of the ponds at some of the Stations" and cited Exhibit 32. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 33 (June 20, 2019). This Board observation is 100% consistent with the statements in Exhibit 22 and in fact emphasizes the consultant's thinking. The confusion could be a simple as a typo in the exhibit with the Board intending to rely on Hearing Exhibit 22, not Hearing Exhibit 32 and the discussion in the transcript of Hearing Exhibit 22. *See* 10/23/17 Tr. at 139:2-140:9. Complainants respectfully suggest that the Board correct the citation in the June 2019 Order at 33 from Hearing Ex. 32; 10/23/17 Tr. 156:18-162:21 (Race Test.) to Hearing Ex. 22; 10/23/17 Tr. 139:2-140:9 (Race Test.).

Further, even were there an issue here, the Board did not find the ash between the layers as the conclusive source of contamination at Joliet. Instead, it stated that "[t]he consistent exceedance of Class I GQS as it appears in the groundwater monitoring results for MW-9 suggest that *some active source of contamination persists*. This persistent source of contamination *may be coal ash remaining in Ash Pond 3, between its layers, or coal ash deposited outside the ash ponds*." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 33 (June 20, 2019) (emphasis added). In other words, the Board's conclusion is even consistent with a finding that Ash Pond 3 did not contribute to contamination. Thus, putting aside the citation error, its fundamental conclusion with respect to Joliet is not in error and is supported by evidence in the record.

B. The Board Appropriately Weighed the Facts Regarding Powerton

MWG did not point to any newly discovered evidence unavailable at the time of the hearing, and MWG does not challenge the Board's primary finding regarding Powerton: There

are coal ash constituents in the groundwater, and they came from onsite coal ash. Even MWG's expert agrees. *See* Complainants' Post-Hearing Brief at 46-47 (July 20, 2018). As the Board correctly noted, "[i]t is immaterial whether any specific ash pond or any specific historic ash area can be pinpointed as a source to find MWG liable." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 79 (June 20, 2019). The groundwater at Powerton is being contaminated by onsite coal ash, and MWG is liable for that contamination.

MWG's arguments for reconsideration pertain to details that do not affect this overall conclusion. However, for completeness, Complainants respond to each argument below.

1. MWG Incorrectly Claims That There Is "No Evidence" of Groundwater Contamination from Historic Fill Areas at Powerton.

MWG states that there is "no evidence in support" of the notion that historic fill areas at Powerton are causing or allowing groundwater contamination. MWG Motion at 8. This broad statement is false, and it is not supported by the argument in MWG's Memorandum, which is limited to the East Yard Runoff Basin, the Limestone Runoff Basin, and an above-ground ash pile (none of which are "historic fill areas"). MWG Memorandum at 25-27.

Complainants provided abundant evidence of groundwater contamination from historic fill areas at Powerton, including soil borings showing coal ash extending as much as 24.5 feet below the surface, groundwater elevation data showing that historic coal ash fill areas are partially saturated with groundwater, groundwater monitoring data showing contamination near these historic fill areas, and statements from both MWG's expert and the Illinois Environmental Protection Agency attributing onsite contamination to historic coal ash. *See* Complainants' Post-Hearing Brief at 39-47 (July 20, 2018). The Board's conclusion that "it is more likely than not that the coal ash is spread out across the Station in the fill and is contributing to the exceedances in the Stations' monitoring wells" is amply supported by the record.

2. The Board Did Not Make Any Errors with Respect to the Condition of the Liners at Powerton

MWG next mischaracterizes what the Board said about the liners at Powerton and attempts to dismiss evidence that does not support its position. The Board stated that "both poz-o-pac and HDPE liners are prone to damage in certain conditions." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 39 (June 20, 2019). This general statement is well supported by the record, which includes testimony from MWG's expert saying as much, 2/2/18 Tr. 148, and documentary evidence of actual liner damage at the MWG plants. *See, e.g.*, Complainants' Post-Hearing Brief at 42, 65-66 (July 20, 2018). The Board went on to say that the "liners at Powerton can and do crack or experience damage on occasions." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 40 (June 20, 2019). The Board's finding is well supported by the record, which includes testimony from Powerton staff confirming liner damage at Powerton. *See, e.g.*, Complainants' Post-Hearing Brief at 42 (July 20, 2018).

MWG also misrepresents what the Board stated in the Order. The Board did not conclude that "liners at three of the four ponds at the Powerton Station were in 'poor' condition." MWG Memorandum at 34. Here MWG is citing a "contested facts" section, and it was in fact MWG's consultant, not the Board, that made that conclusion. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 39 (June 20, 2019) (citing Hearing Ex. 34 at MWG13-15_23615 and Hearing Ex. 606 at MWG13-15_23646.) Regardless, MWG is also wrong to suggest that this conclusion would have "no basis," or that there was "absolutely no evidence" that the poz-o-pac liners were in poor condition. It is not credible for MWG to describe its own consultant's report as "no evidence." MWG Memorandum at 34. Even if NRT never visually inspected the liners, it cannot be denied that MWG hired NRT to evaluate the liners, and that NRT – presumably based on a review of documentary evidence and its own professional experience – concluded that they were

in poor condition. This is clearly relevant evidence with a direct bearing on (a) whether the liners were in fact in poor condition, and (b) what MWG was told about the condition of its liners.

MWG goes on to take issue with the Board's statements about liner installation practices, but again misrepresents what the Board actually said. MWG Memorandum at 35. The Board stated that "there were occasional issues with the liners, or the liners weren't installed correctly." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 39 (June 20, 2019). MWG makes this general observation much more specific and conclusive: "The Board mistakenly concludes that the liners at *all the ponds* at Powerton had 'issues' or were installed incorrectly." MWG Memorandum at 35 (emphasis added). This is not what the Board said. The Board observed, correctly, that the record contains evidence of liner issues, including liner installation issues, at Powerton. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 39 (June 20, 2019) (citing Hearing Exs. 107-109). Among other things, the record contains an email from a Powerton employee about correcting a "miss installed liner" [sic]. Hearing Ex. 109 at MWG13-15_22765. Yet MWG somehow claims that there is "no evidence" that Powerton liners were installed incorrectly. MWG Memorandum at 35. MWG is wrong.

The fact that some of these issues were fixed (MWG Memorandum at 35-36) is beside the point because the liner repairs occurred *after* many of the violations found in the Board's June 2019 Order. Complainants filed their complaint in October 2012, citing evidence of groundwater contamination dating back to 2010. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 4, 16 (June 20, 2019). MWG completed repairs at the Ash Surge Basin and Secondary Ash Settling Basin in 2013. *Id*. at 36; MWG Memorandum at 36. These liner repairs have no bearing on any contamination that occurred prior to 2013. As the Board noted several years ago, the question of whether MWG fixed the problem goes to remedy, not liability:

> [T]he implications of CCAs are 'appropriate for consideration in determining penalties' rather than grounds for dismissing an enforcement action brought by the People or a citizen's group.

Sierra Club v. Midwest Generation, PCB 13-15, Order at 20 (Oct. 3, 2013).internal citations omitted).

MWG actually tried to keep the evidence of liner installation issues out of the record (MWG Memorandum at 35, n. 23 and n. 24). Now that the evidence is in the record, MWG is trying to spin the evidence in a way favorable to itself. The Board should not adopt MWG's spin. The Board's finding that the ash ponds probably leaked finds ample support in the record. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 40 (June 20, 2019). Among other things, groundwater was pouring into the secondary ash settling basin at one point, suggesting that water could have travelled the other way and leaked out of that basin. *See, e.g.*, Hearing Ex. 107; Complainants' Post-Hearing Brief at 42 (July 20, 2018) And we also know that MWG's poz-o-pac liners have cracked. *Id*. at 65-66. Most importantly, we have evidence of groundwater contamination across the Powerton site, *id*. at 39-41, which, as MWG's expert acknowledged, includes coal ash constituents. *Id*. at 46-48. The record on this issue, in a light most favorable to MWG, is at best mixed. The Board did not commit an "error" by weighing the available evidence and reaching its ultimate conclusion.

Regarding the presence or absence of a liner at the Secondary Ash Settling Basin, a MWG consultant at one point determined that the Secondary Ash Settling Basin had "no liner." Hearing Ex. 34 at MWG13-15_23615. Other evidence suggests that the Secondary Ash Settling Basin had a hypalon liner. MWG Memorandum at 36 – 37. However, the Board never adopted the consultant's conclusion as its own. Instead, the Board noted that the consultant "rated the condition" of that pond as "no liner." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at

39 (June 20, 2019). The Board did not commit an error by citing MWG's consultant in a discussion of "contested facts" or by finding that "poz-o-pac and HDPE liners at Powerton can and do crack or experience damage on occasions." *Id*. In short, the Board did not make errors in its findings regarding the condition of the liners of the ponds at Powerton.

3. The Board Did Not Make Any Errors with Respect to Flooding at Powerton.

MWG cannot dispute the fact that groundwater rises above the bottoms of multiple onsite ash ponds, with obvious implications for liner integrity and the migration of contaminants out of the ash ponds. Instead, MWG takes issue with the Board's statement that "MWG employees recalled . . . water rising 30 feet above the bottom of the Secondary Ash Settling Basin." MWG Memorandum at 37; *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 39 (June 20, 2019).

First of all, the Board is not wrong – MWG employee Maria Race did testify as to the following recollection: "I do remember that the river water rose up to probably, you know – it got up very high in elevation during the big flooding that happened and that was around 470 probably." 10/23/17 Tr. 164:18-21. This is 30 feet higher than the bottom of the Secondary Ash Setting Basin. Hearing Ex. 33 at MWG13-15_9728. MWG's disagreement is not with the Board, but with its own employee. The essence of MWG's argument is that the river level as remembered by Maria Race is implausible. MWG Memorandum at 37-38.

Ultimately, the important point here is that Powerton periodically experiences flooding—and on that front, even MWG does not dispute there is plenty of evidence available. Multiple MWG employees have testified to that fact. Complainants' Post-Hearing Brief at 45 (July 20, 2018). When the river rises, groundwater rises, which increases the risk of contamination. *Id*. at 45-46. There was no error in the Board's conclusion that "flooding at the area," among other

factors, made it "more likely than not that the ash ponds did leach contaminants into the groundwater." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 40 (June 20, 2019).

4. Other Factual Issues Identified by MWG Are Not Determinative

The only remaining factual issues that MWG raises involve the Former Ash Basin, the East Yard Runoff Basin, and the Limestone Runoff Basin. These issues do not affect the Board's ultimate conclusions regarding contamination from a combination of coal ash sources at Powerton.

As noted by MWG, there is no evidence that the Former Ash Basin was ever relined, so there could not have been ash left between the liner layers during relining. MWG Memorandum at 37; *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 39 (June 20, 2019). However, MWG confuses the issue by saying that the Former Ash Basin is "inactive," which happens to be both false and irrelevant. The truth is that the Former Ash Basin is used as a destination for periodic overflow from the Ash Surge Basin, which happened as recently as 2017. Complainants' Post-Hearing Brief at 42-43 (July 20, 2018). In any case, its status as active or inactive does not change the basin's potential for leaching coal ash contaminants into groundwater.

Although the Order implied that this ash pond was relined, it was not *re*lined, and in fact it was probably never lined in the first place. *Id*. at 48. In other words, it appears to be unlined. But correcting the error should only strengthen the Board's ultimate conclusions about the potential for contamination. Thus, there is no need for the Board to "reconsider its opinion" with respect to the Former Ash Basin. MWG Memorandum at 37.

Regarding the East Yard Runoff Basin, the Board stated that "[t]he record does not provide information about the content or condition of this basin." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 40 (June 20, 2019). MWG disagrees, pointing to the testimony

of Powerton employee Mark Kelly, who testified that the East Yard Runoff Basin has never been part of the ash flow system, 1/31/18 Tr. 137-138. While MWG does have some support for its position, the record is largely silent about the East Yard Runoff Basin—and in any event, the Board's discussion of this issue in its Order did not meaningfully impact its overall conclusions regarding the Powerton site. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 44-45 (June 20, 2019).

Regarding the Limestone Runoff Basin, the Board stated that "material from this basin may be leaking contaminants into groundwater." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 41 (June 20, 2019). MWG claims, with some support, that this basin is currently empty, so cannot be leaking. MWG Memorandum at 40. MWG does not, however, dispute that this basin contained coal ash in the past. *Id*; *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 40 (June 20, 2019) (citing Hearing Ex. 635). This boils down to timing. A Board finding that "material from this basin *may have leaked* contaminants into groundwater" would be better supported by the record, but in any event the Board's discussion of this issue in its Order did not substantially impact its overall conclusions regarding the Powerton site. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 44-45 (June 20, 2019).

C. The Board Appropriately Weighed the Facts Regarding Will County

MWG's first claim with respect to Will County is that the Board overlooked the fact that Expert Witness James Kunkel did not see or review construction documentation for each pond. MWG Memorandum at 41. But MWG fails to show how the fact that Kunkel did not review construction documentation is relevant, or how it undermines Kunkel's expert opinion that the ponds have leaked in the past and continue to leak.

Construction documentation does not provide any insight into either whether the ponds

leaked before relining or whether the ponds are currently leaking. As MWG explained in its initial post-hearing brief filed on July 20, 2018, the construction documentation only provides "certifications for the installation of the HDPE liner" and "as-built drawings and information for the pond liners." MWG Post-Hearing Brief at 26 (July 20, 2018). MWG's Memorandum in support of its Motion for Reconsideration fails to explain how this information rebuts Kunkel's ultimate conclusion that the coal ash ponds were and are leaking. The significant and numerous groundwater quality standard violations found in the Board's June 2019 Order, together with evidence of liner problems, support a finding that they are leaking. *See generally Sierra Club v. Midwest Generation*, PCB 13-15, Order at 54-63 (June 20, 2019).

MWG also misinterprets the Board's order regarding the poz-o-pac condition at Will County. MWG claims the Board made an assumption regarding the status of the poz-o-pac liners, MWG Memorandum at 41, but the Board did not make an assumption. The Board's June 2019 Order cited to Hearing Exhibit 34 at 7, MWG13-15_23614, – an inspection of the liners by Natural Resource Technology, Inc, commissioned by MWG – and Hearing Exhibit 34 lists the "liner condition" of the poz-o-pac liners at Will County. Hearing Exhibit 34 at 7, MWG13-15_23614, records the poz-o-pac liner condition as "poor." Thus, MWG's claim that the Board made any assumption is without merit because the Board's June 2019 Order is supported by evidence on the record, including an inspection report from a contractor commissioned by MWG to inspect and rate the liners' conditions, which labeled the liner as in "poor" condition. Again, the significant number of groundwater quality standard violations found by the Board's June 2019 Order supports a finding that the liner condition likely contributed to leakage and leaching.

VII. GMZS DO NOT EXCUSE VIOLATIONS OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT.

Complainants also suggest clarification of the section of the Board's Order in which the

Board stated that GMZs negated violations of Section 12(a) of the Environmental Protection Act. "The Board, however, finds no violation of Section 12(a) of the Act at Joliet 29, Powerton, and Will County during the performance of corrective actions in October 2013 under the GMZs established at those three Stations." *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 92 (June 20, 2019). Complainants believe the Board intended to say that there were no violations of Part 620 groundwater quality standards when the GMZs were active. *People v. Texaco*, PCB 02-03, 2003 WL 22761195, at *9 (Nov. 6, 2003). A GMZ only excuses violations of the Part 620 standards; it does not excuse violations of the Illinois Environmental Protection Act.

Water pollution prohibited by Section 12(a) of the Act occurs even when a party is immune from violations of groundwater quality standards as a result of a GMZ. *See* 35 Ill. Adm. Code §§ 620.250(e), 740.530(d). The GMZ only provides immunity "from violating the Part 620 standards." *People v. Texaco*, PCB 02-03, 2003 WL 22761195, at *9 (Nov. 6, 2003). Water pollution is present when a discharge of any contaminant into groundwater "will or is likely to… render such waters harmful or detrimental or injurious to public health, safety or welfare." 415 ILCS § 5/3.545. Contamination in excess of Part 620 standards leaves the affected groundwater "harmful or detrimental or injurious to public health, safety or welfare" under § 415 ILCS 5/3.545. When groundwater quality standards are set to prevent harm to public health, exceedances of those standards in a water body constitute water pollution, even if the polluter cannot be held liable under Part 620 because of a GMZ. *See* Complainants' Post-Hearing Brief at 9-10 (July 20, 2018).

As the Board pointed out in its discussion of Section 12(a) of the Act:

> In another case, the Board concluded that "[c]ompliance with a permitted GMZ would provide . . . immunity from violating the Part 620 standards" but not Section 12(a). People v. Texaco Refining and Marketing, Inc., PCB 2-03, slip op. at 9-10 (Nov. 6, 2003). The Board noted that "Section 12(a) of the Act provides

> no exemption from liability for parties that comply with another regulatory program" and that compliance with GMZ "is not an affirmative defense but rather a factor that may, if anything, mitigate any imposed penalty. *Id*.

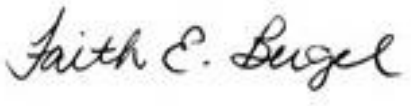
Sierra Club v. Midwest Generation, PCB 13-15, Order at 77 (June 20, 2019). Other Board decisions similarly support the principle that contamination in excess of health-based standards constitutes water pollution. *See Int'l Union v. Caterpillar, Inc.*, PCB 94-240, 1996 WL 454961, at *29 (Aug. 1, 1996) (finding that "exceedences [*sic*] of the Part 620 standards… constitutes degradation of one of the State's water resources and indicates the presence of water pollution caused by respondent"); *People v. CSX Transp., Inc*., PCB 07-16, 2007 WL 2050813, at *16 (July 12, 2007) (finding § 12(a) violation based on exceedance of soil remediation objectives because "exposure above the remediation objective levels would be hazardous to human health"). In other words, violations of Section 12(a) of the Act are possible even when a party is immune from violations of Part 620 groundwater quality standards as a result of a GMZ. Thus, the Board should clarify its Order on this point and affirm the boundaries of its ruling.

VIII. CONCLUSION

For the foregoing reasons, Complainants' request the Board deny MWG's Motion for Reconsideration.

Dated: October 14, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hammons, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' OPPOSITION TO MIDWEST GENERATION'S MOTION FOR RECONSIDERATION** before 5 p.m. Central Time on October 14, 2019 to the email addresses of the parties on the attached Service List.

Respectfully submitted,

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