

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Don Brown, Clerk	Attached Service List
Illinois Pollution Control Board	
60 E. Van Buren St., Ste. 630	
Chicago, Illinois 60605	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Answer and Supplemental Defenses to Second Complaint, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: August 12, 2022

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service for Midwest Generation, LLC's Answer and Supplemental Defenses to Second Complaint, a copy of which is hereby served upon you and filed on August 12, 2022 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

and that true copies of the pleading were emailed on August 12, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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Respondent.)	

ANSWER AND SUPPLEMENTAL DEFENSES TO SECOND COMPLAINT

Respondent, Midwest Generation, LLC (“MWG”), by its undersigned counsel, submits its Answer, Supplemental Defenses and Affirmative Defenses to the Complaint. Pursuant to Section 101.100(b) of the Illinois Pollution Control Board (“Board”) procedural rules and Sections 2-613(d) and 2-616(a) of the Illinois Code of Civil Procedure, MWG may update and supplement its answer at any time prior to final judgment. Accordingly, MWG supplements its pleading by adding defenses IV through IX,¹ consistent with positions it has previously maintained, as follows:

FACTUAL BACKGROUND

1. Midwest Generation, LLC (“MWG”) owns and operates the Joliet 29 Generating Station (“Joliet 29”) in Joliet, Illinois in Will and Kendall Counties, on the north side of the Des Plaines River. MWG has historically stored and disposed of coal ash and other coal combustion waste in repositories that include, but are not limited to, two or more landfills and three ash ponds (two HDPE-lined, one geocomposite-lined) on the same side of the river, and continues to dispose of coal ash and other coal combustion waste in these ponds or repositories.

¹ MWG also corrected typographical errors in paragraph 38 (“speaks” to “speak”) and in paragraph 71 (“or” to “of”).

ANSWER: Respondent admits that it operates the Joliet 29 Electric Generating Station (“Joliet 29”) in Joliet, Will County, Illinois. Respondent admits that Joliet 29 has three, high density polyethylene (“HDPE”) lined, ash ponds as a part of the wastewater treatment system permitted under Joliet 29’s NPDES permit. Respondent denies the remaining allegations contained in paragraph 1.

2. MWG installed eleven groundwater monitoring wells (MW-1 through MW-11) around the Joliet 29 ash ponds in 2010, as depicted in the well map included in MWG groundwater monitoring reports for Joliet 29, attached hereto as Exhibit A. Since monitoring began in late 2010, groundwater monitoring results have shown levels of antimony, boron, chloride, iron, manganese, sulfate, and Total Dissolved Solids (“TDS”) which exceed Illinois Groundwater Quality Standards (“GQSs”). *See* violations of Class I and Class II GQSs and MWG groundwater monitoring data for Joliet 29, attached hereto as Exhibits B, C, and D, respectively.

ANSWER: Respondent admits that it installed eleven groundwater monitoring wells (MW-1 through MW-11) at Joliet 29 in 2010. Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and D and therefore denies same. Respondent denies the remaining allegations contained in paragraph 2.

3. MWG owns and operates the Powerton Generating Station (“Powerton”) in Pekin, Illinois in Tazewell County. MWG has historically stored and disposed of coal ash and other coal combustion waste in repositories that include, but are not limited to three active ash ponds on the site, two of them lined; one less active ash pond on the site; up to two additional ponds or basins containing coal ash and other coal combustion waste; and a former slag dumping area. MWG continues to store or dispose of coal ash and other coal combustion waste in these ponds or repositories.

ANSWER: Respondent admits that it operates the Powerton Electric Generating Station (“Powerton”) in Pekin, Tazewell County, Illinois. Respondent admits that Powerton has three ash ponds, lined with HDPE-liners, as a part of the wastewater treatment system permitted under Powerton’s NPDES permit, and a metal cleaning basin lined with an HDPE liner. Respondent denies the remaining allegations contained in paragraph 3.

4. MWG monitors groundwater at Powerton with a network of 15 wells (MW-1 through MW-15, depicted in the well map included in MWG groundwater monitoring reports for

Powerton, attached hereto as Exhibit E). Since monitoring began in late 2010, groundwater monitoring results have shown levels of antimony, arsenic, boron, chloride, iron, lead, manganese, nitrate, selenium, sulfate, thallium, and TDS which exceed Illinois GQS and/or open dumping standards. *See* violations of Class I and Class II GQSs and MWG groundwater monitoring data for Powerton, attached hereto as Exhibits B, C, and F, respectively.

ANSWER: Respondent admits that it installed fifteen groundwater monitoring wells (MW-1 through MW-15) at Powerton in 2010. Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and F and therefore denies same. Respondent denies the remaining allegations contained in paragraph 4.

5. MWG owns and operates the Waukegan Generating Station (“Waukegan”) in Waukegan, Illinois in Lake County. There are two active HDPE-lined ponds at this site. MWG has stored and disposed of coal ash and other coal combustion waste in repositories that include, but are not limited to, these two ponds and one former ash landfill or disposal area and continues to do so.

ANSWER: Respondent admits that it owns and operates the Waukegan Electric Generating Station (“Waukegan”) in Waukegan, Lake County, Illinois. Respondent further admits that Waukegan has two ash ponds which are lined with HDPE-liners and states that the ash ponds are a part of the wastewater treatment system permitted by Waukegan’s ND PES permit. Respondent denies the remaining allegations contained in paragraph 5.

6. MWG installed 5 wells (MW-1 through MW-5) around the Waukegan ash ponds in 2010, as depicted in the well map included in MWG groundwater monitoring reports for Waukegan, attached hereto as Exhibit G. Groundwater monitoring results from Waukegan show levels of antimony, arsenic, boron, chloride, iron, manganese, nitrate, selenium, pH, sulfate, and TDS which exceed Illinois GQS and/or open dumping standards. *See* violations of Class I and Class II GQSs and MWG groundwater monitoring data for Waukegan, attached hereto as Exhibits B, C, and H, respectively.

ANSWER: Respondent admits that it installed five groundwater monitoring wells (MW-1 through MW-5) at Waukegan. Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and H and therefore denies same. Respondent denies the remaining allegations contained in paragraph 6.

7. MWG owns and operates the Will County Generating Station (“Will County”) in Romeoville, Illinois in Will County. MWG has stored and disposed of coal ash and other coal combustion waste at the site in repositories that include four geocomposite-lined ponds and two or more additional ponds. MWG continues to store and dispose of coal ash and other coal combustion waste in one or more of these ponds.

ANSWER: Respondent admits that it owns and operates the Will County Electric Generating Station (“Will County”) in Romeoville, Will County, Illinois. Respondent admits that Will County has two ash ponds, lined with HDPE-liners, which are a part of the wastewater treatment system and permitted by Will County’s NDPEs permit. Respondent further states that in 2013, Respondent took two ash ponds at Will County out of service. Respondent denies the remaining allegations contained in paragraph 7.

8. MWG installed 10 wells around the Will County plant’s ponds in 2010 (MW-1 through MW-10; *see* the well map included in MWG groundwater monitoring reports for Will County, attached hereto as Exhibit I.) Groundwater monitoring results from Will County show levels of antimony, arsenic, boron, chloride, manganese, pH, selenium, sulfate, and TDS which exceed Illinois GQS and/or open dumping standards. *See* violations of Class I and Class II GQSs and MWG groundwater monitoring data for Will County, attached hereto as Exhibits B, C, and J, respectively.

ANSWER: Respondent admits that it installed ten groundwater monitoring wells (MW-1 through MW-10) at Will County. Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and J and therefore denies same. Respondent denies the remaining allegations contained in paragraph 8.

9. On June 11, 2012, the Illinois Environmental Protection Agency (“IEPA”) sent MWG Violation Notices describing violations of Section 12 of the Illinois Environmental Protection Act, 415 ILCS 5/12, and Groundwater Quality regulations at Joliet 29, Powerton, Waukegan, and Will County. *See* Violation Notices for Powerton, Joliet 29, Waukegan, and Will County, attached hereto as Exhibits K–N. In the Violation Notices IEPA identified groundwater monitoring results that exceeded Illinois Class I GQS, which are found at 35 IAC 620.410.

ANSWER: Respondent admits that on June 11, 2012 the Illinois Environmental Protection Agency sent Violation Notices to Respondent and states that the Violation Notices speak for themselves. Respondent denies the remaining allegations contained in paragraph 9.

THE POLLUTANTS

10. As set forth in detail in Exhibit B, groundwater monitoring results at Joliet 29, Powerton, Waukegan, and/or Will County have exceeded Illinois Class I GQS, 35 Ill. Admin. Code § 620.410, for the following pollutants: Antimony, arsenic, boron, chloride, iron, lead, manganese, mercury, nitrate, selenium, sulfate, total dissolved solids, and thallium.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibit B, and therefore denies same. Respondent denies the remaining allegations contained in paragraph 10.

11. Many of the pollutants found at elevated concentrations in the groundwater monitoring results at Joliet 29, Powerton, Waukegan, and/or Will County are constituents of coal ash.²

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 11 and therefore denies same

12. As MWG recognizes, boron is a primary indicator of potential coal ash impacts to groundwater.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 12 and therefore denies same.

13. The pollutants listed in this complaint, when present at the concentrations found in MWG's groundwater wells, make the groundwater unusable. Many of these pollutants are toxic and have been found at concentrations that present a human health risk. Others are dangerous to aquatic ecosystems; this is a significant concern to the extent that contaminated groundwater is migrating into adjacent surface water bodies.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 13 and therefore denies same.

14. Antimony is associated with reduced lifespan, decreased blood glucose, and altered cholesterol in rodents, and with vomiting and cardiac and respiratory effects in humans.³ To protect public health, the U.S. EPA has established a Maximum Contaminant Level (MCL) of 0.006 mg/L. The Illinois Class I GQS for antimony is also 0.006 mg/L. Even this level may be

² See, e.g., U.S. EPA, Human and Ecological Risk Assessment of Coal Combustion Wastes at 2-4 (Draft, April 2000) (listing Coal Combustion Waste constituents), available at <http://earthjustice.org/sites/default/files/library/reports/epa-coal-combustion-waste-risk-assessment.pdf> (last visited October 2, 2012).

³ See, e.g., U.S. EPA, Integrated Risk Information System: Antimony, <http://www.epa.gov/iris/subst/0006.htm>; California EPA, Draft Public Health Goal for Antimony in Drinking Water (July 2009).

unsafe; the California EPA, for example, has proposed a much lower Public Health Goal of 0.0007 mg/L.⁴

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 14 and therefore denies same.

15. Arsenic is known to cause multiple forms of cancer in humans and is also associated with non-cancer health effects of the skin and the nervous system.⁵ Groundwater that exceeds Illinois GQSs for arsenic is highly toxic; based on current U.S. EPA risk estimates, the cancer risk associated with drinking water at 0.05 mg/L, the Illinois Class I GQS for arsenic, is greater than 2 in 1,000.⁶ The risk at 0.2 mg/L, the Class II GQS, is 1 in 100.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 15 and therefore denies same.

16. Oral exposure to boron has led to developmental and reproductive toxicity in multiple species. Specific effects include testicular degeneration, reduced sperm count, reduced birth weight, and birth defects.⁷ The EPA has established a child health advisory of 3 mg/L for boron, close to the Illinois Class I and Class II GQS of 2 mg/L.⁸

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 16 and therefore denies same.

17. Chloride renders water unusable by imparting a salty taste; to prevent this the EPA has set a secondary drinking water regulation of 250 mg/L, close to the Illinois Class I and Class II GQS of 200 mg/L.⁹

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 17 and therefore denies same.

18. Iron renders water unusable by imparting a rusty color and a metallic taste and causing sedimentation and staining; to prevent these effects the EPA has set a secondary drinking water regulation of 0.3 mg/L.¹⁰ The Illinois Class I and II GQS for iron, at 5 mg/L, is much

⁴ See California EPA, *supra* note 2.

⁵ See, e.g., U.S. EPA, Integrated Risk Information System: Arsenic, inorganic, <http://www.epa.gov/iris/subst/0278.htm>; U.S. Agency for Toxic Substances and Disease Registry (ATSDR), Toxicological Profile for Arsenic (Aug. 2007).

⁶ Derived from the U.S. EPA drinking water unit risk of 5E-5 per ug/L. U.S. EPA, *supra* note 8.

⁷ See, e.g., U.S. EPA, Toxicological Profile of Boron and Compounds 60-61 (June 2004).

⁸ U.S. EPA, 2012 Edition of the Drinking Water Standards and Health Advisories (April, 2012)

⁹ U.S. EPA, Secondary Drinking Water Regulations: Guidance for Nuisance Chemicals, <http://water.epa.gov/drink/contaminants/secondarystandards.cfm>.

¹⁰ *Id.*

higher than the EPA secondary drinking water regulation, suggesting that violations of the GQS represent concentrations of iron far higher than what would be usable.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 18 and therefore denies same.

19. Lead is known to be toxic to the nervous system, and is particularly associated with effects on childhood neurobehavioral development at very low doses. Lead is also classified by the EPA as a “probable human carcinogen.”¹¹ The EPA Action Level for lead in drinking water is 0.015 mg/L.¹² This is unlikely to represent a “safe” level of exposure—the EPA has noted, for example, that there may be no threshold for lead toxicity.¹³ Groundwater concentrations of lead above the Illinois Class I GQS, 0.0075 mg/L, are thus unsafe to drink.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 19 and therefore denies same.

20. Manganese is also known to be toxic to the nervous system.¹⁴ The EPA has not updated its assessment of manganese toxicity in 16 years, so EPA standards and advisories may not reflect the latest scientific knowledge concerning effects on childhood neurological development,¹⁵ and the EPA Lifetime Health Advisory for manganese – 0.3 mg/L – may not be adequately health-protective. In any event, manganese concentrations greater than 0.05 mg/L render water unusable by discoloring the water, giving it a metallic taste, and causing black staining.¹⁶ Groundwater with manganese above the Illinois Class I GQS – 0.15 mg/L – is clearly not usable and is likely to be toxic.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 20 and therefore denies same.

21. Inorganic mercury is toxic to the kidneys, and has also been associated with developmental toxicity.¹⁷ The California EPA Public Health Goal for inorganic mercury is 0.0012 mg/L; the U.S. EPA MCL, like the Illinois Class I GQS, is 0.002 mg/L.¹⁸

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 21 and therefore denies same.

¹¹ U.S. EPA, Integrated Risk Information System: Lead and Compounds, <http://www.epa.gov/iris/subst/0277.htm>.

¹² U.S. EPA drinking water standards, *supra* note 7.

¹³ U.S. EPA, IRIS web page for lead, *supra* note 10.

¹⁴ *See, e.g.*, U.S. EPA, Integrated Risk Information System: Manganese, <http://www.epa.gov/iris/subst/0373.htm>.

¹⁵ *See, e.g.*, G.A. Wasserman et al., Water manganese exposure and children’s intellectual function in araiharaz, Bangladesh. 114 ENVIRON. HEALTH PERSP. 124 (2006).

¹⁶ *See* U.S. EPA secondary drinking water regulations, *supra* note 8.

¹⁷ *See, e.g.*, California EPA, Public Health Goal for Inorganic Mercury in Drinking Water (Feb. 1999).

¹⁸ *Id.*; U.S. EPA drinking water standards, *supra* note 7.

22. Nitrate is known to cause methemoglobinemia in infants, a condition that impairs oxygen delivery to tissues and can cause bluish skin coloration. The U.S. EPA MCL, the California EPA Public Health Goal, and the Illinois Class I and II GQSs are all 10 mg/L, a level at which infant methemoglobinemia is not expected to occur.¹⁹

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 22 and therefore denies same.

23. Selenium is an essential element, but excess exposure can cause a chemical-specific condition known as selenosis, with symptoms that include hair and nail loss. Various agencies have derived health-protective values between 0.01 and 0.05 mg/L, but are in agreement that selenium concentrations above 0.05 mg/L, the Illinois Class I and II GQS, are unsafe to drink.²⁰

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 23 and therefore denies same.

24. High concentrations of sulfates in drinking water impart a salty taste and can cause diarrhea; to protect against these effects, the U.S. EPA has established a secondary MCL of 250 mg/L and a health-based advisory of 500 mg/L.²¹ Groundwater with sulfate concentrations above the Illinois Class I and Class II GQS of 400 mg/L is therefore unusable and potentially unsafe.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 24 and therefore denies same.

25. Total Dissolved Solids (TDS) is a measure of multiple dissolved chemicals, but because high TDS is generally associated with hardness, staining, salty taste, and deposits, the U.S. EPA has established a secondary MCL of 500 mg/L.²² Groundwater with TDS above the Illinois Class I and Class II GQS, 1,200 mg/L, is clearly unusable.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 25 and therefore denies same.

¹⁹ See U.S. EPA, Integrated Risk Information System: Nitrate, <http://www.epa.gov/iris/subst/0076.htm>; California EPA, Public Health Goals for Nitrate and Nitrite (Dec. 1997).

²⁰ See, e.g., California EPA, Public Health Goal for Selenium (Dec. 2010) (Setting a Public Health Goal of 0.03 mg/L); World Health Organization, Guidelines for Drinking Water Quality, 4th Ed., 413 (2011) (Setting a provisional guideline of 0.04 mg/L); U.S. EPA drinking water standards, *supra* note 11 (setting forth a MCL of 0.05 mg/L).

²¹ U.S. EPA, Drinking Water Advisory: Consumer Acceptability Advice and Health Effects Analysis on Sulfate (Feb. 2003).

²² See U.S. EPA secondary drinking water regulations, *supra* note 8.

26. Thallium is known to cause neurotoxicity, and is also associated with developmental and reproductive toxicity and other adverse health effects. The Illinois Class I GQS and the U.S. EPA MCL are both 0.002 mg/L.²³

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 26 and therefore denies same.

27. Finally, many of the pollutants associated with coal ash, including but not limited to selenium, are known to bioaccumulate in aquatic ecosystems causing tissue damage and other effects in fish and amphibians. One review, for example, noted that “the combined effects of multiple accumulated elements may lead to numerous changes in individuals that could compromise individual fitness or health,” and provided several examples of coal ash-contaminated sites where the health of individuals and communities in aquatic ecosystems had been severely impaired.²⁴

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 27 and therefore denies same.

PARTIES

28. Citizens Against Ruining the Environment (“CARE”) is located at 230 E. 6th Street, Lockport, IL 60441. CARE is an incorporated, not-for-profit community organization with members in the Lockport area, including Will County. CARE was organized for the purpose of preserving and protecting Illinois's land, air, water, and other natural resources, and protecting the organization's members and other residents of the state from threats of pollution.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 28 and therefore denies same.

29. The Environmental Law and Policy Center (“ELPC”) is an Illinois not-for-profit corporation with its principal office located at 35 East Wacker Drive, Suite 1600, Chicago, IL 60601. ELPC's mission includes advocating for the protection of water quality, and protection of public health related to water quality, throughout the Midwest.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 29 and therefore denies same.

²³ See U.S. EPA drinking water standards, *supra* note 7.

²⁴ C.L. Rowe et al., Ecotoxicological implications of aquatic disposal of coal combustion residues in the United States: A review, 80 ENVTL. MONITORING AND ASSESSMENT 207, 242 (2002); see also A.D. Lemly and J.P. Skorupa, Wildlife and the coal waste policy debate: Proposed rules on coal waste disposal ignore lessons from 45 years of wildlife poisoning, 46 ENVTL. SCI. TECH. 46 (2012).

30. Prairie Rivers Network, a nonprofit organization and a state affiliate of the National Wildlife Federation, is Illinois' statewide leader in river protection, conservation, and restoration. Prairie Rivers Network has a membership of over 700 in Illinois.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 30 and therefore denies same.

31. Sierra Club is the nation's oldest and largest grassroots environmental organization. Sierra Club is an incorporated, not-for-profit organization with headquarters located at 85 Second Street, 2nd Floor, San Francisco, CA, 94105. Sierra Club's Illinois Chapter office is located at 70 E. Lake St., Suite 1500, Chicago, IL, 60601. Sierra Club's mission is to preserve, protect, and enhance the natural environment. Sierra Club has 641,000 members, including approximately 23,000 members in Illinois.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in paragraph 31 and therefore denies same.

32. Midwest Generation, LLC (MWG), is a Delaware Corporation doing business in Illinois with principal executive offices at 235 Remington Boulevard, Suite A, Bolingbrook, Illinois 60440. MWG's registered agent is C T Corporation System, 208 S. LaSalle St., Suite 814, Chicago, Illinois 60604. MWG is a subsidiary of Edison Mission Energy ("EME"), of Santa Ana, California. EME is a subsidiary of Edison International, 2244 Walnut Grove Avenue, (P.O. Box 976), Rosemead, California, 91770.

ANSWER: Respondent admits that it is a Delaware Corporation duly authorized and doing business in Illinois and its principal offices are located at 211 Carnegie Center in Princeton, New Jersey. Respondent further admits that its registered agent is C T Corporation System, 208 S. LaSalle St., Suite 814, Chicago, Illinois 60604. Respondent states that on December 17, 2012, Edison Mission Energy and certain of its subsidiaries and affiliates, including Respondent, filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Northern District of Illinois (the "Bankruptcy Court"). On March 11, 2014, the Bankruptcy Court approved the purchase of certain assets and operating companies of Edison Mission Energy, including Respondent, by NRG Energy, Inc.

LEGAL BACKGROUND: OPEN DUMPING

33. The Illinois Environmental Protection Act prohibits “the open dumping of any waste.” 415 ILCS 5/21(a). “Open dumping” is defined as “the consolidation of refuse from one or more sources at a disposal site that does not fulfill the requirements of a sanitary landfill.” 415 ILCS 5/3.305. “Refuse” is defined as “waste.” 415 ILCS 5/3.385. “Waste” is defined to include “any garbage, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility or other discarded material, including solid, liquid, semi-solid, or contained gaseous material resulting from industrial, commercial, mining and agricultural operations” at 415 ILCS 5/3.535. “Sanitary landfills” are defined as “facilit[ies] permitted by the Agency for the disposal waste on land meeting the requirements of the Resource Conservation and Recovery Act [42 USCA § 6901 et seq.]” 415 ILCS 5/3.445. The requirements of the Resource Conservation and Recovery Act include criteria for distinguishing between sanitary landfills and open dumps. 42 USCA § 6944(a). These criteria are found in federal regulations at 40 CFR Part 257. According to 40 CFR § 257.1, facilities failing to meet, inter alia, the criterion at 40 CFR § 257.3-4 are considered prohibited open dumps.

ANSWER: Respondent admits that there are statutory provisions 415 ILCS §§ 5/21(a), 3.305, 3.385, 3.535, 3.445, 42 USCA § 6944(a), and 40 CFR Part 257 and states that the statutes and regulations speak for themselves. Respondent denies the allegations to the extent that they are inconsistent with the statutes and regulations as cited and to the extent a response is required.

34. 40 CFR § 257.3-4 establishes a criterion for identifying open dumps based on groundwater contamination. 40 CFR § 257.3-4 prohibits “contaminat[ion of] an underground drinking water source beyond the solid waste boundary or beyond an alternative compliance boundary.” The contamination must exist beyond either the perimeter of the solid waste disposal area or beyond an alternative boundary established by the state or the courts after finding that establishing such a boundary will not result in the contamination of groundwater that may be used for drinking. 40 C.F.R. § 257.3-4.

ANSWER: Respondent admits that there is a regulatory provision 40 CFR § 257.3-4 and states that the regulation speaks for itself. Respondent denies the allegations to the extent that they are inconsistent with the regulation as cited and to the extent a response is required.

35. Groundwater contamination for purposes of RCRA open dumping is demonstrated by an exceedance of one of the Maximum Contaminant Levels (MCLs) set forth in 40 CFR pt. 257 Appendix I (hereinafter “Appendix I MCLs”),²⁵ in either an actual drinking

²⁵ The open dumping MCLs in 40 CFR pt. 257 Appendix I are in some cases different from the most recent Maximum Contaminant Levels promulgated by the U.S. Environmental Protection Agency. For example, the Appendix I MCL for arsenic is 50 ug/L while the current MCL for arsenic is 10 ug/L. See U.S. EPA drinking water standards, *supra* note 7.

water source, or in an aquifer with less than 10,000 mg/L total dissolved solids. 40 CFR § 257.3-4. The Appendix I MCLs for the pollutants identified in this complaint are as follows:

Chemical	Appendix I MCL (40 C.F.R. Pt. 257, App. I)
Arsenic	0.05 mg/L
Mercury	0.002 mg/L
Nitrate	10 mg/L
Selenium	0.01 mg/L

ANSWER: Respondent admits that there is a regulatory provision 40 C.F.R. Pt. 257, App. I and states that the regulation speaks for itself. Respondent denies the allegations to the extent that they are inconsistent with the regulation as cited and to the extent a response is required.

LEGAL BACKGROUND: WATER POLLUTION

36. The Illinois Environmental Protection Act prohibits “the discharge of any contaminants into the environment . . . so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources,” 415 ILCS 5/12(a), and prohibits the deposition of “any contaminants upon the land in such place and manner so as to create a water pollution hazard.” 415 ILCS 5/12(d). “Water pollution” is defined as the “alteration” or “discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life.” 415 ILCS 5/3.545. “Waters” of the State is defined to include “all accumulations of water, surface and underground, natural, and artificial, public and private, or parts thereof, which are wholly or partially within, flow through, or border upon this State.” 415 ILCS 5/3.550.

ANSWER: Respondent admits that there are statutory provisions 415 ILCS §§ 5/12(a), 12(d), 3.545, 3.550 and states that the statutes speak for themselves. Respondent denies the allegations to the extent that they are inconsistent with the statutes as cited and to the extent a response is required.

37. 35 Ill. Admin. Code § 620.405 prohibits “the release of any contaminant to groundwater so as to cause a groundwater quality standard set forth in this Subpart to be exceeded.” 35 Ill. Admin. Code § 620.405. The Illinois Administrative Code establishes different groundwater quality standards for Class I and Class II groundwater.

ANSWER: Respondent admits that there is a regulatory provision 35 Ill. Adm. Code §620.405 and states that the regulation speaks for itself. Respondent denies the allegations to the extent that they are inconsistent with the regulation as cited and to the extent a response is required.

38. 35 Ill. Admin. Code § 620.410 establishes Class I GQSs that cannot be exceeded in potable resource groundwater. "Potable resource groundwater" is defined as:

Groundwater located 10 feet or more below the land surface and within: (1) The minimum setback zone of a well which serves as a potable water supply and to the bottom of such well; (2) Unconsolidated sand, gravel or sand and gravel which is 5 feet or more in thickness and that contains 12 percent or less of fines . . . ; (3) Sandstone which is 10 feet or more in thickness, or fractured carbonate which is 15 feet or more in thickness; or (4) Any geologic material which is capable of a: (A) sustained groundwater yield , from up to a 12 inch borehole, of 150 gallons per day or more from a thickness of 15 feet or less; or (B) Hydraulic conductivity of 1×10^{-4} cm/sec or greater using one of the following test methods or its equivalent: (i) Permeameter; (ii) Slug test; or (iii) Pump test. 35 Ill. Admin. Code § 620.210(a).

ANSWER: Respondent admits that there are regulatory provisions 35 Ill. Admin. Code §§620.410, 620.210 and states that the regulations speak for themselves. Respondent denies the allegations to the extent that they are inconsistent with the regulations as cited and to the extent a response is required.

39. The definition of Class I groundwater specifically excludes: Class III "special resource groundwater," Class IV "other groundwater," which includes groundwater in a zone of attenuation; and groundwater in a "groundwater management zone." 35 Ill. Admin. Code § 620.210; *see also* 35 Ill. Admin. Code §§ 620.230, 620.240, 620.250.35 Ill. Admin. Code § 620.115 provides that "No person shall cause, threaten or allow a violation of the Act, the [Illinois Groundwater Protection Act] or regulations adopted by the Board thereunder, including but not limited to this part." 35 Ill. Admin. Code § 620.301(a) provides that "No person shall cause, threaten or allow the release of any contaminant to a resource groundwater such that: 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or 2) An existing or potential use of such groundwater is precluded."

ANSWER: Respondent admits that there are regulatory provisions 35 Ill. Admin. Code §§620.115, 620.210, 620.230, 620.240, 620.250, 620.301(a) and states that the regulations speak for themselves. Respondent denies the allegations to the extent that they are inconsistent with the regulations as cited and to the extent a response is required.

40. 35 Ill. Admin. Code § 620.420 establishes Class II GQSs that cannot be exceeded in general resource groundwater. “General resource groundwater” is defined as “groundwater which does not meet the provisions of . . . Class I . . . Class III . . . or . . . Class IV” and “groundwater which is found by the Board, pursuant to the petition procedures set forth in Section 620.260, to be capable of agricultural, industrial, recreational or other beneficial uses.” 35 Ill. Admin. Code § 620.220. Groundwater in a zone of attenuation must meet Class II GQSs. 35 Ill. Admin. Code § 620.440(b).

The Illinois Class I and Class II GQSs for pollutants identified in this report are as follows:

Chemical	Class I GQS (mg/L) (35 Ill. Admin. Code § 620.410)	Class II GQS (mg/L) (35 IAC § 620.420)
Antimony	0.006	0.024
Arsenic	0.01	0.2
Boron	2	2
Chloride	200	200
Iron	5	5
Lead	0.0075	0.10
Manganese	0.15	10
Mercury	0.002	0.01
Nitrate	10	100
pH	6.5 – 9.0	6.5 – 9.0
Selenium	0.05	0.05
Sulfate	400	400
Thallium	0.002	0.020
Total Dissolved Solids	1,200	1,200

ANSWER: Respondent admits that there are regulatory provisions 35 Ill. Admin. Code §§620.220, 620.410, 620.420, 620.440(b) and states that the regulations speak for themselves. Respondent denies the allegations to the extent that they are inconsistent with the regulations as cited and to the extent a response is required.

COUNT I

OPEN DUMPING VIOLATIONS AT POWERTON

41. Paragraphs 1-40 are realleged and incorporated herein by reference.

ANSWER: Respondent incorporates herein, as if restated, its answers to paragraphs 1 through 40 of the Complaint.

42. MWG, through the coal ash disposal ponds, landfills, unconsolidated coal ash fill, and/or other coal ash and coal combustion waste repositories at Powerton, has caused or contributed to contamination of the groundwater beneath Powerton in violation of 415 ILCS 5/21(a), as shown in Table 1.

Table 1: Open dumping violations at Powerton.

	Well	Pollutant	Sample value (mg/L)	Appendix I MCL (mg/L)	Collection date
1	MW-1	Nitrate	11	10	9/20/11
2	MW-4	Selenium	0.013	0.010	9/27/13
3	MW-6	Arsenic	0.200	0.050	5/29/14
4	MW-7	Arsenic	0.085	0.050	3/25/11
5	MW-7	Arsenic	0.120	0.050	6/16/11
6	MW-7	Arsenic	0.180	0.050	9/20/11
7	MW-7	Arsenic	0.230	0.050	12/12/11
8	MW-7	Arsenic	0.230	0.050	3/19/12
9	MW-7	Arsenic	150	0.050	6/25/12
10	MW-7	Arsenic	180	0.050	9/18/12
11	MW-7	Arsenic	260	0.050	12/12/12
12	MW-7	Arsenic	170	0.050	2/27/13
13	MW-7	Arsenic	120	0.050	5/31/13
14	MW-7	Arsenic	220	0.050	7/31/13
15	MW-7	Arsenic	200	0.050	10/23/13
16	MW-7	Arsenic	150	0.050	3/5/14
17	MW-7	Arsenic	190	0.050	8/27/14
18	MW-9	Selenium	0.072 ²⁶	0.010	3/25/11
19	MW-9	Selenium	0.015	0.010	2/27/13
20	MW-9	Selenium	0.016	0.010	5/30/13
21	MW-9	Selenium	0.014	0.010	7/30/13
22	MW-9	Nitrate	12	10	2/27/13
23	MW-9	Nitrate	11	10	5/30/13
24	MW-9	Nitrate	11	10	5/29/14
25	MW-11	Arsenic	0.057	0.050	3/4/14
26	MW-11	Arsenic	0.068	0.050	8/26/14
27	MW-12	Mercury	0.0096 ²⁷	0.002	12/15/10

²⁶ This value was originally reported as 0.072 mg/L. See letter from Richard M. Frendt, Patrick Engineering, to IEPA, Attachment A (July 30, 2012) (transmitting amended groundwater monitoring report for Midwest generation's Powerton Generating Station). MidGen has since revised the value to 0.072 mg/L. *Id.* at Attachments B and C.

²⁷ This value was originally reported as 0.0096 ug/L. *Id.* at Attachment A. MidGen has since revised the value to nondetect. *Id.* at Attachments B and C.

	Well	Pollutant	Sample value (mg/L)	Appendix I MCL (mg/L)	Collection date
28	MW-14	Selenium	0.065	0.010	4/25/11
29	MW-14	Selenium	0.022	0.010	4/10/12
30	MW-14	Selenium	0.150	0.010	2/27/13
31	MW-14	Selenium	0.020	0.010	3/4/14
32	MW-14	Selenium	0.014	0.010	5/28/14
33	MW-15	Selenium	0.017	0.010	4/25/11
34	MW-15	Selenium	0.025	0.010	4/10/12
35	MW-15	Selenium	0.013	0.010	10/23/13
36	MW-15	Selenium	0.033	0.010	5/28/14

ANSWER: Respondent denies the allegations in paragraph 42.

43. Groundwater samples from nine different wells at Powerton have exceeded the Appendix I MCLs on the thirty-six occasions delineated in Table 1.

ANSWER: Respondent denies the allegations in paragraph 43.

COUNT 2

OPEN DUMPING VIOLATIONS AT WAUKEGAN

44. Paragraphs 1-43 are realleged and incorporated herein by reference.

ANSWER: Respondent incorporates herein, as if restated, its answers to paragraphs 1 through 43 of the Complaint.

45. MWG, through the coal ash disposal ponds, landfills, unconsolidated coal ash fill, and/or other coal ash and coal combustion waste repositories at Waukegan, has caused or contributed to contamination of the groundwater beneath Waukegan in violation of 415 ILCS 5/21(a), as shown in Table 2.

Table 2: Open dumping violations at Waukegan

	Well	Pollutant	Sample value (mg/L)	Appendix I MCL (mg/L)	Collection date
1	MW-1	Arsenic	0.054	0.050	10/25/10
2	MW-1	Arsenic	0.170	0.050	6/13/11
3	MW-1	Arsenic	0.077	0.050	9/13/11
4	MW-1	Arsenic	0.057	0.050	12/6/11
5	MW-1	Arsenic	0.078	0.050	3/14/12
6	MW-1	Arsenic	0.070	0.050	6/18/12
7	MW-1	Arsenic	0.070	0.050	9/28/12
8	MW-1	Arsenic	0.091	0.050	12/19/12

	Well	Pollutant	Sample value (mg/L)	Appendix I MCL (mg/L)	Collection date
9	MW-1	Arsenic	0.098	0.050	3/7/13
10	MW-1	Arsenic	0.055	0.050	7/25/13
6	MW-1	Selenium	0.031	0.010	10/25/10
7	MW-1	Selenium	0.030	0.010	3/24/11
8	MW-1	Selenium	0.016	0.010	6/13/11
9	MW-1	Selenium	0.039	0.010	9/13/11
10	MW-1	Selenium	0.032	0.010	12/6/11
11	MW-1	Selenium	0.037	0.010	3/14/12
12	MW-1	Selenium	0.013	0.010	6/18/12
13	MW-1	Selenium	0.056	0.010	3/7/13
14	MW-1	Selenium	0.043	0.010	6/7/13
15	MW-1	Selenium	0.031	0.010	7/25/13
16	MW-1	Selenium	0.013	0.010	11/4/13
17	MW-2	Selenium	0.026	0.010	10/25/10
18	MW-2	Selenium	0.028	0.010	6/13/11
19	MW-2	Selenium	0.022	0.010	9/13/11
20	MW-2	Selenium	0.015	0.010	7/25/13
21	MW-3	Selenium	0.016	0.010	3/24/11
22	MW-3	Selenium	0.030	0.010	6/13/11
23	MW-3	Selenium	0.012	0.010	9/13/11
24	MW-3	Selenium	0.011	0.010	12/6/11
25	MW-3	Selenium	0.011	0.010	3/7/13
26	MW-3	Selenium	0.067	0.010	6/7/13
27	MW-3	Nitrate	13	10	6/7/13
28	MW-4	Selenium	0.022	0.010	6/13/11
29	MW-4	Selenium	0.025	0.010	9/13/11
30	MW-4	Selenium	0.015	0.010	12/6/11
31	MW-4	Selenium	0.028	0.010	6/6/13
32	MW-4	Selenium	0.050	0.010	7/25/13
33	MW-4	Selenium	0.011	0.010	11/4/13

ANSWER: Respondent denies the allegations in paragraph 45.

46. Groundwater samples at four of five wells monitored showed exceedances of the Appendix I MCLs on the thirty-three occasions delineated in Table 2.

ANSWER: Respondent denies the allegations in paragraph 46.

COUNT 3

OPEN DUMPING VIOLATIONS AT WILL COUNTY

47. Paragraphs 1-46 are realleged and incorporated herein by reference.

ANSWER: Respondent incorporates herein, as if restated, its answers to paragraphs 1 through 46 of the Complaint.

48. MWG, through coal ash disposal ponds, landfills, unconsolidated coal ash fill, and/or other coal ash and other coal combustion waste repositories at Will County, has caused or contributed to contamination of the groundwater beneath Will County in violation of 415 ILCS 5/21(a), as shown in Table 3.

Table 3: Open dumping violations at Will County

	Well	Pollutant	Sample value (mg/L)	Appendix I MCL (mg/L)	Collection date
1	MW-4	Selenium	0.015	0.010	3/5/13
2	MW-5	Selenium	0.017	0.010	12/13/10
3	MW-5	Selenium	0.014	0.010	3/28/11
4	MW-5	Selenium	0.016	0.010	6/15/11
5	MW-5	Selenium	0.017	0.010	9/24/12
6	MW-5	Selenium	0.026	0.010	6/5/13
7	MW-5	Selenium	0.170	0.010	10/28/13
8	MW-5	Selenium	0.024	0.010	2/13/14
9	MW-6	Selenium	0.011	0.010	9/15/11
10	MW-6	Selenium	0.014	0.010	9/24/12
11	MW-8	Selenium	0.015	0.010	10/28/13

ANSWER: Respondent denies the allegations in paragraph 48.

49. As Table 3 shows, there have been eleven exceedances of the open dumping MCL for selenium since monitoring began in late 2010.

ANSWER: Respondent denies the allegations in paragraph 49.

COUNT 4

WATER POLLUTION AT JOLIET 29

50. Paragraphs 1-49 are realleged and incorporated herein by reference.

ANSWER: Respondent incorporates herein, as if restated, its answers to paragraphs 1 through 49 of the Complaint.

51. MWG, through the coal ash disposal ponds, landfills, unconsolidated coal ash fill, and/or other coal ash and coal combustion waste repositories at Joliet 29, has discharged contaminants into the environment at Joliet 29 and thereby caused water pollution in violation of 415 ILCS 5/12(a) and (d), and 35 Ill. Admin. Code §§ 620.115, 620.301(a), and 620.405. As

shown in Exhibits B, C, and D, there have been at least 156 violations of Illinois Class I Groundwater Quality Standards and at least 132 violations of Illinois Class II Groundwater Quality Standards since monitoring began in late 2010.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and D and therefore denies same. Respondent denies the remaining allegations contained in paragraph 51.

52. Since 2010, the groundwater at Joliet 29 has exceeded the Class I GQSs for antimony, boron, chloride, iron, manganese, sulfate, and TDS, and the Class II GQSs for boron, chloride, iron, sulfate, and TDS. *See* Exhibits B, C, and D.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and D and therefore denies same. Respondent denies the remaining allegations contained in paragraph 52.

COUNT 5

WATER POLLUTION AT POWERTON

53. Paragraphs 1-52 are realleged and incorporated herein by reference.

ANSWER: Respondent incorporates herein, as if restated, its answers to paragraphs 1 through 52 of the Complaint.

54. MWG, through the coal ash disposal ponds, landfills, unconsolidated coal ash fill, and/or other coal ash and coal combustion waste repositories at Powerton, has discharged contaminants into the environment at Powerton and thereby caused water pollution in violation of 415 ILCS 5/12(a) and (d), and 35 Ill. Admin. Code §§ 620.115, 620.301(a), and 620.405. As shown in Exhibits B, C, and F, there have been at least 445 violations of Illinois Class I Groundwater Quality Standards and at least 216 violations of Illinois Class II Groundwater Quality Standards since monitoring began in late 2010.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and F and therefore denies same. Respondent denies the remaining allegations contained in paragraph 54.

55. Since 2010, the groundwater at Powerton has exceeded the Class I GQSs for antimony, arsenic, boron, chloride, iron, manganese, nitrate, selenium, sulfate, thallium, and

TDS, and the Class II GQSs for arsenic, boron, chloride, iron, manganese, selenium, sulfate, and TDS. *See Exhibits B, C, and F.*

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and F and therefore denies same. Respondent denies the remaining allegations contained in paragraph 55.

COUNT 6

WATER POLLUTION AT WAUKEGAN

56. Paragraphs 1-55 are realleged and incorporated herein by reference.

ANSWER: Respondent incorporates herein, as if restated, its answers to paragraphs 1 through 55 of the Complaint.

57. MWG, through the coal ash disposal ponds, landfills, unconsolidated coal ash fill, and/or other coal ash and coal combustion waste repositories at Waukegan, has discharged contaminants into the environment at Waukegan and thereby caused water pollution in violation of 415 ILCS 5/12(a) and (d), and 35 Ill. Admin. Code §§ 620.115, 620.301(a), and 620.405. As shown in Exhibits B, C, and H, there have been at least 155 violations of Illinois Class I Groundwater Quality Standards and 105 violations of Illinois Class II Groundwater Quality Standards since monitoring began in late 2010.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and H and therefore denies same. Respondent denies the remaining allegations contained in paragraph 57.

58. Since 2010, the groundwater at Waukegan has exceeded the Class I GQSs for antimony, arsenic, boron, chloride, iron, manganese, nitrate, selenium, pH, sulfate, and TDS, and the Class II GQSs for boron, chloride, iron, pH, selenium, sulfate, and TDS. *See Exhibits B, C, and H.*

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and H and therefore denies same. Respondent denies the remaining allegations contained in paragraph 58.

COUNT 7

WATER POLLUTION AT WILL COUNTY

59. Paragraphs 1-58 are realleged and incorporated herein by reference.

ANSWER: Respondent incorporates herein, as if restated, its answers to paragraphs 1 through 59 of the Complaint.

60. MWG, through the coal ash disposal ponds, landfills, unconsolidated coal ash fill, and/or other coal ash and coal combustion waste repositories at Will County, has discharged contaminants into the environment at Will County and thereby caused water pollution in violation of 415 ILCS 5/12(a) and (d), and 35 Ill. Admin. Code §§ 620.115, 620.301(a), and 620.405. As shown in Exhibits B, C, and J, there have been at least 297 violations of Illinois Class I Groundwater Quality Standards and at least 214 violations of Illinois Class II Groundwater Quality Standards since monitoring began in late 2010.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and J and therefore denies same. Respondent denies the remaining allegations contained in paragraph 60.

61. Since 2010, the groundwater at Will County has exceeded the Class I GQSs for antimony, arsenic, boron, chloride, manganese, pH, sulfate, and TDS, and the Class II GQSs for boron, chloride, pH, selenium, sulfate, and TDS. *See* Exhibits B, C, and J.

ANSWER: Respondent is without sufficient information to admit or deny the allegations in Exhibits B, C, and J and therefore denies same. Respondent denies the remaining allegations contained in paragraph 61.

MIDWEST GENERATION, L.L.C.'S DEFENSES TO THE COMPLAINT

Respondent, Midwest Generation, L.L.C. (“MWG”) asserts the following defenses without waiving Complainants’ obligation to meet its burden of proof and without assuming any burden of proof not otherwise imposed by law.

62. Section 2-613(d) of the Illinois Code of Civil Procedure (“Code”) states “any ground or defense, whether affirmative or not, which if not expressly stated in the pleading,

would be likely to take the opposite party by surprise, must be plainly set forth in the answer or reply.” 735 ILCS 5/2-613(d).

63. Section 2-616(a) of the Code states “At any time before final judgment, amendments may be allowed on just and reasonable terms, ... adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable ... the defendant to make a defense or assert a cross claim.” 735 ILCS 5/2-616(a).

64. Section 101.100(b) of the Board procedural rules allows the Board to look to the Code when the Board’s rules are silent. 35 Ill. Adm. Code 101.100(b); *People of the State of Illinois v. Inverse Investments, LLC*. PCB 11-79 (June 21, 2021), *slip op.* p. 6.

I. MWG DID NOT CAUSE OR ALLOW OPEN DUMPING

65. The ash ponds at the Joliet 29 Station, the Powerton Station, the Waukegan Station, and the Will County Station (collectively “the Stations”) are surface impoundments and operate as a part of each Stations’ wastewater treatment plants pursuant to the Stations’ respective NDPEs permits.

66. The active ash ponds at the Stations are lined with HDPE liners, a synthetic liner designed to prevent releases to the soil and groundwater.

67. MWG routinely removes the ash from the ash ponds.

68. Because the ash ponds are classified as surface impoundments, which are permitted and regulated as water pollution treatment units, and because MWG routinely removes the ash from the ponds, the ash ponds are not disposal sites.

69. Complainants also allege other “landfills” and “coal ash and coal combustion waste repositories” may contain coal ash at the Stations.

70. Any other locations at the Stations alleged in the Complaint that may contain historical coal ash combustion debris were not created by MWG, nor used or filled with any coal combustion material, or any other material, by MWG.

71. MWG did not cause or allow open dumping at the Powerton, Will County or Waukegan Stations because the ash ponds are not disposal sites and the historical areas were not created, filled, or used by MWG for any storage or disposal of any coal combustion material, or any other material.

II. MWG DID NOT CAUSE OR ALLOW WATER POLLUTION

72. Paragraphs 62-71 are realleged and incorporated herein by reference.

73. In 2010, MWG voluntarily agreed to the Illinois Environmental Protection Agency's ("Illinois EPA's") request to perform a hydrogeological assessment around the ash ponds at the Stations.

74. On June 11, 2012, Illinois EPA issued Violation Notices ("VNs") to MWG alleging violations of groundwater quality standards purportedly caused by the ash ponds at the Stations. (Complaint ¶9).

75. In response to the hydrogeological assessments and the VNs, MWG evaluated the distribution of the sample results as it relates to the ash ponds at each Station.

76. The alleged exceedances in the groundwater underlying the Stations, including the ash ponds, are random, inconsistent, historic and do not show a connection to the MWG Stations or ash ponds.

77. Because there is no connection between the alleged groundwater exceedances and MWG Stations or the ash ponds, MWG has not caused or allowed the discharge of contaminants into the groundwater.

III. COMPLAINANTS MAY NOT BE GRANTED INJUNCTIVE RELIEF

78. Paragraphs 72-77 are realleged and incorporated herein by reference.

79. Complainants request that the Board order MWG to "... modify its coal ash disposal practices so as to avoid future groundwater contamination and remediate the contaminated groundwater so that it meets applicable Illinois groundwater standards." (Complainant, Relief Requested, ¶3).

80. As a creature of statute, the Illinois Pollution Control Board may only operate within the bounds of its powers set out by the statute by which it was created. *County of Knox ex rel. Masterson v. Highlands, L.L.C.*, 188 Ill.2d 546, 554, 723 N.E.2d 256, 262 (1999).

81. Under Section 33(b) of the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/33(b), the Board is limited to:

...a direction to cease and desist from violations of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order, and/or the imposition by the Board of civil penalties in accord with Section 42 of this Act." 415 ILCS 5/33(b)

82. The Board has no enforcement power, *People of the State of Illinois v. NL Industries, et al*, 152 Ill.2d 82, 99, 604 N.E.2d 349, 356 (1992), and does not have the authority to grant injunctive relief. *Janson v. Illinois Pollution Control Bd.*, 69 Ill.App.3d 324, 328, 387 N.E.2d 404, 408 (3rd Dist., 1979), *Clean the Uniform Company-Highland v. Aramark Uniform & Career Apparel, Inc.*, PCB 03-21, Nov. 7, 2002 slip op. at 1 & 3.

83. Complainants' requests that the Board order MWG to "modify its coal ash disposal practice" and to "remediate the contaminated groundwater so that it meets applicable Illinois groundwater standards" are demands for mandatory injunctive relief.

84. As the Board does not have the authority to order mandatory injunctive relief, Complainant's request for such relief cannot be granted.

MWG states its additional defenses IV – IX as follows:

IV. BECAUSE THERE WAS NO 21(A) CLAIM AS TO JOLIET 29, THERE CANNOT BE A FINDING OF OPEN DUMPING AT JOLIET 29

85. Paragraphs 78-84 are realleged and incorporated herein by reference.

86. In 2015, the Board granted leave for the Complainants to file a “First Amended Complaint.” Board Order, Feb. 19, 2015. The Amended Complaint alleges three “Counts” related to “Open Dumping” (i.e. Section 21(a) of the Act). Count 1 is directed at the Powerton Station, Count 2 is directed at the Waukegan Station, and Count 3 is directed at the Will County Station.

87. There is no count or claim alleging a Section 21(a) violation at the Joliet 29 Station.

88. On June 16, 2016, the Complainants moved for Summary Judgment on the three “open dumping” counts in its Amended Complaint, specifically excluding Joliet 29 because there was no such claim as to Joliet 29.

89. On January 19, 2017, the Board denied the motion, unambiguously noting that “Citizen Groups do not allege open dumping at Joliet 29.” 2017 Order, at 1 n.2.

90. In MWG’s opening remarks at the first hearing, counsel for MWG specifically noted that the Amended Complaint did not allege a Section 21(a) violation at the Joliet 29 Station, so it did not need to be addressed. 10/23/21 Hearing Tr., p. 25:11-13.

91. In Complainants’ lengthy analysis of the Joliet 29 Station in their post-hearing brief, Complainants never discussed a violation of Section 21(a) because they never made that claim. In contrast, Complainants specifically argued violations of Section 21(a) at Powerton, Waukegan, and Will County. Complainants’ Post-hearing Br., pp. 50, 62, and 72.

92. In MWG's post-hearing brief, MWG again noted that Complainants' open dumping claims were limited to Powerton, Waukegan and Will County, and there was no claim of open dumping at the Joliet 29 Station. MWG's Post-Hearing Br., p. 55 n.21.

93. On June 20, 2019, the Board entered an "Interim Order and Opinion" and included a finding "that MWG violated Section 21(a) of the Act at all four Stations." 2019 Interim Order, at 92. This finding references Joliet 29 because the Board defined "Stations" as referring to Powerton, Will County, Waukegan, and Joliet. *Id.* at 1. The Board did not identify how it had the authority to find a violation at the Joliet 29 Station that was not alleged in the Amended Complaint and was never claimed or addressed by the parties.

94. The Complainants have never asserted that their Amended Complaint contains any allegation of an open dumping violation at Joliet 29. Nor could any complainant bring an implied charge: this would violate the Board's requirement that a complaint "must be sufficiently clear and specific to allow preparation of a defense." *Sierra Club et al. v. Midwest Generation, LLC*, PCB13-15, 2013 Ill. ENV LEXIS 294 (Oct. 3, 2013), p. 48, *citing Lloyd A. Fry Roofing Co. v. Pollution Control Board*, 20 Ill. App. 3d 301, 305 (1st Dist. 1974).

95. The Board does not have the authority to find violations of statutes or regulations not claimed in the complaint. *Lloyd A. Fry Roofing Co. v. Pollution Control Board*, 20 Ill. App. 3d 301, 305 (1st Dist. 1974) (Court reversed Board finding of violation of regulation because the allegation was not in the complaint); *City of Pekin v. Pollution Control Bd.*, 47 Ill. App. 3d 187, 192 (3d Dist. 1977) (Court reversed part of Board order regarding alleged violations not in the complaint); *Citizens Utils. Co. v. Ill. Pollution Control Bd.*, 9 Ill. App. 3d 158, 164, 289 N.E.2d 642, 647 (1972) ("We conclude that enforcement-type orders, ... may not be entered without compliance with the procedures under the enforcement provisions of the act. There one is

entitled to notice of a specific violation charged against it, to notice of the specific conduct constituting the violation, and to the benefit of a favorable burden of proof.”).

96. It is not relevant that the Board may have received evidence that it believes could relate to Section 21(a) violations at the Joliet 29 Station. The Board cannot make a finding because the underlying allegation did not exist. “[P]roof without pleadings is as defective as pleadings without proof.” *Curry v. Summer*, 136 Ill. App. 3d 468, 480 (4th Dist. 1985); *City of Pekin*, 47 Ill. App. 3d at 192 (Court held that it may only consider the evidence concerned with the violations charged in the complaint); *Draper & Kramer, Inc., v. Pollution Control Board*, 40 Ill. App. 3d 918, 922 (1st Dist. 1976) (introduction of evidence that respondent emitted water vapor did not put it on notice that the water vapor was alleged to have caused air pollution).

97. Although the 2019 Interim Order (referencing “all four Stations) could leave the misimpression that the Board made an interim finding of an open dumping violation at the Joliet 29 Station, ambiguities in Board orders should not be resolved in a manner that would create a conflict with Illinois law. There is no evidence that the Board intended to expand the scope of the Amended Complaint, and the Board must be presumed to act in accordance with the limits of its jurisdiction and in accordance with the Act. Nonetheless, the final order should make clear to all readers that the Board has made no such finding regarding the Joliet 29 Station. *See Leopold v. Levin*, 45 Ill. 2d 434, 446 (1970) (interlocutory orders may be reversed or revised any time prior to final judgment); *Berry v. Chade Fashions, Inc.*, 383 Ill. App. 3d 1005, 1009 (1st Dist. 2008) (same). Without a properly filed complaint alleging such a violation, the Board has no jurisdiction over the question.

V. SECTION 21(R) OF THE ACT IS THE APPLICABLE SECTION FOR DISPOSAL OF COAL COMBUSTION WASTE

98. Paragraphs 85-97 are realleged and incorporated herein by reference.

99. Subsection 21(r) states, in relevant part:

No person shall:

* * *

(r) Cause or allow the storage or disposal of coal combustion waste unless:

(1) such waste is stored or disposed of at a site or facility for which a permit has been obtained *or is not otherwise required under subsection (d)* of this Section;

415 ILCS 5/21(r)(1) (emphasis added).

100. At the time the Amended Complaint was filed, Subsection 21(d)(1) of the Act, as referenced in Section 21(r) above, stated, in relevant part:

No person shall:

* * *

(d) Conduct any waste-storage, waste-treatment, or waste-disposal operation:

(1) without a permit granted by the Agency or in violation of any conditions imposed by such permit, including periodic reports and full access to adequate records and the inspection of facilities, as may be necessary to assure compliance with this Act and with regulations and standards adopted thereunder; provided, however, that, except for municipal solid waste landfill units that receive waste on or after October 9, 1993, no permit shall be required for (i) any person conducting a waste-storage, waste-treatment, or waste-disposal operation for wastes generated by such person's own activities which are stored, treated, or disposed within the site where such wastes are generated, . . .

415 ILCS 5/21(d) (2018).

101. Complainants' failed to state a claim under 21(a), because that provision does not apply to CCW. Section 21(r) is the only applicable section as to causing or allowing the open dumping of CCW. The Amended Complaint does not allege a violation of Section 21(r).

102. In its Interim Order, the Board specifically found that the coal ash in the historic fill areas at the Stations was "coal combustion waste" ("CCW") as defined in 415 ILCS 5/3.140. 2019 Board Interim Order, pp. 87-88.

103. The CCW in the historic fill areas at the Joliet 29, Powerton, Waukegan, and Will County Stations was historically deposited by the former owner of the three stations from its coal-fired power generation at the three stations, prior to MWG's control.²⁸

104. The prior owner conducted "a waste-storage...or waste disposal operation for wastes generated by" its own activities, and "stored [or] disposed]" the CCW "within the site where such wastes are generated" at the Joliet 29, Powerton, Waukegan, and Will County Stations, thus a permit was not required. 415 ILCS 5/21(d)(1) (2018).

105. Sections 21(r) and 21(d)(1) of the Act allowed the storage or disposal of CCW within the MWG Stations without a permit.

106. Sections 21(r) and 21(d)(1) of the Act are specific to the storage or disposal of CCW, and MWG's conduct with regard to the historic fill areas was in compliance with those provisions. The generalized provisions of Section 21(a) cannot be used to punish conduct permitted by Sections 21(r) and 21(d)(1), as this would undermine the intentions of the General Assembly. *Knolls Condominium Assn. v. Harms*, 202 Ill.2d 450, 459, 269 Ill. Dec. 464, 470 (2002) ("It is also a fundamental rule of statutory construction that where there exists a general statutory provision and a specific statutory provision, either in the same or in another act, both relating to the same subject the specific provision controls and should be applied."). As such, the Amended Complaint does not state a claim under Section 21(a).

VI. THE FORMER ASH BASIN AT THE POWERTON STATION IS NOT A SOURCE OF CONTAMINATION AND NO REMEDY IS REQUIRED

107. Paragraphs 99-106 are realleged and incorporated herein by reference.

²⁸Per MWG Defense No. IV, because the Amended Complaint does not allege that MWG violated Section 21(a) of the Act at the Joliet 29 Station, the Board did not have the authority to find a violation of 21(a) of the Act at the Joliet 29 Station. However, in the alternative, Section 21(r) coupled with 21(d) of the Act also allowed any CCW generated by the Site to be deposited at the Joliet 29 Station.

108. The Former Ash Basin at the Powerton Station is an Inactive CCR surface impoundment as that term is defined Section 845.120 of the Board Rules. 35 Ill. Adm. Code 845.120.

109. In its 2019 Interim Order, the Board found that “Groundwater samples taken downgradient of the [Former Ash Basin] showed no coal ash constituents.” 2019 Interim Order, p.41.

110. Based upon that finding, the Board concluded that “that the Environmental Groups did not prove that it is more likely than not that this basin is a source of contamination at the Station.” 2019 Interim Order, p. 41.

111. In its February 6, 2020 Order, the Board’s opinion regarding the Former Ash Basin did not change. 2020 Order, p. 14-15.

112. An owner or operator does not have a duty to investigate its property under the Illinois Environmental Protection Act without evidence of a release of contaminants. 415 ILCS 5/*et seq.* (2021).

113. Because the Board found that the groundwater downgradient of the Former Ash Basin showed no coal ash constituents and because there is no statutory duty to investigate in the absence of evidence of a release of contaminants, no remedy and/or penalty may be ordered or is required for the Former Ash Basin.

VII. THE HISTORIC AREA AT THE WILL COUNTY STATION IS NOT A SOURCE OF CONTAMINATION AND NO REMEDY IS REQUIRED

114. Paragraphs 107-113 are realleged and incorporated herein by reference.

115. A 1998 ENSR Phase II Environmental Site Assessment conducted for the prior owner of the Will County Station identified an alleged area as the Former Slag and Bottom Ash Placement Area (“Former Placement Area”). Hearing Ex. 18D.²⁹

116. No MWG employee identified the Former Placement Area as an area that contained coal ash.

117. Table 6 of the 1998 ENSR Phase II Report has the groundwater analytical results including for a monitoring well installed near the Former Placement Area (MW-1). Table 6 shows that the concentrations of constituents in the groundwater in MW-1 were non-detect.

118. Samples of historic ash at other locations on the Will County Station show that the leachate from historical ash in fill materials is not adversely impacting the groundwater. Hearing Ex. 903, pp. 48.

119. The leaching data from the historic ash at Will County found that no constituents in the historic ash were above the groundwater Class I quality criteria. MWG Ex. 901, p. 9.

120. There is no evidence that the Former Placement Area is a potential source of contamination, and the totality of the evidence demonstrates that it is not.

121. Because the only evidence in the record is that the Former Placement Area is not a source, and because there is no evidence of a release, no remedy and/or penalty may be ordered or is required for the Former Placement Area.

VIII. THE HISTORIC AREAS AT THE JOLIET 29 STATION ARE NOT A SOURCE OF CONTAMINATION AND NO REMEDY IS REQUIRED

122. Paragraphs 114-121 are realleged and incorporated herein by reference.

²⁹ The Hearing Officer entered the ENSR Reports (Exhibits 17D, 18D, 19D, and 20D) over MWG’s objection. 10/23/2017 Tr., p. 112:4-5, 117:20-119:20, 124:10-13, 126:6-14. MWG does not waive its objections to the admission of the ENSR reports.

123. A 1998 ENSR Phase II Environmental Site Assessment conducted for the prior owner of the Joliet 29 Station identified two alleged areas as an alleged “Ash Landfill.” Hearing Ex. 20D. The Board identified the two areas as the “Northeast Area” and the “Southwest Area.” 2019 Interim Order, p. 27-28.

124. The Board found that the closest groundwater monitoring wells to both the Northeast Area and the Southwest Area are unlikely to show conclusive results of any contaminants from the either area. 2019 Interim Order, p. 27.

125. There is no evidence that the Northeast Area and the Southwest Area are potential sources of contamination.

126. Because there is no evidence that the Northeast Area and the Southwest Area are sources, and because there is no evidence of a release of any contamination, no remedy and/or penalty may be ordered or is required for the Northeast Area and the Southwest Area.

127. A third historic fill area at Joliet 29 is referred to as “the Northwest Area.” MWG took samples from the Northwest Area and determined that the material met the criteria for beneficial use and that concentrations of boron, manganese, and barium were below Class I groundwater quality standards. 2019 Interim Order, p. 28, and Hearing Ex. 293.

128. There was a small area within the Northwest Area (GP-14A) that was properly removed due to specific exceedances of Class I standards. Despite evidence in the record, the Board incorrectly concluded in the Interim Order that it was not clear whether the GP-14A area had been removed. 2019 Interim Order, p. 27. There is no question that, in November 2005, MWG removed the ash in the vicinity of GP-14A in the Northwest Area. See Hearing Ex. 903, p. 47 (MWG’s Expert Report) (“Approximately 1,068 tons of fill material containing historical ash was excavated and disposed off-site at a landfill during the week of November 21, 2005.

The excavation was backfilled using surficial materials near the excavation area. Following the excavation, the historic ash in the area met the CCB criteria under 415 ILCS 5/3.135.”) citing KPRG and Associates Inc. Coal Ash and Slag Removal - Joliet Station #29 Report, December 6, 2005. The Dec. 6, 2005 KPRG Report was also attached as Exhibit 9 to MWG’s Motion to Reconsider (Sept. 9, 2019).

129. Because MWG conducted an investigation of the Northwest Area, removed the material around GP-14A, and determined that the area met the criteria for beneficial reuse, the evidence demonstrates that the Northwest Area is not a source.

130. Because the only evidence presented is that the Northwest Area is not a source, and because there is no evidence of a release from the Northwest Area, no remedy and/or penalty may be ordered or is required.

IX. THE ACTIONS MWG IS CONDUCTING PURSUANT TO THE FEDERAL AND STATE CCR REGULATIONS FOR ITS SURFACE IMPOUNDMENTS ARE THE APPROPRIATE REMEDY

131. Paragraphs 122-130 are realleged and incorporated herein by reference.

132. In 2015, USEPA issued the Federal Coal Combustion Residual (“CCR”) regulations, 40 C.F.R. 257 (“Federal CCR Rule”).

133. The Federal CCR Rule regulates surface impoundments, including certain of the surface impoundments at the MWG Stations.

134. Upon adoption, MWG began performing work at its surface impoundments impacted by the Federal CCR Rule, including conducting weekly inspections, assessing the structural stability, preparing the history of construction, installing additional groundwater monitoring wells, beginning engineering designs of retrofitting or closing the surface impoundments, and conducting groundwater sampling program of the surface impoundments.

135. On April 15, 2021, the Board adopted the “Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments” as the new Part 845 of the Board Rules (“Illinois CCR Rule”).

136. The Illinois CCR Rule became effective on April 21, 2021

137. Upon adoption, MWG began performing additional work at its surface impoundments impacted by the Illinois CCR Rule, including but not limited to conducting the weekly inspections, re-assessing the structural stability, installing more groundwater monitoring wells, preparing the operating permit applications, preparing certain construction permit applications, and conducting groundwater sampling program of the surface impoundments.

138. On November 1, 2021, MWG submitted the extensive operating permit applications to the Illinois EPA for the following CCR surface impoundments:

- a. Joliet 29 – Pond 2
- b. Powerton Station – the Ash Surge Basin, the Bypass Basin, and the Former Ash Basin
- c. Waukegan – the East Pond and West Pond
- d. Will County – Pond 2S and Pond 3S

139. On March 31, 2022, pursuant to the variances granted by the Board, MWG submitted the extensive operating permit applications to the Illinois EPA for the Metal Cleaning Basin at the Powerton Station and Ponds 1N and 1S at the Will County Station.

140. On February 1, 2021, MWG submitted construction permit applications to the Illinois EPA for the closure of Pond 2 at Joliet 29 and for the closure of the East Pond and West Pond at the Waukegan Station.

141. MWG will submit construction permit applications to the Illinois EPA for the closure or retrofit of its CCR surface impoundments pursuant to the schedules set forth in the Illinois CCR Rule, or at earlier dates.

142. MWG will continue to perform required actions, including closure or retrofitting, of its impoundments pursuant to the requirements of both the Federal CCR Rule and the Illinois CCR Rule.

143. Where work is being performed pursuant to the Illinois and Federal CCR rules, no further remedy is required.

MWG'S AFFIRMATIVE DEFENSES TO THE COMPLAINT

Respondent, MWG asserts the following affirmative defenses without waiving Complainants' obligation to meet its burden of proof and without assuming any burden of proof not otherwise imposed by law.

I. **RESPONDENT IS NOT IN VIOLATION OF THE GROUNDWATER STANDARDS BECAUSE THE GROUNDWATER UNDERLYING THE STATIONS IS WITHIN A GROUNDWATER MANAGEMENT ZONE**

144. Paragraphs 131-143 are realleged and incorporated herein by reference.

145. On October 24, 2012, MWG resolved the violations alleged in the VNs by entering into a Compliance Commitment Agreement ("CCA") for the ash ponds at the Stations. (Illinois EPA CCAs for the Stations, attached as Exs. 1-4)

146. From the date the CCAs were issued, MWG executed and completed all the terms of the CCAs. In October 2013, MWG submitted Completion Statements for the Stations certifying that the corrective actions in the CCAs were completed. (Illinois EPA Compliance Statements for the Stations, attached as Exs. 5-8).

147. Pursuant to the CCAs, MWG established a Groundwater Management Zone ("GMZ") for the areas underneath the Joliet 29 Station, Powerton Station, and the Will County Station.

148. Upon establishment of a GMZ, the standards specified in 35 Ill. Adm. Code §§620.410, 620.420, 620.430, and 620.440 are not applicable. 35 Ill. Adm. Code 620.450(a)(3).

149. Upon the establishment of the GMZs, the Joliet 29 Station, Powerton Station, and the Will County Station are not in violation of the groundwater standards alleged in the Complaint.

150. As Respondent is not in violation of the groundwater standards, Respondent is not in violation of 35 Ill. Adm. Code 620.301(a) and 620.405.

II. RESPONDENT DID NOT CAUSE WATER POLLUTION
BECAUSE THERE IS NO RISK TO PUBLIC HEALTH AND NO
RISK OF ENVIRONMENTAL HARM

151. Paragraphs 144-150 are realleged and incorporated herein by reference.

152. Pursuant to the CCAs, MWG entered into Environmental Land Use Controls (“ELUCs”) for the areas of the Powerton Station, Waukegan Station, and the Will County Station.

153. MWG did not enter into an ELUC at the Joliet 29 Station because Illinois EPA determined that there were no potential groundwater receptors in the area.

154. An ELUC is an institutional control that is used to impose land use limitations, and prevent the use or consumption of the groundwater. 35 Ill. Adm. Code 742.1010.

155. By establishing an ELUC at the Stations and the absence of groundwater receptors, there is no risk or harm to public health.

156. Pursuant to the CCAs, MWG has instituted corrective actions that address any alleged environmental harms.

157. In addition to the previously stated corrective actions taken, including lining the ash ponds with HDPE liners (Complaint ¶5, Answer ¶¶1, 3, and 7), establishing GMZs (¶82), and establishing ELUCs (¶¶87, 88), MWG is conducting ongoing groundwater monitoring at the ash ponds on a quarterly basis.

158. MWG did not fill or place coal ash in historic landfilled areas at or near the Stations.

159. Based on the low levels of constituents in the groundwater and the absence of human and environmental receptors, there is no nuisance, harm or injury to public health, safety or welfare at or around the Stations.

WHEREFORE, Respondent, Midwest Generation, LLC, respectfully requests that the Board dismiss Complainants' Amended Complaint with prejudice, or alternatively find that no further remedy is required, and issue such further relief as the Board deems just and proper.

Respectfully submitted,

Midwest Generation, LLC

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