ILLINOIS POLLUTION CONTROL BOARD
February 6, 2020

SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, AND CITIZENS AGAINST RUINING THE ENVIRONMENT,	)	
Complainants,	)	
v.	)	PCB 13-15
	)	(Enforcement – Water, Land)
MIDWEST GENERATION, LLC,	)	
Respondent.	)	

ORDER OF THE BOARD (by B.F. Currie):

On October 3, 2012, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, Environmental Groups) filed a seven-count complaint against Midwest Generation, LLC (MWG). The complaint was later amended and alleged groundwater contamination and open dumping in violation of the Environmental Protection Act (Act) and Board regulations. The Environmental Groups alleged that MWG discharged contaminants into the environment through coal ash disposal ponds and historical coal ash storage sites at four of MWG's electric generation stations (Stations) in Illinois: (1) Joliet #29 Station in Joliet, Will County (Joliet 29); (2) Powerton Station in Pekin, Tazewell County (Powerton); (3) Will County Station in Romeoville, Will County (Will County); and (4) Waukegan Station in Waukegan, Lake County (Waukegan).

On June 20, 2019, the Board issued an interim opinion and order (Interim Order) finding that MWG violated Sections 12(a), 12(d), and 21(a) of the Act (415 ILCS 5/12(a), 12(d), 21(a) (2016)), as well as Sections 620.115, 620.301(a), and 620.405 of the Board groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301(a), 620.405). Following the Board's Interim Order, MWG filed a motion to reconsider and clarify. A motion for leave to file an *amicus curiae* brief supporting MWG's motion to reconsider was filed by the Illinois Environmental Regulatory Group, the Illinois Coal Association, the Chemical Industry Council of Illinois, and the Illinois Chapter of the National Waste & Recycling Association (collectively, Amicus Groups). In turn, the Environmental Groups filed motions and responses opposing reconsideration and opposing both leave to file and the substance of the *amicus curiae* brief.

Today, the Board grants in part and denies in part MWG's motion to reconsider. In doing so, the Board addresses the merits of the arguments for and against reconsideration. The Board also affirms the substance of its Interim Order. The primary question that arises from these filings is whether the groundwater management zones (GMZs) at Joliet 29, Powerton, and Will County Stations have expired. On reconsideration, the Board finds that these GMZs have not expired as the Illinois Environmental Protection Agency (Agency) did not receive documentation

from MWG confirming either completion of the corrective action process or attainment of applicable groundwater quality standards.

In this order, the Board first provides the procedural history of the case and rules on the procedural motions, including the motion for leave to file the *amicus curiae* brief, which the Board grants. Next, the Board sets forth legal background on motions to reconsider and GMZs, after which the Board summarizes relevant aspects of its Interim Order. The Board then discusses each of the issues concerning the requested reconsideration and clarification and renders its conclusions.

PROCEDURAL BACKGROUND

Procedural History

The Interim Order describes this case's extensive record. *See* Sierra Club v. Midwest Generation, LLC, PCB 13-15, slip op. at 4 (June 20, 2019) (Interim Order). Therefore, the Board here describes only the filings following the June 20, 2019 issuance of the Interim Order.

Motion to Reconsider and Clarify

MWG filed a motion on July 17, 2019, requesting an extension of time to file a motion for reconsideration.[1] On July 19, 2019, the Environmental Groups filed a response opposing the request for an extension. On July 22, 2019, MWG requested leave to reply to the Environmental Groups' response opposing the extension. By hearing officer order, the Board granted MWG's motions for leave to reply and for extension of time. On September 9, 2019, MWG timely filed a motion and memorandum to reconsider and clarify the Interim Order (Mot. to Recons.; Memo Recons.), which the Board generally refers to as MWG's "motion to reconsider."

On September 12, 2019, the Environmental Groups filed an unopposed motion for an extension of time to file their response to MWG's motion to reconsider.[2] the hearing officer granted the extension and on October 14, 2019, the Environmental Groups timely filed their response opposing MWG's motion to reconsider (Resp. to Mot. Recons.). On October 28, 2019, MWG filed a motion for leave to file a reply in support of its motion for reconsideration, attaching the reply (MWG Mot. Lv. Reply; MWG Reply). On November 12, 2019, the Environmental Groups filed a response opposing MWG's motion for leave to file its reply in support of its motion for reconsideration (Resp. to MWG Mot. Lv. Reply).

[1] A party may file a motion to reconsider a Board order within 35 days after receiving the order. 35 Ill. Adm. Code 101.520(a).

[2] Any response to a motion to reconsider must be filed within 14 days after the filing of the motion. 35 Ill. Adm. Code 101.520(b).

Motion to File Amicus Brief

On October 14, 2019, the Board received from the Amicus Groups a motion for leave to file an *amicus curiae* brief supporting MWG's motion to reconsider (Mot. Lv. Amicus Br.), to which was attached their brief (Amicus Br.). On October 28, 2019, the Environmental Groups filed their response opposing the Amicus Groups' motion for leave to file the amicus brief (Resp. to Mot. Lv. Amicus Br.). Further, the Environmental Groups filed an alternative motion to strike portions of the amicus brief (Alt. Mot. to Strike Amicus Br.), as well as another alternative motion for leave to respond to the amicus brief (Alt. Mot. Lv. Resp. to Amicus Br.), but not attaching the response.

On November 12, 2019, the Amicus Groups made two filings. The first was a motion for leave to file a reply to the Environmental Groups' response opposing the motion for leave to file the amicus brief (Mot. Lv. Reply to Resp. to Mot. Lv. Amicus Br.), to which was attached their reply (Reply to Resp. to Mot. Lv. Amicus Br.). The second filing was a response to the Environmental Groups' alternative motion to strike portions of the amicus brief (Resp. to Alt. Mot. to Strike Amicus Br.).

On November 25, 2019, the Environmental Groups filed a response opposing the Amicus Groups' motion for leave to file a reply to the Environmental Groups' response opposing their motion for leave to file the amicus brief (Resp. to Mot. Lv. Reply to Resp. to Mot. Lv. Amicus Br.). On December 13, 2019, the Environmental Groups filed a "renewed" alternative motion for leave to respond to the amicus brief (Ren. Alt. Mot. Lv. Resp. to Amicus Br.), this time attaching the response (Resp. to Amicus Br.).

Rulings on Procedural Motions

Motion to Reconsider and Clarify

In its motion for leave to file a reply in support of its motion to reconsider, MWG argues that the Environmental Groups' response to the motion to reconsider raises new and untimely issues to which MWG must reply to avoid material prejudice. MWG Mot. Lv. Reply at 1-2. The Board's procedural rules provide that the moving party "will not have the right to reply, except as the Board or the hearing officer permits to prevent material prejudice." 35 Ill. Adm. Code 101.500(e). The Board grants MWG's motion for leave and accepts its reply.

Motion to File Amicus Brief

The Environmental Groups oppose the Amicus Groups' motion for leave to file the amicus frief for three main reasons: (1) all legal arguments made by the Amicus Groups have already been argued by MWG; (2) the amicus brief raises facts that are not in evidence; and (3) the amicus brief contains speculative statements, not grounded in fact or based on the record. Resp. to Mot. Lv. Amicus Br. at 1. The Board grants the Amicus Groups' motion for leave to reply to the Environmental Groups' response opposing the filing of the amicus brief. Should the Board accept the amicus brief, the Environmental Groups alternatively filed an original and renewed motion for leave to respond to the amicus brief, providing the response with their renewed

motion. In the response, the Environmental Groups argue that the Board appropriately applied Illinois law and regulations in deciding the GMZ issue and that the Board is empowered to interpret environmental regulations. Resp. to Amicus Br. at 2, 7. Further, the Environmental Groups dispute that the Amicus Groups were deprived of due process on the GMZ issue, maintaining that the Amicus Groups "ignore the distinction between Amici and parties to a proceeding: Amici never have an affirmative right to participate in a proceeding." *Id.* at 6. Even if the Amicus Groups were deprived of due process, the remedy, the Environmental Groups argue, is the Board's "consideration of the issues on a motion for reconsideration and *amicus curiae* motion." *Id.* at 6-7.

The Board observes that "*[a]micus curiae* briefs may be filed in any adjudicatory proceeding by any interested person, provided permission is granted by the Board." 35 Ill. Adm. Code 101.110(c). Any *amicus curiae* brief must consist only of argument, must not raise facts that are not in evidence, and must not delay the Board's decision. *Id.* Response briefs will be allowed only with the Board's permission. *Id.* The Board grants leave to the Amicus Groups and accepts their brief. 35 Ill. Adm. Code 101.111(c). The Amicus Groups have demonstrated that they regularly use GMZs in Illinois and depend upon a consistent interpretation of their duration. The Board also grants the Environmental Groups leave to file a response to the amicus brief and accepts the response.

Having accepted the amicus brief, the Board turns to the Environmental Groups' motion to strike portions of that brief. Alt. Mot. to Strike Amicus Br. at 1. Specifically, the Environmental Groups move to strike 14 elements of the amicus brief, claiming they are speculative or inadmissible under the Board's procedural rules for *amicus curiae* briefs. *Id.* at 1, 2. . The Board partially grants the Environmental Groups' motion to strike. The amicus brief includes as "Attachment 1" an October 8, 2009 letter from the Agency to a representative of Dynegy Midwest Regions Operations, which is not a party to this proceeding. Because this letter raises facts that are not in evidence and does not consist only of argument, the Board strikes Attachment 1 of the amicus brief. 35 Ill. Adm. Code 101.110(c). The Board otherwise denies Environmental Groups' alternative motion to strike.

LEGAL BACKGROUND

Motions to Reconsider

In ruling on a motion for reconsideration, the Board will consider factors including new evidence or a change in the law to conclude that the Board's decision was in error. 35 Ill. Adm. Code 101.902. The Board has observed that "the 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 hearing, changes in the law, or errors in the court's previous application of the existing law." Citizens Against Regional Landfill v. County Board of Whiteside, PCB 92-156, slip op. at ?? (Mar. 11, 1993), *citing* Korogluyan v. Chicago Title & Trust Co., 213 Ill. App. 3d 622, 627, 572 N.E.2s 1154, 1158 (1st Dist. 1992). A motion to reconsider may also specify "facts in the record which were overlooked." Wei Enterprises v. IEPA, PCB 04-23, slip op. at 3 (Feb. 19, 2004).

Groundwater Management Zone Regulations

Below, the Board excerpts relevant portions of its Part 620 groundwater quality regulations.

Section 620.250 Groundwater Management Zone

a) Within any class of groundwater, a groundwater management zone may be established as a three dimensional region containing groundwater being managed to mitigate impairment caused by the release of contaminants from a site:

1) That is subject to a corrective action process approved by the Agency;[3] or

2) For which the owner or operator undertakes an adequate corrective action in a timely and appropriate manner and provides a written confirmation to the Agency. Such confirmation must be provided in a form as prescribed by the Agency.

b) A groundwater management zone is established upon concurrence by the Agency that the conditions as specified in subsection (a) are met and groundwater management continues for a period of time consistent with the action described in that subsection.

c) A groundwater management zone expires upon the Agency's receipt of appropriate documentation which confirms the completion of the action taken pursuant to subsection (a) and which confirms the attainment of applicable standards as set forth in Subpart D. The Agency shall review the on-going adequacy of controls and continued management at the site if concentrations of chemical constituents, as specified in Section 620.450(a)(4)(B), remain in groundwater at the site following completion of such action. The review must take place no less often than every 5 years and the results shall be presented to the Agency in a written report.

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35 Ill. Adm. Code 620.250(a)-(c).

Section 620.450 Alternative Groundwater Quality Standards

a) Groundwater Quality Restoration Standards

[3] "Corrective action process" means "those procedures and practices that may be imposed by a regulatory agency when a determination has been made that contamination of groundwater has taken place, and are necessary to address a potential or existing violation of the standards set forth in Subpart D." 35 Ill. Adm. Code 620.110.

***3) Prior to completion of a corrective action described in Section 620.250(a), the standards as specified in Sections 620.410, 620.420, 620.430, and 620.440[4] are not applicable to such released chemical constituent, provided that the initiated action proceeds in a timely and appropriate manner.

4) After completion of a corrective action as described in Section 620.250(a), the standard for such released chemical constituent is:

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)(3), (4).

Part IV of Section 620.APPENDIX D Confirmation of an Adequate Corrective Action Pursuant to 35 Ill. Adm. Code 620.250(a)(2)

PART IV: Completion Certification

This certification must accompany documentation which includes soil and groundwater monitoring data demonstrating successful completion of the corrective process described in Parts I-III.

Facility Name _____

Facility Address _____

_____

[4] Respectively, these are the Board's Class I, Class II, Class III, and Class IV groundwater quality standards. *See* 35 Ill. Adm. Code 620.410, 620.420, 620.430, 620.440.

County _____

Standard Industrial Code (SIC) _____

Date _____

Based on my inquiry of those persons directly responsible for gathering the information, I certify that an adequate corrective action, equivalent to a corrective action process approved by the Agency, has been undertaken and that the following restoration concentrations are being met:

Chemical Name	Chemical Abstract No.	Concentration (mg/L)

***

35 Ill. Adm. Code 620.Appendix D, Part IV.

Interim Order

The Board's findings of fact and conclusions of law are set forth in its June 20, 2019 Interim Order and are incorporated here by reference. The Board now highlights certain of those findings and conclusions as background for the Board's decision on MWG's motion to reconsider and clarify.

The four electric generation stations that are the subject of this matter are: (1) the Joliet #29 Station, in Joliet, Will County (Joliet 29); (2) the Powerton Station, in Pekin, Tazewell County (Powerton); (3) the Will County Station, in Romeoville, Will County (Will County); and (4) the Waukegan Station, in Waukegan, Lake County (Waukegan). Interim Order at 1. On June 11, 2012, the Illinois Environmental Protection Agency (Agency) issued violation notices (VNs) for all four stations. Complainants Exhs. 1A, 2A, 3A and 4A. Subsequently, MWG and the Agency developed Compliance Commitment Agreements (CCAs) addressing the violations at all four stations. *See* MWG Exhs. 626; 636; 656; and 647. Three of the CCAs required the establishment of GMZs pursuant to Section 620.250(a)(2) and Appendix D of Part 620, 35 Ill. Adm. Code 620.250(a)(2); Appendix D as one of the components of the compliance agreement. MWG Exhs. 626 at 3; 636 at 4; 656 at 4. A groundwater management zone is a three-dimensional region containing groundwater being managed to mitigate impairment caused by the release of contaminants from a site that is subject to a corrective action process. 35 Ill. Adm. Code 620.250(a)(1).

MWG subsequently established GMZs at Joliet 29, Powerton and Will County that were approved by the Agency. MWG Exhs. 638, 658, and 627. The Board is aware MWG was

submitting the appropriate quarterly monitoring reports to IEPA for the three stations until the close of discovery in this matter, *See* Exhs. 243-246 (Joliet 29), 256-260 (Powerton) and 276-280 (Will County). The Board expects MWG has continued to submit those reports to the Agency in the interim. Per the CCAs, MWG was required to submit "either the attached 'Illinois EPA Compliance Statement' or another similar writing to satisfy the statement of compliance within one year of the effective date of the CCA." MWG Ex. 626 at 4. On October 9, 2013, MWG submitted a "Compliance Statement" for Joliet 29 which stated that, "all compliance commitment agreement (CCA) measures have been successfully completed." MWG Ex. 630. On October 17, 2013, MWG submitted nearly identical documents for Powerton and for Will County. MWG Exhs. 637 and 661.

In the Interim Order, the Board found that the 2013 Compliance Statements submitted by MWG to the Agency were, effectively, terminations of each the CCAs. Interim Order at 82, 83. If the CCAs are terminated, the Interim Order holds that MWG would be required to meet Class I ground water quality standards (GQS) under Section 620.410(a) of the Board Regulations, 35 Ill. Adm. Code 620.410(a) at the three stations. Interim Order at 84. The reasoning provided in the Interim Order is as follows:

> In this case, the GMZs were established to remedy violations alleged in VNs. However, the groundwater monitoring results indicate that exceedance of Class I GQS persisted at some of the monitoring wells at Joliet 29, Powerton or Will County even upon completion of GMZ corrective actions. Since the record does not indicate when, if, or even how, exceedances found in groundwater monitoring will be addressed, the Board finds MWG did not meet its burden of proving that groundwater in Joliet 29, Powerton, and Will County are exempt from Class I GQS under section 620.450(a)(3). The Board therefore finds that continued violations of the Board's Class I GQS, occurring at Joliet 29, Powerton, and Will County after MWG certified completion of the requirements of the CCA, violate the Class I GQS. Thus, the Board finds that it is more probable than not that MWG violated the Class I GQS at Joliet 29, Powerton, and Will County during those times, in violation of Section 620.410(a) of the Board rules. *Id*.

The Interim Order holds that violations of the Board Regulations regarding Ground Water Quality Standards (GQS), Sections 620.115, 620.301(a) and 620.405, are stayed only during the time between the establishment of GMZs and the submittal of the 2013 Compliance Statements. *Id.* at 81 and 84.

> "The Board finds that any exceedances of Class I GQS that occurred before a GMZ was established, violate the Board's standards in Section 620.410, and thus Sections 620.301(a) and 620.405. The groundwater monitoring results show exceedance of Class I GQS at Joliet 29, Powerton, or Will County before the GMZs were established. […] The Board, therefore, finds that MWG did violate Board's Class I GQS in 620.410(a) and Sections 620.301(a) and 620.405 with respect to the exceedances that took place between 2010 and 2013 before the three GMZs were established at Joliet 29, Powerton, and Will County." *Id*.

For Joliet 29, the stay of the GQS violations would have been from August 8, 2013 to October 9, 2013. MWG Exhs. 627 and 630. For Will County, the time period would have been July 2, 2013 to October 17, 2013. MWG Exhs. 658 and 661. For Powerton, the time period would have been October 3, 2013 to October 17, 2013. MWG Exhs. 638 and 637. GMZs would have been active for only two months at Joliet 29, for only three months at Will County and for only two weeks at Powerton.

In the Interim Order, the Board held that, "continuous groundwater monitoring can be [an] effective corrective action. . ." Interim Order at 82. As to the three Stations with GMZs, the Interim Order found, "[t]here is no evidence in the record to expect that groundwater quality at Joliet 29, Powerton, and Will County will return to Class I standards naturally, considering the continuous exceedances at these stations that persist even after the relining of the ash ponds." *Id.* at 83. Further, the Board held that the record in this matter, "fails to establish that the continuous monitoring, by MWG at the Stations is in fact a corrective action." *Id.* at 82.

Motion to Reconsider

MWG moves the Board to reconsider and clarify its June 20, 2019 Interim Order. Mot. to Recons. at 2. MWG argues that the Board erred in application of the law, made inconsistent findings, and overlooked facts in the record. *Id.* at 1. The Memorandum in support of the Motion to Reconsider makes three broad arguments: 1) lack of due process, 2) error in determining the groundwater management zones (GMZs) had expired, and 3) error in describing natural attenuation. *Id.* at 2-7. Following those claims, MWG additionally describes 12 factual errors it argues were made in the Board's Interim Order and three issues it requests the Board clarify. *Id*. at 8-9.

DISCUSSION

Board Partially Grants and Partially Denies MWG's Motion to Reconsider

The Board has carefully considered the arguments made by MWG and the Amicus Groups in support of reconsideration as well as the Environmental Groups' strong opposition to reconsideration. One of the intended purposes of a motion to reconsider is to identify errors in the Board's application of the existing law. The Board finds MWG has identified one such error in relation to the termination of the CCAs and GMZs at three of MWG's Stations. In reviewing these arguments, the Board finds the Interim Order was in error as to whether the GMZs had been terminated as MWG never requested their termination. However, the Board affirms its previous determination that MWG has violated Sections 12(a), 12(d), and 21(a) of the Act. The Board additionally affirms its previous determination that MWG violated Sections 620.115, 620.301(a) and 620.405 of the Board's regulations, and affirms that those violations are stayed once a GMZ is established.

GMZs Did Not Expire

MWG argues that the Board erred in its application of the law by determining the Compliance Statements were terminations of the CCAs. Memo Recons. at 11. Rather, MWG

states, these 2013 submittals were confirmations of the corrective action process MWG had completed at the four stations. Mot. to Recons. at 3. "The CCA compliance statements are not the same as the 'appropriate documentation' required by section 620.250(c). The CCA compliance statements do not contain the information required by 620.250(c), which demands documentation of both 'completion of the action taken pursuant to subsection (a)' *and* 'the attainment of applicable standards as set forth in Subpart D.'" Memo Rec. at 11. MWG contends the 2013 Compliance Statements are acknowledgements to the Agency of the completion of actions performed by MWG as required in the CCAs. *Id.* at 11. One of the requirements of the CCAs for these three Stations was to establish a GMZ at each of the three Stations. MWG Exhs. 626 at 3; 636 at 4; 656 at 4.

Part IV of Appendix D in Section 620 requires facilities to certify to the Agency that they have completed compliance activities and requires the facilities report the restoration concentrations of the groundwater within the GMZs. 35 Ill. Adm. Code Section 620 Appendix D, Part IV. Absent from MWG's 2013 Compliance Statements are any reports of restoration concentrations being met at the three GMZs. Memo Recons. at 11 and 12. MWG affirmatively states it has not claimed the GMZs have expired or ended. *Id*. at 12. MWG affirmatively states continues to monitor the groundwater at the three stations that have GMZs. *Id*. In submitting the 2013 Compliance Statements, MWG claims it did not intend to terminate the CCA. *Id.* "The CCA compliance statements are not evidence that the GMZs are 'completed.'" *Id*.

Broadly, MWG argues the Board erred in deciding the GMZs had expired upon submittal of the Compliance Statements in 2013 because to do so would be to render GMZs meaningless. Memo Recons. at 19. "The Board strips GMZs of any value because the Board's opinion invalidates the protection from violations GMZs provide." Mot. to Recons. at 4. MWG argues that to determine a GMZ has expired two weeks after it was established, as at Powerton, would make little sense as more time is required for the natural attenuation process to occur. *Id.* at 3. MWG further argues that the Board's decision to read the 2013 Compliance Statements as terminating the CCAs has consequences that extend past the matter at hand. Memo to Recons. At 19. "There is no reason to have a GMZ if there is no time allowed after the active portion of a corrective action remedy to assess whether it will have the appropriate impact on the groundwater and whether natural attenuation is taking place." *Id.*

MWG argues that the Board was in error to conclude that MWG's monitored natural attenuation is not an ongoing remedy. Mot. to Recons. at 3. "Ultimately, the Board incorrectly concludes that the record does not establish that the continuous monitoring by MWG of the natural attenuation process is a corrective action pursuant to the GMZs." Memo Recons. at 13. MWG points to USEPA resources that say state-monitored natural attenuation following an action that controls the source of the pollutant is an accepted and allowed method to remediate contamination. *Id*. at 20. Furthermore, MWG argues that achieving groundwater standards can take a great deal of time and by suggesting a GMZ would expire two weeks after it was implemented would render the notion of natural attenuation meaningless. *Id*. at 21.

In their motion for leave to file an amicus brief and the brief itself, the Amicus Groups support MWG's argument regarding the process for terminating GMZs. Amicus Br. at 3, and 4. The Amicus Groups state their specific and general interests in GMZs by explaining that their

members utilize GMZs with some regularity. Amicus Br. at 2. Each of the four associations that jointly filed the amicus brief describes an interest in the Board's interpretation of GMZs. *Id.* at 2 – 3. The Amicus Groups argue that the Board erred in its interpretation and application of Section 620.250(a) by confusing the 2013 Compliance Statements with a request to terminate the CCAs. 35. Ill. Adm. Code 620.250(a) and Amicus Br. at 6.

The Amicus Groups argue that the process for determining whether a GMZ has expired involves the party filing documentation as required by 35 Ill. Adm. Code 620.250(c) and the Agency's determination of the applicable GQS per 35 Ill. Adm. Code 620.450. Amicus Br. at 5. The Board's Interim Order determining that the GMZs had expired after submittal of the 2013 Compliance Statements amounts to an error of law, as argued by the Amicus Groups. Amicus Br. at 6, and 8 (*Citing* Interim Order at 83). "The Board correctly concluded that GMZs had been established at the three MWG Stations, but then erroneously found that the GMZs expired after the first regulatory condition of 620.250(c) was, in the Board's view, met. That is, the Board addressed the first element of GMZ expiration under Section 620.250(c) – completion of corrective action – but did not address, much less cite evidence to support, the second element." *Id.* at 8.

In addition, the Amicus Groups argue that the effect of the Board's Interim Order would be to render meaningless the process of natural attenuation and continuous monitoring. Amicus Br. at 10. "The potential precedential effect of the Board's *sua sponte* ruling would be that all GMZs are limited to the time period that active corrective action work is being performed." *Id.* at 11. "In so ruling, the Board has ignored monitored natural attenuation as an effective corrective action tool that is used by industry, subject to the approval of Illinois EPA." *Id*. This finding concerns the Amicus Groups as, "[i]t could effectively preclude the use of monitored natural attenuation as part of a corrective action process. Natural attenuation is often paired with other corrective action work as part of an economically reasonable corrective action process at sites with significant groundwater impacts." *Id*.

In regards to the GMZ issue, the Environmental Groups support the Board's authority to interpret environmental regulations. Ren. Alt. Mot. Lv. Resp. to Amicus Br. at 7. "[B]ecause the Board's ruling on when the GMZ expired was based on its application of its interpretation of environmental regulations to the facts in this proceeding, the Board did not exceed its authority." *Id*. Additionally, the issue of the duration of the GMZ is a distraction to the main focus of the Environmental Groups' complaint, they argue. *Id.* "Regardless of how long the GMZs lasted, the existence or duration of the GMZs would not affect MWG's liability for that pre-existing contamination. Instead, the open question for the Board is whether the GMZs and the accompanying corrective action were sufficient to remedy the contamination." *Id.* at 2. Further, the Environmental Groups argue the issue is more appropriately debated in the remedy phase of the matter. *Id.* at 2.

As to natural attenuation and continuous monitoring, the Environmental Groups affirm the use of these methods as part of a comprehensive remedy. Ren. Alt. Mot. Lv. Resp. to Amicus Br. At 4. "Nothing in the Board's ruling would prevent the proper use of natural attenuation, in combination with remedies such as source removal or source control, to achieve compliance with groundwater standards." *Id.* The Environmental Groups support a policy of

explicitly adding natural attenuation to CCAs and GMZ applications as a listed remedy and allowing the parties of a CCA to determine whether it is required on a case-by-case basis. *Id.* at 3 and 4.

For the reasons below, the Board grants MWG's motion to reconsider in part but affirms the substance of its Interim Order. A GMZ may be established under Section 620.250(a)(1) or Section 620.250(a)(2) to address a release of contaminants. Under Section 620.250(a)(1), a GMZ may be established to address a release "[t]hat is subject to a corrective action process approved by the Agency." 35 Ill. Adm. Code 620.450(a)(1). Alternatively, under Section 620.250(a)(2), a GMZ may be established to address a release "[f]or which the owner or operator undertakes an adequate corrective action in a timely and appropriate manner and provides a written confirmation to the Agency." 35 Ill. Adm. Code 620.450(a)(2). MWG is proceeding at the Stations under CCAs approved by the Agency. Through each CCA, the Agency imposed enforceable obligations on MWG to apply for and establish GMZs. *See* 415 ILCS 5/31(a), 42(k) (2018). Accordingly, each CCA is an Agency-approved "corrective action process." *See* 35 Ill. Adm. Code 620.110 (definition). MWG therefore established the GMZs under Section 620.250(a)(1) after the Agency approved MWG's GMZ applications. *See* 35 Ill. Adm. Code 620.250(b).

A GMZ expires when the Agency receives appropriate documentation confirming two conditions, as described in Section 620.250(c). First, the documentation must confirm that the corrective action taken under Section 620.250(a)(1) or Section 620.250(a)(2) is complete. 35 Ill. Adm. Code 620.250(c). Second, the documentation must confirm that the applicable groundwater quality standards under Section 620.450(a)(4) have been attained. *Id*. As discussed below, the Agency has not received documentation from MWG confirming that either condition under Section 620.250(c) has been met.

MWG submitted the 2013 Compliance Statements to the Agency under the CCAs, but MWG has not submitted documentation confirming that the corrective action taken under Section 620.250(a)(1) is complete. MWG's applications to establish the GMZs consist of Part I ("Facility Information"), Part II ("Release Information"), and Part III ("Remedy Selection Information") of the form in Appendix D of Part 620. 35 Ill. Adm. Code 620.Appendix D. The form is to be used when applying to establish a GMZ under Section 620.250(a)(2), but it may be used—and the Agency approved it here—for the same purposes under Section 620.250(a)(1). It is likewise the case for Part IV of the form, which is a "Completion Certification" that must include monitoring data demonstrating successful completion of the corrective process and include the resulting restoration concentrations of chemical constituents in the groundwater. *Id*. MWG has not yet submitted Part IV or otherwise provided the information it calls for. MWG's 2013 Compliance Statements—each a page in length—merely certified the completion of those CCA steps that had been taken as of that date. They are distinct from documentation confirming that the corrective action taken under Section 620.250(a)(1) is complete. Accordingly, the first condition for GMZ expiration under Section 620.250(c) has not been met.

Nor has the second condition. MWG has not submitted documentation confirming that the applicable groundwater quality standards under Section 620.450(a)(4) have been attained. The applicable groundwater quality standard for a given chemical constituent depends on its

remaining concentration *after* the corrective action under Section 620.250(a)(1) has been completed. Specifically, the standard is either:

- The Part 620 standard *if* the monitored concentration meets that standard; or

- The monitored concentration exceeding the Part 620 standard *if*, to the extent practicable, the exceedance has been minimized and beneficial use, appropriate for the groundwater class, has been returned; and any threat to public health or the environment has been minimized. 35 Ill. Adm. Code 620.450(a)(4)(A), (B).

On reconsideration, the Board finds that because MWG has not submitted documentation confirming that the corrective action is complete or that the applicable groundwater quality standards have been attained, the GMZs at Joliet 29, Will County, and Powerton did not expire. The Board is aware that the process of monitored natural attenuation can be, by its nature, a long one. Monitored natural attenuation, depending on its efficacy and subject to the Agency's review, can conceivably last for many years. For a GMZ to expire two weeks after it had been established (as in Powerton) risks rendering them effectively meaningless.

The Board reverses its finding in the Interim Order that the GMZs expired. However, the Board affirms MWG's violations of the Act (415 ILCS 5/12(a), 12(d), 21(a) (2016)) since at least 2010. Additionally, the Board affirms MWG's violations of Part 620 (35 Ill. Adm. Code 620.115, 620.301(a), 620.405) from at least 2010 until the GMZs were established: August 8, 2013, at Joliet 29; July 2, 2013, at Will County; and October 3, 2013, at Powerton. MWG's violations of those Board regulations are stayed as of those dates. *See* People of the State of Illinois v. Texaco Refining and Marketing, Inc., PCB 02-03, slip op. at 10 (Nov. 6, 2003) ("Compliance with a permitted GMZ would provide [the party] immunity from violating the Part 620 standards.").

MWG Was Not Denied Due Process

MWG claims the Board made a *sua sponte* ruling in the Interim Order in deciding the three GMZs were terminated by MWG's submittal of the 2013 Compliance Statements. Memo Recons. at 4. "The Board's *sua sponte* determination that the GMZs expired violates due process of law and MWG's fundamental right of notice of the issues to be tried at hearing." *Id.* MWG believed the establishment and continued use of the GMZs was not in question. *Id.* at 4 and 5. Had the expiration of GMZs been at issue, MWG argues it would have presented evidence at the hearings as to the continued existence of the CCAs and would have called witnesses to testify to the same. *Id*. at 7.

In support of this argument on lack of due process, MWG cites Niles Twp. High Sch. Dist 219 v. Ill. Educ. Labor Rels. Bd., 369 Ill. App. 3d 128, 859 N.E. 2d 57 (1st Dist. 2006). MWG claims that in *Niles Township*, the administrative law judge decided without notice to the parties that a petition by the plaintiff was untimely filed. Memo Recons. at 4. For MWG, this is analogous to the Board's decision in the Interim Order that the GMZs had expired at three of the Stations. MWG claims the continued existence of GMZs was not at issue at any time prior to the issuance of the Board's Interim Order and if it had been, MWG would have brought evidence

forward during the hearings to support its claim that the GMZs were still active. *Id*. at 6. "The question of whether there are violations of Class I groundwater standards after GMZs are in place *was never at issue* during the hearing." *Id.* at 4. This makes the Board's decision untimely and ultimately a violation of MWG's right to due process, according to MWG. *Id.* at 4.

Addressing MWG's claim of lack of due process, the Environmental Groups argue that any purported surprise at the reasoning used within the Interim Order is cured through filing of the motion to reconsider. *Id*. at 3. "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." *Id.* To support this argument, the Environmental Groups cite Smith, et al. v. City of Champaign, et al., PCB 92-55, slip op. at 4 (Oct. 16, 1992). This matter resolved a motion to reconsider by complainants who argued the Board denied them "fundamental fairness and due process of law by sua sponte deciding not to conduct a factual review of the record." *Id.* at 3. The Board found there was no deprivation of due process for, "[i]n any event, petitioners have had the opportunity, in their motion for reconsideration, to raise their argument in support of a Board review of the record." *Id.* at 4.

The Board is not persuaded by MWG's claim that it was denied due process as to the issue of the GMZ termination. It was well within MWG's ability to provide witnesses at the time of the hearings that could have testified as to the continued existence of the CCAs and GMZs. Additionally, MWG could have obtained documentation from the Agency of the continued existence of CCAs and GMZs. It chose not to avail itself of these opportunities. As to the GMZ issue, the Board decided the case before it. It did not need to, nor did it *sua sponte* raise new issues. Assuming *arguendo* that the Board did make a *sua sponte* decision, MWG has now had ample opportunity to adequately explain its position through the filing of the motion to reconsider, memo to reconsider and its reply to Complainants. The Board finds MWG was not denied due process in this matter.

Board Made No Factual Errors

MWG claims that the Board "overlooks facts . . . that result in errors in the Board's findings for each of the MWG Stations." Memo Recons. at 28. MWG asks the Board to "[c]onsider and apply the numerous overlooked facts that lead to erroneous conclusions in law and fact." Mot. to Recons. at 8. Rather than summarize the alleged overlooked facts and resulting errors (Memo Recons. at 28-42), the Board quotes MWG's proposed revised findings:

a. Finding that the poz-o-pac in the three ash ponds at the Joliet 29 Station are in good condition;
b. Finding that the HDPE liners in the ash ponds at the Joliet 29 Station were installed correctly and not damaged;
c. Correcting the findings to state that no ash was left between the poz-o-pac and HDPE in the ash ponds at Joliet 29;
d. Correcting its findings to state that certain constituents at Joliet 29 are not in violation of the Class I standards;
e. Finding that the poz-o-pac in the ash ponds at the Powerton Station are in good condition;

f. Finding that the liners in the ash ponds at the Powerton Station were installed correctly and not damaged;
g. Correcting its finding to state that the Secondary Ash Settling Basin at Powerton Station has had a liner since at least 1999;
h. Correcting its finding to state that Former Ash Basin at Powerton Station had no ash beneath the liner because it is an inactive basin;
i. Correcting its finding to delete any reference that river water rose "30-feet above" the bottom of the Powerton Secondary Ash Settling basin;
j. Correcting its finding to state that the East yard Basin and the Limestone Basin do not contain ash and are not currently a source;
k. Correcting its findings to state that certain constituents at Powerton are not in violation of the Class I standards; and,
l. Correcting its findings that any ash was let between the poz-o-pac and HDPE liners at the ash ponds at Will County.

Mot. to Recons. at 8.

Having reviewed each of the alleged overlooked facts, the Board denies MWG's motion to reconsider on these grounds. The Board neither overlooked facts in the record nor reached erroneous conclusions. Each of the Board's findings of fact is established by a preponderance of the evidence.

Board Partially Grants and Partially Denies MWG's Motion to Clarify

MWG additionally categorizes three further requests as clarifications rather than errors of the Board's Interim Order. Mot. to Recons. At 8, and 9. First, MWG requests the Board clarify whether the Interim Order concluded that pond liners were leaking after the ponds were relined in instances where the ponds contained no ash or where no ash has been removed. Memo Recons. at 42. Relatedly, MWG requests the Board distinguish the ponds in which no ash has ever been removed such that there was no likelihood of damage to liners. *Id*. at 43. The second clarification MWG requests is that the Board reclassify all of MWG's witnesses that testified at the hearings as laypersons except for John Seymore, an expert witness. *Id.* At the hearings, MWG identified John Seymore as its only expert witness. *Id.* Third, and lastly, MWG requests the Board clarify whether the Board considers monitoring wells 8, 10 and 11 at Joliet 29 to be background wells. *Id* at 43 - 44.

The Board sees no reason to change or clarify the first request, but will revise its order as to the second and third. MWG requested the Board identify only John Seymour as an expert witness and classify MWG's other witnesses who testified at the hearings as lay witnesses. The Board accepts this clarification. Further, MWG requests the Board clarify whether it considers monitoring wells 8, 10 and 11 at Joliet 29 to be background wells. The Interim Order notes that neither the Environmental Groups nor MWG witnesses established background values for the contaminants of concern on a site-specific basis using the groundwater monitoring results from the upgradient wells MW 8, 10 and 11. Interim Order at 33 - 35. Additionally, the Interim Order notes that as recommended by MWG's witnesses (Gnat and Seymour), the Board relied upon the comparison of the median values of boron and sulfate in the monitoring wells with the

90th percentile statewide values from the statewide database as the Environmental Groups claimed exceedance of the statewide background values and not site-specific background values. *Id* at 34. The following revisions will be made to the first paragraph on page 35 of the Interim Order:

> Here, the Board notes that neither the Environmental Groups nor MWG ~~experts can~~ established background values on a site-specific basis ~~by~~ using the groundwater monitoring results from upgradient wells MW-8, 10~~9~~, and 11.
>
> Interim Order at 35.

CONCLUSION

The Board grants in part and denies in part MWG's motion to reconsider. In its June 20, 2019 Interim Order, the Board found that Compliance Statements sent by MWG to the Agency in 2013 constituted terminations of the CCAs at three of its Stations. Upon reconsideration, the Board takes the GMZ requirements of 35 Ill. Adm. Code 620 into account and to that end, grants the requested reconsideration and finds upon reconsideration that the CCAs at the Stations have not been terminated and are still in effect. However, the Board otherwise denies MWG's motion to reconsider except as to the two issues that have been clarified. The Board directs the parties and the hearing officer to move expeditiously to hearings on remedy.

The Board incorporates by reference its findings of fact and conclusions of law from its opinion and order of June 20, 2019, as modified by this order. The Board therefore affirms its June 20, 2019 decision, in which the Board: (1) found MWG violated Section 12(a) of the Act, 415 ILCS 5/12(a) (2016); found MWG violated Section 12(d) of the Act, 415 ILCS 5/12(d) (2016; (3) found that MWG violated Section 21(a) of the Act, 415 ILCS 5/21(a) (2016); (4) found MWG violated Sections 620.115, 620.301(a) and 620.405 of the Board regulations, 35 Ill. Adm. Code 620.115, 620.301(a), 620.405.

ORDER

1. The Board grants the Amicus Groups' motion for leave to file the *amicus curiae* brief and accepts that brief but strikes its Attachment 1.

2. Except as provided in paragraph 3 below, the Board denies MWG's motion to reconsider and clarify.

3. The Board grants MWG's motion to reconsider and clarify as follows:

    a. On reconsideration of its Interim Order, the Board finds that the GMZs at Joliet 29, Powerton, and Will County Stations did not expire; and

    b. As specified in the discussion above, the Board clarifies its Interim Order concerning whether MWG's witnesses testified as experts or laypersons

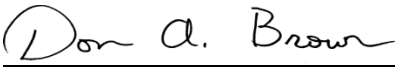
and whether monitoring wells 8, 10, and 11 were used to establish background values.

4. The Board directs the parties and the hearing officer to proceed expeditiously to hearing on remedy.

IT IS SO ORDERED

Board Member Brenda Carter abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on February 6, 2020 by a vote of 3-0.



Don A. Brown, Clerk
Illinois Pollution Control Board