BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF ELECTRONIC FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the following **COMPLAINANTS' POST-HEARING REMEDY RESPONSE BRIEF** in the above-captioned case today, copies of which are hereby served upon you.

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Dated: March 4, 2024

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COMPLAINANTS' POST-HEARING REMEDY RESPONSE BRIEF

Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network and Citizens Against Ruining the Environment (collectively, "Complainants") respectfully submit this Post-Hearing Remedy Response Brief for the Illinois Pollution Control Board's ("Board") consideration in this case.

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COMPLAINANTS' POST-HEARING REMEDY RESPONSE BRIEF

I. INTRODUCTION

Midwest Generation, LLC's ("MWG") initial Post-Hearing Brief reinforces the central theme of this case: MWG's absolute refusal to take responsibility for persistent and severe groundwater contamination at four properties it acquired in 1999. MWG expresses its commitment to environmental stewardship, but the record tells a very different story. MWG has repeatedly denied the existence of numerous massive coal ash fill areas—coal ash landfills, old ash ponds, coal ash dumps, coal ash underneath pond liners—that are clearly reflected in the record. At the same time, MWG has refused to undertake site evaluations that would identify the full scope of its groundwater contamination problem, speculated about alternative sources, and manipulated its data to make unsupported claims. MWG has tried to wield Groundwater Management Zones ("GMZs") as a cudgel against liability for contamination from sources unrelated to the GMZs, and tries to take credit for monitoring activities that have been mandatory for years and were initiated only after pressure from state regulators. MWG attempts to narrow the focus of this case to ash impoundments, but this case is much more broadly about groundwater contamination and open dumping of coal ash waste.

MWG now comes to the Board with a deeply flawed remediation plan that involves doing no more than what is already required by state and federal coal ash rules, but these rules do

not currently apply to the historical coal ash dumps at the plants. MWG also advocates for a slap-on-the-wrist penalty that would communicate to polluters that they will face no real consequences if they break the law. The Board should impose a remedy that will finally hold MWG accountable for more than a decade of noncompliance and start the process of cleaning up these four polluted sites. The law requires that the Board assess a penalty that claws back what MWG has gained from ignoring Illinois law for over a decade, and sends a message to polluters across the State that Illinois will enforce our environmental laws and regulations even where doing so takes many years of time and effort.

II. MWG MAKES NUMEROUS MISREPRESENTATIONS OF FACT AND LAW

MWG's post-hearing brief contains many misrepresentations of both fact and law. Several of these are discussed immediately below. Additional misrepresentations of expert testimony regarding MWG's proposed remedy at Waukegan are discussed in detail in Section IV.C.

A. MWG Continues to Ignore, or Deny the Existence of, Historic Coal Ash Disposal Areas.

In its post-hearing brief, MWG continues to ignore historic ash areas[1] that were identified by the Board in 2019. Complainants address each plant in turn.

At Joliet 29, MWG continues to deny the presence of coal ash in the area that business records describe as an "Ash Landfill" (known in this case as the Northeast Ash Area or the Northeast Ash Landfill).[2] For example, MWG claims that the United States Army Corps of Engineers took boring logs from the Northeast Ash Landfill and that the boring showed no ash.[3] Yet MWG cites no documentary evidence, only hearsay testimony from its own witnesses who claim to have seen the boring logs.[4] Furthermore, one of those witnesses (Michael Maxwell) describes the soil borings as being "along the river bank."[5] If true, then the borings were almost certainly outside of the ash landfill, and there would be no reason to expect to find ash in the borings. Anecdotal descriptions of boring logs that are not in the record are not reliable evidence. The actual record here, as correctly described by the Board in 2019, is clear: the area described

[1] "Historic ash areas" means "Historic Coal Ash Sites" as identified in the Board's June 20, 2019 Interim Opinion and Order at 26-28, 40-42, 55-57, 66-68.
[2] Ex. 21, Figure 2 at MWG13-15_25149; Ex. 20D, Figure 2 at MWG13-15_23339; *see also* Bd. Interim Op. and Order, PCB 13-15 at 26-27 (June 20, 2019).
[3] Midwest Generation, LLC's Post-Hr'g Br. at 34-35 (Jan. 18, 2024) [hereinafter "MWG Post-Hr'g Br."].
[4] *See id*. and MWG Post-Hr'g Br., App. A: Statement of Facts at para. 794 [hereinafter "MWG SOF"].
[5] June 12, 2023 Hr'g Tr. at 278:10-23.

in MWG documents as an "ash landfill" on the northeast part of the Joliet 29 property is exactly what it appears to be, a large landfill that was used to dispose of ash from Joliet 9, and continues to hold a large volume of ash in an unlined, uncapped state.[6]

As to Will County, MWG states that "there is a single small area on the southeast side of the Station that was suspected to contain ash."[7] This ignores another, much larger historic coal ash area at Will County, which was discussed in detail by the Board in 2019, and that is the "coal ash buried around the ash ponds."[8] This coal ash fill area is up to twelve feet thick, and much of it is saturated with groundwater.[9] In addition, the Board identified Ponds 1 North and 1 South at Will County as "historical coal ash sites," and also noted that "the bottom of these ponds is sitting below the water table [and] the cracks in the poz-o-pac liners allow groundwater to seep into the ponds and for ash constituents to leak out into groundwater."[10] These are all areas that clearly require source control to address ongoing contamination.

At Waukegan, MWG states that "there is an area at Waukegan Station that contains historic coal ash," names the Former Slag/Fly Ash Area ("FSFA Area"), and then goes on to say that "[t]here are no other known areas of historic ash at the Waukegan Station."[11] MWG is ignoring the other historic ash area identified by the Board, described as "Coal Ash in Fill areas" and including fill around the two ash ponds.[12] This fill area is contiguous with the FSFA Area, but also extends south and east of the ash ponds.[13]

At Powerton, in its discussion of "Other Purported Areas of Ash", MWG discusses ash placed on the ground and "an area of land between two intake channels," but it does not discuss any other ash outside of ponds.[14] This is despite the Board identifying at least 17 soil borings that contained ash throughout the site, up to 16 feet below the ground's surface.[15]

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[6] Bd. Interim Op. and Order, PCB 13-15 at 26-27 (June 20, 2019); Compls.' Post-Hr'g Remedy Br. at 11-12 (Jan.18, 2024) [hereinafter Compls.' Post-Hr'g Br."].
[7] MWG Post-Hr'g Br. at 43.
[8] Bd. Interim Op. and Order, PCB 13-15 at 56 (June 20, 2019).
[9] *Id*.; *see also* Compls.' Post-Hr'g Br. at 9-10.
[10] Bd. Interim Op. and Order, PCB 13-15 at 56 (June 20, 2019).
[11] MWG Post-Hr'g Br. at 15.
[12] Bd. Interim Op. and Order, PCB 13-15 at 67 (June 20, 2019).
[13] *See id*. (describing soil borings that show coal ash "at depths below the surface ranging from 1 to 19 feet in GT-4 (taken west of the West Pond), and 1 to 22 feet in GT-5 (taken south of the East Pond).").
[14] MWG Post-Hr'g Br. at 12.
[15] Bd. Interim Op. and Order, PCB 13-15 at 41 (June 20, 2019).

MWG also entirely ignores the historic ash areas in its discussion of "due diligence."[16] That discussion covers the ash ponds, the 2010 hydrogeologic assessments (which were limited to the ash ponds), and the Compliance Commitment Agreements ("CCAs") (which again were limited to the ash ponds). Nowhere does MWG mention any of the historic ash areas that we now know to be contaminating groundwater. The inevitable conclusion, given MWG's failure to cite anything to the contrary, is that MWG did not show due diligence with respect to the historic ash areas.

All of this is inconsistent with *Employees of Holmes Bros., Inc. v. Merlan, Inc.*, which MWG cites at the outset of its brief.[17] In *Employees of Holmes Bros*., the court determined that the defendant had "exercised good faith in trying to control its problems."[18] Here, MWG has, to the contrary, turned a blind eye to all the historic ash areas identified by the Board in its June 20, 2019 Order.[19] The Board found that MWG failed to take "extensive precautions to prevent the releases"[20] and MWG has still not taken extensive precautions to prevent ongoing releases.[21] MWG's claim that it has gone "beyond compliance with the [Illinois Environmental Protection] Act and underlying regulations"[22] is nonsense.

B. Groundwater Quality at the Four Plants is Not Improving.

Under Illinois coal ash regulations, as in virtually every regulatory context, trends only "count" as increasing or decreasing if they are statistically significant.[23] Douglas Dorgan and Michael Maxwell, both employed by Weaver Consultants Group ("Weaver witnesses") fail to apply this basic statistical concept consistently or correctly. This means that, contrary to MWG's claims, the Weaver witnesses have not established that "concentrations in the groundwater at the Stations [are] generally decreasing."[24] As explained in detail in Complainants' initial Post-Hearing Remedy Brief,[25] the Weaver analysis was profoundly flawed. The Weaver witnesses

[16] MWG Post-Hr'g Br. at 69-71.
[17] MWG Post-Hr'g Br. at 3.
[18] *Emps. of Holmes Bros., Inc. v. Merlan, Inc*., PCB 71-39, 1971 WL 4356, at *4 (Sept. 16, 1971).
[19] Bd. Interim Op. and Order, PCB 13-15 at 26-28, 40-42, 56-57, 66-68 (June 20, 2019).
[20] *Id.* at 79 (internal quotes omitted).
[21] *See* Compls.' Post-Hr'g Br. at 58-60.
[22] MWG Post-Hr'g Br. at 3.
[23] *See, e.g.*, 35 Ill. Adm. Code 840.118(a)(2)(A)(i) (site-specific closure standards for the Hutsonville Power Station, requiring "statistically significant decreasing trend[s]" to establish compliance with offsite groundwater standards); *see also* 35 Ill. Adm. Code 845.650(b)(5) (statewide groundwater monitoring regulations for coal ash impoundments, requiring more frequent monitoring only after "statistically significant increasing trend[s]").
[24] MWG Post-Hearing Br. at 31.
[25] Compls.' Post-Hr'g Br. at 46-50.

used an arbitrary and irrational subset of the data, excluded many downgradient wells (contrary to the approach that they claimed to be using), excluded many of the most contaminated wells at the four plants, and unjustifiably minimized the significance of trend test results that showed static conditions (i.e., "no trend").[26] And yet, despite all these distortions in MWG's favor, the Weaver analysis still does not show what MWG claims. In fact, very few trend tests—between 7% and 11% of tests at each site—were significantly downward.[27] The rest—an overwhelming majority of trend tests—were either static (no significant trend) or significantly upward.

The Weaver witnesses seem to agree that trends must be statistically significant to count as increasing or decreasing, but only when that fact helps their client: The Weaver witnesses excluded non-significant trend results from their analysis of increasing trends, even as they included non-significant trend results in their list of decreasing trends.[28] This one-directional misapplication of basic statistical rules only underscores the bias they brought to their analysis.

MWG's improper use of trends comes to a head at the Waukegan site, where MWG claims that concentrations of contaminants at Waukegan are "also decreasing, but not as significantly."[29] This is demonstrably false, even within the flawed analytical framework used by MWG's experts: The Weaver witnesses themselves testified that "there's a slightly more number of upward trends than there is downward trends" at Waukegan.[30] MWG's opposite conclusion ironically relies on testimony in which the Weaver witnesses only looked at statistically significant trends (and also ignored all evidence of static groundwater quality).[31] Again MWG is excluding nonsignificant trend results where it suits their argument, despite relying on nonsignificant decreasing trends elsewhere. This is inherently biased and must be rejected. The

[26] *Id*. Although MWG elicited hearing testimony in which the Weaver witnesses attempted to walk back some of their more egregious errors, the conclusions were revised on the fly, and there is no documentary evidence of corrections to the original, flawed analysis in the record. *See, e.g.,* MWG Post-Hr'g Br. at 36-37.
[27] Compls.' Post-Hr'g Br. at 7-8, 49-50.
[28] *See, e.g.*, June 13, 2023 Hr'g Tr. at 30:2-30:18 (Weaver witnesses discussing how they limited their analysis of upward trends to the "statistically significant" increases); *see also* MWG Post-Hr'g Br., App. D at slide 26 (showing the "second bullet" described in the testimony)).
[29] MWG Post-Hearing Br. at 32.
[30] June 13, 2023 Hr'g Tr. at 145:18-145:20.
[31] June 13, 2023 Hr'g Tr. at 145:22-146:14 (Weaver witnesses testifying that, after [improperly] excluding the "60 percent" of trend tests that showed no trend, "when you look at the graphs on the right, the downward trend, roughly 9 of the 26 were deemed to be statistically significant, and you have of the upward trends, 6 out of the roughly 28 are deemed to be statistically significant. So that ratio has held somewhat consistent"). MWG does the same thing in its post-hearing brief, discussing "increasing" concentrations with citations to Weaver testimony and slides that are limited to statistically significant increases. MWG Post-Hr'g Br. at 37.

facts show that groundwater at Waukegan (as at the other plants) is not improving, and is, if anything, getting worse.

In the end, a vast majority of the Weaver trend test results—between 89% and 93% of trend tests at each site—were either static (no significant trend) or significantly increasing. The data do not show "generally decreasing" concentrations; they in fact show ongoing releases of coal ash pollutants producing generally static levels of contamination at each site with no discernable improvement.

C. MWG Misstates the Law with Respect to Cleanup Feasibility Studies.

According to MWG, feasibility studies for remedial options are only required at Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "Superfund") sites or Resource Conservation and Recovery Act ("RCRA") hazardous waste sites.[32] This is not true. In fact, both federal and Illinois coal ash rules require feasibility studies under the name "Assessments of Corrective Measures." An Assessment of Corrective Measures is "an analysis of the effectiveness of potential corrective measures in meeting all the requirements and objectives of the corrective action plan," and it requires owners and operators to assess, among other things, "[t]he performance, reliability, ease of implementation, and potential impacts of appropriate potential remedies," the time it would take to implement each potential remedy, and any "institutional requirements" that might affect implementation.[33] In short, assessments of corrective measures are designed to document the feasibility of various corrective measures and are equivalent to feasibility studies.

D. *People ex rel. Raoul v. Lincoln* Is Not Precedent.

MWG repeatedly relies on *People ex rel. Raoul v. Lincoln*. *People ex rel. Raoul v. Lincoln, Ltd.* contains a heading stating, "NOTICE**:** This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1)." Rule 23 provides that "[a]n order entered under subpart (b) or (c) of this rule is not precedential except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case."[34]). *People ex rel. Raoul v. Lincoln, Ltd.* should be given no weight in this proceeding.

[32] MWG Post-Hr'g Br. at 48.
[33] 35 Ill. Adm. Code 845.660(c); *see also* 40 C.F.R. § 257.96(c) (reciting the same description of an Assessment of Corrective Measures). The federal coal ash regulations apply to both coal ash impoundments and coal ash landfills.
[34] Ill. Sup. Ct. R. 23(e)(1).

III. THE BOARD SHOULD REJECT MWG'S SUGGESTED CORRECTIONS

In its post-hearing brief, MWG offers a series of what it terms "corrections" to the Board's June 20, 2019 Interim Opinion and Order. As an initial matter, Complainants protest this entire section because it is procedurally improper: the deadline to seek reconsideration of the Board's Interim Order came years ago, just after the Order came out (and indeed, MWG availed itself of that opportunity, by seeking reconsideration on several aspects of the Interim Order; it was unsuccessful). Using remedy briefing as an opportunity to revisit an existing order is yet another example of MWG undermining the Board's procedural rules to its benefit. Nonetheless, Complainants offer the following substantive responses to MWG's proposed "corrections."

A. The Board Can Make an Open Dumping Finding at Joliet 29.

MWG argues first that the Board cannot find an open dumping violation at Joliet 29 because it received inadequate notice.[35] MWG is incorrect. First, "pleadings are to be liberally construed, and formal or technical allegations are unnecessary."[36]

In fact, the Complaint included the facts necessary for an open dumping violation at Joliet 29.[37] Further, the Complaint included an open dumping claim for every other site.[38] Moreover, the Complaint contains a general section called "Legal Background: Open Dumping" with citations and legal definitions including "criterion for identifying open dumps based on groundwater contamination" applicable to all four plants.[39] This general section includes the legal details necessary for an open dumping claim and put MWG sufficiently on notice of an open dumping claim at Joliet 29.

B. The Groundwater Management Zones Do Not Shield MWG From Liability Under the Illinois Environmental Protection Act ("Act").

MWG argues that a GMZ "resolves liability under Section 12 of the Act *and* its underlying regulations"[40] but this argument is invalid. First, GMZs were established by regulation.[41] Regulations cannot alter statutes.[42] Section 620.250—a regulation established by the Illinois Pollution Control Board—cannot narrow the scope of Section 12(a)—a statute

[35] MWG Post-Hr'g Br. at 17.
[36] *Bauscher v. Freeport*, 103 Ill. App.2d 372, 376, (1968) (citing *Fanning v. LeMay*, 38 Ill.2d 209, 211 (1967)).
[37] First Amended Compl., PCB 13-15 at para. 2, 51-52, Exs. B, C, D (Jan. 14, 2015).
[38] *Id.* at 10, para. 41-49.
[39] *Id.* at 10, para. 33-35.
[40] MWG Post-Hr'g Br. at 18-19.
[41] 35 Ill. Adm. Code 620.250.
[42] *Canteen Corp. v. Dep't of Revenue*, 123 Ill. 2d 95, 104, 108 (1988); *Du-Mont Ventilating Co. v. Dep't of Revenue*, 73 Ill.2d 243, 247-48 (1978).

established by the General Assembly. This is exactly what MWG would have Section 620.250 do if GMZs relieved owner/operators from Section 12(a) liability.

MWG also argues that the Board improperly relied on *People v. Texaco* to conclude that the GMZs did not relieve MWG of Section 12(a) liability.[43] MWG is incorrect in arguing that the Board didn't squarely address the GMZ question in *People v. Texaco*. In that case, the Board explicitly decided that the GMZ would shield Texaco from only Part 620 liability.[44]

MWG next offers an argument based on a quote from the Attorney General's brief in *People v. Heritage Coal Co. LLC*, in reply on a motion for summary judgment.[45] MWG states that "[t]he People conceded that 'respondent's liability for civil penalties [did] not extend past' the date the GMZ was established."[46] MWG's quoted material is not a legal conclusion offered by a court or the Board. It is merely the Board's articulation of the Attorney General's position in one case. The Board clearly need not defer to the Attorney General's position in a separate case.

Finally, the CCAs and GMZs were put in place to deal with the impoundments, and did not contemplate additional sources of contamination that we now know to be significant—the historic ash areas.[47] MWG does not (and cannot) explain how the GMZs could shield them from liability for additional contamination being caused by different and separate sources.[48]

The present case is the perfect example of why GMZs cannot resolve both regulatory and statutory liability. A GMZ does not give the owner a free pass for all sources of contamination therein, especially if those sources, like the historic ash fill areas at issue here, were not contemplated by the drafters of the GMZs.

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[43] MWG Post-Hr'g Br. at 19.

[44] *People v. Texaco Refin. and Mktg., Inc.,* PCB 02-03, 2003 WL 22761195, *9 (Nov. 6, 2003) ("Additionally, the present allegations involve a different section of the Act. Compliance with a permitted GMZ would provide Texaco immunity from violating the Part 620 standards").

[45] MWG Post-Hr'g Br. at 19 (citing *People v. Heritage Coal Co. LLC,* PCB No. 99-134, 2012 WL 4024868 *8 (Sept. 6, 2012)).

[46] *Id*.

[47] *See, e.g.,* Ex. 647 at MWG13-15_566 ("[T]he Illinois EPA contends that Respondent has violated the following provisions of the Act and the Illinois Pollution Control Board ("Board") Regulations: a) Operations at ash impoundments have resulted in violations of the Groundwater Quality Standards…").

[48] MWG argues that not absolving them of statutory liability would allow Illinois Environmental Protection Agency ("IEPA") to impose a GMZ and then follow with an enforcement action over statutory violations. MWG Post-Hr'g Br. at 18. MWG's example is perplexing; it is hard to imagine why IEPA would choose such a course of action when it would be a complete and utter waste of IEPA resources. Also, the Board doesn't need to weigh in on MWG's fictional IEPA example because that is not the case in front of the Board right now.

C. The Board's Interim Opinion and Order Is Not Required to Include Section 33(c) Factors.

MWG next argues that the Board's June 20, 2019 Interim Opinion and Order was required to include Section 33(c) considerations. MWG is incorrect. Case law on consideration of the Section 33(c) factors indicates that the Board need only consider the 33(c) factors at some point when deciding a case. The *Sangamo Construction Co. v. Pollution Control Board* decision indicates if the Board considers the Section 33(c) factors in one part of its opinion, that is sufficient. In *Sangamao*, the Section 33(c) favors were "discussed by the Board in its determination of permit violations, but it is applicable to the 9(a) violation and shows that the Board considered the evidence on this issue. It therefore appears that the evidence as to the 33(c) criteria was considered by the Board."[49] As is clear from other Board caselaw, Complainants need not submit evidence on every factor, which translates to the Board not being required to consider every factor.[50] Similarly, in *Discovery South*, the Appellate Court upheld the Board's decision when the Board considered the Section 33(c) factors in an interim decision and incorporated its conclusions on some of the factors from the interim decision into the final decision without reevaluation.[51]

The Board is not required to be specific in its Section 33(c) findings; reasonable compliance is all that is required from the Board when applying Section 33(c) to its decisions. As one Illinois court described this issue:

> We are inclined to agree with appellant that the Board was not as specific as it might have been in making written findings as to each of the section 33(c) criteria. However, there was substantial compliance with the Act, and in view of all the evidence and the fact that the Board appears to have properly determined the issue of reasonableness in light of the section 33(c) factors, we do not deem it necessary to remand the cause for further findings.[52]

In the present case, the Board presumably will incorporate all its liability findings from the Interim Opinion and Order into its final order. The Board can consider the Section 33(c) factors now in its final order when incorporating its liability findings, which will be sufficient to meet the standards set out in *Sangamo* and *Discovery South*.

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[49] *Sangamo Constr. Co. v. Pollution Control Bd.*, 27 Ill. App.3d 949, 955 (4th Dist. 1975).
[50] *Id.* at 954 ("In order to make a valid determination that a violation has been committed in a specific instance, an unfavorable finding as to each 33(c) factor is not necessary.").
[51] *Disc. S. Grp., Ltd. v. Pollution Control Bd.*, 275 Ill. App. 3d 547, 556 (1st Dist. 1995) ("The Board specifically readopts the evaluation of the Section 33(c) factors in the interim opinion and order dated April 25, 1991.").
[52] *Incinerator, Inc. v. Pollution Control Bd.*, 59 Ill. 2d 290, 299 (1974).

D. Complainants Met their Burden of Proof at Joliet 29.

Finally, MWG argues that there is no link between the monitoring results and the ash areas at Joliet 29; and that there is no evidence that ash areas are causing contamination.[53] In making this argument, MWG applies an unjustifiably stringent standard and disregards what the Complainants did prove. Complainants proved all of the following elements, through which there is a direct thread from the presence of coal ash to groundwater contamination caused by coal ash and MWG's liability.

First, to prove open dumping, all that Complainants needed to prove was that MWG openly dumped waste upon the property.[54] Complainants proved the presence of ash both in ponds and the three historic ash areas. The Board concluded regarding the Northeast Ash Landfill and the Southwest Ash Landfill that "MWG admits, and the record indicates, that this area contains historic coal ash."[55] The Board concluded that the Northwest Area "contains coal ash fill material, as admitted by MWG and supported by the record."[56] As a result, because Complainants proved the presence of coal ash—coal combustion waste—dumped at Joliet 29, Complainants bore our burden of proof on the open dumping claim at Joliet 29.

MWG is belatedly attempting to relitigate the question of whether ash is present at the historic ash areas at Joliet 29. MWG questioned the logic of whether Commonwealth Edison Company ("ComEd") or any previous operator would have used the Northeast Ash Landfill for any large-scale placement of ash.[57] This argument is the very definition of speculative: it relies on suppositions from personnel who have no actual connection to the site operations during the period when ash was deposited, to contest concrete evidence from the liability-phase record clearly demonstrating the presence of ash in the Northeast Ash Landfill. It is also at odds with the known history of the site. The historic site record explains clearly why coal ash was deposited in the Northwest and Southeast Ash Landfills: "[a]ccording to ComEd, the site was used for coal ash disposal by the Joliet #9 station prior to the construction of Joliet #29 in 1964-

[53] MWG Post-Hr'g Br. at 21-22.
[54] 415 ILCS 5/21(a) ("No person shall cause or allow the open dumping of any waste.").
[55] Bd. Interim Op. and Order at 26 (June 20, 2019) (citing MWG Br. at 11; 2/2/18 Tr. at 323 (Seymour Test.); EG Exh. 248N at 1 (#19442); EG Exh. 20D at (#23342; 23357); EG Exh. 401 at 11); *Id.* at 27 (citing MWG Br. at 11; 2/2/18 Tr. at 293:3-294:24, 323:12-20 (Seymour Test.); EG Exh 248N at 1 (#19442); EG Exh. 20D at (#23342; 23357); EG Exh. 401 at 11).
[56] *Id.* at 28 (citing MWG Br. at 11; 2/2/18 Tr. at 323 (Seymour Test.); EG Exh. 20D at (#23342; 23357); MWG Exh. at 401 at 11).
[57] MWG Post-Hr'g Br. at 8.

1965. Coal ash was primarily disposed in a landfill on the eastern portion of the site. A second abandoned ash disposal landfill lies on the southwest portion of the site between the coal pile and the Caterpillar, Inc. site."[58] In short, a close examination of the site operational history actually confirms the Board's fact-based conclusion MWG is trying to contest: there is ash in the historic ash areas at Joliet 29 including the both Southwest and Northeast Ash Landfills.

Second, Complainants have proved there was groundwater contamination from coal ash at Joliet 29. As the Board concluded, "[g]roundwater monitoring results in the record indicate 69 exceedances of the Board's Part 620 GQS [Groundwater Quality Standards] for coal ash constituents at Joliet 29."[59] It is impossible to prove groundwater contamination from a specific source without a groundwater monitoring system that adequately monitors upgradient and downgradient groundwater around that source.[60] There is no groundwater monitoring installed around the Northeast, Northwest, and Southwest Ash Areas at Joliet 29.[61] And MWG did not comprehensively investigate any of these areas.[62]

Fundamentally, MWG has failed to take extensive precautions at the Joliet 29 historic ash areas.[63] It has failed to install groundwater monitoring that would capture groundwater contamination from historic ash areas at Joliet 29, despite significant evidence that such ash areas exist. And MWG now argues that the blame for this lack of monitoring data should be laid at Complainants' feet, in the form of a finding that Complainants fell short of the required burden of proof because we do not have evidence of groundwater contamination.[64] The Board should reject this argument because the alternative would be to provide MWG a "get out of jail free" card for any areas where it has refused to monitor the groundwater. This would be an absurd result and is presumably the reason that Illinois Courts requires the owner or operator of polluting sources to take "extensive precautions" in such situations to avoid liability.[65]

It was eminently logical for the Board to conclude that the historic ash areas and ponds at Joliet 29 are causing groundwater contamination because (1) coal ash contamination was

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[58] Ex. 21 at MWG13-15_25150.
[59] Bd. Interim Op. and Order at 29 (June 20, 2019)(citing MWG Ex. 809).
[60] 35 Ill. Adm. Code 845.630.
[61] Bd. Interim Op. and Order at 26 (June 20, 2019)(citing 2/1/18 Tr. at 196-198 (Gnat Test.); MWG Exh. 901 at 19; MWG Exh. 667 at 3) ("No monitoring wells are installed around any of these areas.").
[62] *Id.* at 27-28.
[63] *Id.* at 79.
[64] MWG Post-Hr'g Br. at 21-22.
[65] *Perkinson v. Ill. Pollution Control Bd.,* 187 Ill. App.3d 689, 695 (3rd Dist. 1989).

detected in the groundwater at Joliet 29; and (2) the coal ash at every other MWG site is causing groundwater contamination.[66] Similarly, as the Board pointed out for a liability finding, the Board need only to conclude that the contamination was coming from within MWG's property.[67]

E. MWG's Other Proposed Modifications of Factual Determinations Made by the Board Are Improper.

Finally, MWG offers a series of what it claims are factual errors made by the Board. As Complainants explain in the following sections, none of these "corrections" are appropriate.

i. The Board's finding of flooding 30 feet above the bottom of the secondary ash settling basin is supported by testimony in the record.

MWG argues that no documents support the Board's finding that water levels reached 30 feet above the bottom of the Secondary Ash Settling Basin during recent flooding events, but ignores testimony from NRG Energy Director of Federal Environmental Programs, Maria Race, who testified: "I do remember that the river water rose up to probably, you know -- it got up very high in elevation during the big flooding that happened and that was around 470 probably."[68] Even if Race was wrong about the precise floodwater elevation, the salient point is that there was significant flooding. The documents and testimony cited by the Board on this point support a finding of flooding at Powerton Station and flood water or groundwater infiltrating the ash ponds at Powerton Station.[69]

ii. The Powerton Limestone Basin still presents a risk of groundwater contamination.

The Parties agree that the Limestone Basin at Powerton has been empty since 2013.[70] But "empty" isn't determinative of whether the pond is leaking contaminants into the groundwater. First, the pond is lined with poz-o-pac.[71] Poz-o-pac is made of coal ash, and can be up to 97%

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[66] Bd. Interim Op. and Order at 29, 43-50, 58-63, 69-76 (June 20, 2019).
[67] *Id.* at 79 (citing *People v. A.J. Davinroy Contractors,* 249 Ill. App.3d 788, 796 (5th Dist. 1993) ("It is immaterial whether any specific ash pond or any specific historic ash fill area can be pinpointed as a source to find MWG liable. The groundwater monitoring results narrow the contamination to defined areas within each of MWG Stations delineated by the monitoring wells.").
[68] Oct. 23, 2017 Hr'g Tr. at 164:18-21.
[69] *See* Oct. 23, 2017 Hr'g Tr. at 164:18-21; Jan. 31, 2018 Hr'g Tr. at 211:10-21; Oct. 24, 2018 Hr'g Tr. at 95:24-96:3; Ex. 107; Oct. 24, 2017 Hr'g Tr. at 94:0-11, 93:7 (cited in Bd. Interim Op. and Order at 39 (June 20, 2019)).
[70] Joint Agreed Stipulations for the Continued Hr'g at No. 13 (Feb. 14, 2022) [hereinafter "2022 Joint Agreed Stipulations"].
[71] Bd. Interim Op. and Order at 40 (June 20, 2019).

ash.[72] As the Board has concluded, poz-o-pac can crack and break down.[73] Just as the Illinois Environmental Protection Agency ("IEPA") concluded regarding poz-o-pac liners at Joliet 29, "[u]nconsolidated or pulverized poz-o-pac material … may leach because it is CCR material that is unlikely to have been rendered inert. Leaching occurs from the surface area of a material containing heavy metals. The more surface area exposures that occur because of cracking, the greater the leaching potential of the material."[74] Thus, the Limestone Basin may be empty but it still has a liner that is made of ash and could be cracking and leaching coal ash contaminants.

In addition, MWG and the previous owner of the plants commonly used ash in construction and as fill material, which would still present a contamination risk. Historical documents at Powerton show the presence of extensive coal ash fill throughout the site.[75] For instance, fourteen borings taken between 1998 and 2005 had ash fill in them.[76] Those borings showed ash fill as deep as 14 to 16 feet below the surface.[77] Separate borings for monitoring wells installed in 2010 showed ash fill as deep as 24.5 feet below the surface.[78] History of Construction documents for other MWG impoundments show coal ash that does not meet the definition of coal combustion byproduct ("CCB") used for structural fill in pond relining projects.[79] Consequently, because of the presence of coal ash in the poz-o-pac liner and the possibility of coal ash used as structural fill supporting the basin, even if the Limestone Basin at Powerton is empty, it still poses the risk of leaching coal ash contaminants into the groundwater.

iii. The Powerton Former Ash Basin is unlined.

MWG argues that the Powerton Former Ash Basin ("FAB") is not leaking and is not a source.[80] But MWG starts out with a much different point—that the Powerton FAB is not lined. Complainants agree that the FAB is not lined and stipulated to that fact.[81] As a result, Complainants support the Board amending its findings to accurately reflect the unlined status of

[72] Ex. 1409 at MWG13-15_120624.
[73] Bd. Interim Op. and Order at 25; Ex. 1409 at MWG13-15_120625 ("Due to the poz-o-pac's nature and use conditions, it has likely been compromised by way of cracking or otherwise breaking down, resulting in material becoming unconsolidated or pulverized in certain areas.").
[74] *Id.* at 120625-626 (internal citations omitted).
[75] Ex. 17D at 57-72 (#3309-3324); Ex. 201 at 37, 41, 43-46 (#24300, #24304-24310); Ex. 13C at 22-41 (#7102-7121); Ex. 30.5E; Ex. 24E at 16-19 (#40059-40062).
[76] Ex. 17D at 57-72 (#3309-3324); Ex. 201 at 37, 41, 43-46 (#24300, #24304-24310).
[77] *Id.*
[78] Ex. 13C at 22-41 (#7102-7121); Ex. 30.5E; Ex. 24E at 16-19 (#40059-40062).
[79] Ex. 1409 at MWG13-15_120627-630.
[80] MWG Post-Hr'g Br. at 24-25.
[81] 2022 Joint Agreed Stipulations at No. 9.

Powerton FAB. Complainants do not believe any other changes need to be made to the Board's findings about the FAB.

iv. The Board's conclusions about the condition of the poz-o-pac pond liners are fully supported by testimony and evidence.

MWG argues that the Board relied too heavily on a 2005 NRT memo for the Board's conclusions about the condition of the poz-o-pac pond liners.[82] However, the Board's conclusions about the condition of the poz-o-pac pond liners are fully supported by testimony and evidence in the record. MWG cites two cases for its argument that the Board's conclusions based on the NRT memo are against the manifest weight of the evidence. The first case, *Helber v. Helber* is not about the "manifest weight of the evidence."[83] *Helber v. Helber* is, in fact, about an expert opinion that had no evidentiary support and was completely contradicted by the evidence in the record.[84] This is distinguishable from the NRT memo which is not an expert opinion and is consistent with other evidence in the record. In *Board of Education v. Cady*, the other case relied on by MWG, the Administrative Law Judge ("ALJ") rejected a witness's testimony based on assumptions made by the ALJ.[85] The Court pointed out that "a fact finder cannot arbitrarily or capriciously reject the testimony of an unimpeached witness where the testimony of the witness is 'neither contradicted, either by positive testimony or by circumstances, nor inherently improbable.'"[86] As will be discussed below, the Board was not arbitrary and capricious in rejecting Race's testimony that the liners were in good condition because her testimony was contradicted by other evidence.

The relevant case law here is governed by the Illinois Environmental Protection Act, Section 41(b)[87] and reviewed under a manifest weight of the evidence standard.[88] In elaborating on how this standard is applied, the Third District stated, "It must be clearly evident from the

[82] MWG Post-Hr'g Br. at 25-26.
[83] *Helber v. Helber,* 180 Ill. App.3d 507, 512 (5th Dist. 1989).
[84] *Id.*
[85] *Bd. of Educ. of Chicago v. Cady,* 369 Ill.App.3d 486, 496 (1st Dist. 2006).
[86] *Id*. at 496-97 (citing *Crabtree v. Illinois Department of Agriculture, Division of Agricultural Industry Regulation,* 128 Ill.2d 510, 518, 132 Ill. Dec. 446, 539 N.E.2d 1252, 1257 (1989)).
[87] 415 ILCS 5/41(b) ("Any final order of the Board under this Act shall be based solely on the evidence in the record of the particular proceeding involved, and any such final order for permit appeals, enforcement actions and variance proceedings, shall be invalid if it is against the manifest weight of the evidence.").
[88] *Will Cnty. v. Vill. of Rockdale*, 2018 IL App (3d) 160463, ¶ 55 (3rd Dist. 2018) (citing *Fox Moraine*, 2011 IL App (2d) 100017, ¶ 87).

record that the Pollution Board should have reached the opposite conclusion before a reviewing court reverses the Pollution Board's decision."[89]

In the present case, the Board found that the liners were in poor condition. Applying the manifest weight of the evidence standard, the opposite conclusion—that the liners were in good condition—is not clearly evident from the record.[90] In fact, the conclusion that the liners were in poor condition is supported by most of the evidence—at least eight exhibits, stipulations as to the age of the poz-o-pac liner, and witness testimony. There were numerous other pieces of evidence and testimony relied upon and cited by the Board that were consistent with the NRT memo as to the condition of the pond liners being poor.[91] These include Exhibit 107 and witness testimony which indicated that water was infiltrating a basin beneath the previous liner;[92] Exhibit 108 which indicated that a liner was either damaged or not constructed to specifications;[93] Exhibit 286 which indicated that there were hairline cracks in a core sample of poz-o-pac;[94] and Exhibits 302 and 303 which collectively indicate that water was infiltrating a pond through cracks in the underlying poz-o-pac liner and getting trapped under the new high-density polyethylene ("HDPE") liner.[95] Testimony indicated that if poz-o-pac were cracked, liquid would flow through if there were a liquid head on top of the crack.[96] The Board also relied on Exhibit 607, [97] an compilation of information belonging to Director of Federal Environmental Programs at NRG Energy Maria Race,[98] which indicated that the poz-o-pac liners were in poor conditions.[99]

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[89] *Id.* (citing *Peoria Disposal Co. v. Ill. Pollution Control Bd.*, 385 Ill. App. 3d 781, 800 (2008)).
[90] *Will Cnty.*, 2018 IL App (3d) 160463, ¶ 55.
[91] MWG's characterization of the NRT memo being based on an assumption is belied by the NRT memo itself. MWG Post-Hr'g Br. at 25-26. The NRT memo makes clear that the characterization of the condition of the poz-o-pac liners was not just an assumption based on age. Ex. 34 at MWG13-15_23608. (The score for "[e]xisting liner" condition took into "consider[ation] type, age, and known condition based on the Pond Characterization document [(Midwest Generation, June 2005)] and Midwest' s knowledge of the liners.").
[92] Bd. Interim Op. and Order at 39, 56 (June 20, 2019) (citing Oct. 24, 2017 Hr'g Tr. at 211:18-213:20).
[93] *Id.* at 39. ("[T]he liner on the east wall of the basin may not have been constructed as designed or it may have been damaged in the past and altered.").
[94] *Id.* at 55.
[95] Ex. 302 (cited in Bd. Interim Op. and Order at 56 (June 20, 2019)) ("Cut holes in liner to pump out groundwater"); Ex. 303 (cited in Bd. Interim Op. and Order at 25, 55 (June 20, 2019)) ("water is seeping thru cracks in 2nd p-o-p [poz-o-pac] layer").
[96] Feb. 2, 2018 Hr'g Tr. at 149:15-18.
[97] Bd. Interim Op. and Order at 54 (June 20, 2019).
[98] Jan 29, 2018 Hr'g Tr. at 159:11-16; 227:1-229:6.
[99] Jan 29, 2018 Hr'g Tr. at 227:7-8. Ms. Race testified as to Exhibit 607: "What I wanted to do is have everything in one spot where I could look at it and see, you know, what the ranking of the various impoundments were, the years that they would be relined, you know, all of this stuff. And this was a moment in time, too, where I had comments and questions that hadn't been answered yet. So I want -- this was my thinking out loud essentially." *Id.* at 227:14-

Finally, the Board relied on testimony and exhibits establishing that the ponds' original poz-o-pac and Hypalon liners were more than 30 years old.[100] In short, the preponderance of the evidence supports the Board's finding of fact that the poz-o-pac liners were in poor condition and is in no way countered by the manifest weight of the evidence. The only evidence countering the Board's decision is testimony from MWG employees[101] about primarily visual inspections.[102] The preponderance of the evidence indicates that the condition of the poz-o-pac liners contributed to the ash ponds and material in the ash ponds leaching contaminants to the groundwater.[103]

IV. SECTION 21(r) OF THE ACT DOES NOT RELIEVE MWG OF LIABILITY UNDER SECTION 21(d)

The next argument MWG raises, on whether Section 21(r) is the applicable law for disposal of coal combustion waste, has already been addressed and rejected by the Board. Section 21(r) does not apply in the present case.

MWG begins by acknowledging that, pursuant to the Board's 1976 *People v. Commonwealth Edison Company* decision, Section 21(d)(1)(i) only allows unpermitted, onsite disposal of self-generated waste in minor amounts.[104] Having acknowledged that limitation, MWG then argues that the limitation does not apply to coal ash because the Illinois General Assembly enacted Section 21(r)(1) "to legislatively overrule the *ComEd* decision."[105] But there is simply no evidence of this being true. In 1976, the Board held that the ComEd was not eligible for an onsite waste disposal exemption under Section 21(e) of the Act (the predecessor of what is now Section 21(d)), because "the intent of Section 21(e) was to exempt minor amounts of refuse which could be disposed of without environmental harm on the site where it was generated."[106]

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21. Ms. Race also testified that some of the comments and questions came from "our construction folks who we call our project management folks." *Id.* at 227:22-228:1.

[100] Joint Agreed Stipulations at 1-2, No. 1-16 (Oct. 2, 2017) [hereinafter "2017 Joint Stipulations"]; MWG SOF at para. 88; Ex. 34 at (#23608); Ex. 500 at #5-9; Ex. 606 at (#23631); Ex. 667 at 4; Ex. 901 at 5, 16, 28, 44; Jan. 30, 2018 Hr'g Tr. at 191:9-19.

[101] In addition to Maria Race, who is noted by MWG, Mr. Veenbaas and Mr. Kelly testified as to the condition of the poz-o-pac. MWG SOF at para. 454, 536, 548, 549, 583.

[102] MWG points to Sharene Shealey's testimony as well. MWG Post-Hr'g Br. at 25. But Ms. Shealey wasn't at MWG during the pond relining projects and, therefore, would likely have no first-hand knowledge as to the condition of the poz-o-pac pond liners. June 13, 2023 Hr'g Tr. at 112:19-113:23

[103] *See* Bd. Interim Op. and Order at 39-40, 54-57 (June 20, 2019).

[104] MWG Post-Hr'g Br. at 28.

[105] *Id.*

[106] *Ill. v. Commonwealth Edison Co.,* PCB 75-368, 1976 WL 8158, *3 (Nov. 10, 1976) (emphasis added).

Fourteen years later the General Assembly enacted Section 21(r).[107] MWG cites *Collins v. Board of Trustees* for the proposition that "[a]n amendment that contradicts a recent interpretation of a statute is an indication that such interpretation was incorrect and that the amendment was enacted to clarify the legislature's original intent."[108] But a fourteen-year-old case is not "recent." There is no reason to presume that the legislature was responding to a fourteen-year-old case that they did not cite. There is also no "contradict[ion]" between Section 21(r) and the *ComEd* decision; as discussed in more detail below, the Board's and the courts' longstanding interpretation of Section 21(d) is perfectly consistent with Section 21(r).

Moreover, the legislative history of Section 21(r)[109] is not what MWG claims. It helps to note that Section 21(r) includes subsections 21(r)(2) and (3), which pertain entirely to disposal at mine sites.[110] Senator Dunn explained that the Section 21(r) amendment was the result of "an agreement between the EPA, the Coal Association and the United Mine Workers," suggesting that the purpose of the amendment had to do with mines.[111] MWG claims that the purpose of 21(r) was to overrule *ComEd* and "allow coal ash to remain in place,"[112] but provides no evidence. There is no mention of *ComEd* in the legislative history cited by MWG, no mention of onsite waste disposal exemptions, and no mention of Section 21(d). Further, none of the language in 21(r)(1) references any quantities of coal combustion waste ("CCW"). Presumably, if the legislature intended to overrule the quantity limitation that the *ComEd* decision placed on Section 21(d)(1)(i), the legislature would have used language that referenced that case or quantity limitations on onsite disposal of coal ash. It did not.

MWG also points to the modifications to 21(r) and the change in the terminology to "coal combustion byproducts" and then back again to "coal combustion waste," as well as the reference to the "current disposal program," as further evidence of the legislature's intent for 21(r)(1) to cover onsite disposal of coal ash.[113] The General Assembly was not, as MWG asserts,

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[107] Pub. Act 86-0364 (eff. Jan. 1, 1990, codified as 415 ILCS 5/21(r)).
[108] MWG Post-Hr'g Br. at 29 (citing *Collins v. Bd. of Trs. of Firemen's Annuity & Benefit Fund*, 155 Ill. 2d 103, 111 (1993)).
[109] At the time, it was enacted as Section 21(s).
[110] *See* Pub. Act 86-0364 (eff. Jan. 1, 1990, codified as 415 ILCS 5/21(r)).
[111] Similarly, MWG's later-cited extract of legislative history from 1996 appears to be related to the mine disposal provisions. *See, e.g.,* Midwest Generation, LLC's Mot. for Leave to File, *Instanter*, its Reply in Supp. of its Mot. in *Lim.* to Exclude Evid. of the Need for a Remedy at Certain Areas at Three Stations, Ex. 4: 89th Ill. Gen. Assem., House Proceedings at 72 (Apr. 26, 1996) (Rep. Bost) at 72 (emphasis added).
[112] MWG Post-Hr'g Br. at 28.
[113] MWG Post-Hr'g Br. at 29-30.

changing Section 21(r)(1): it was changing Section 21(r), which is where the words "coal combustion waste" appear. This change affected not only onsite coal ash storage and disposal under Section 21(r)(1), but also the use of coal ash in mines pursuant to Sections 21(r)(2) and 21(r)(3). When 21(r) was amended to apply to coal combustion waste instead of coal combustion byproduct, Representative Bost explained that "Under the Mines and Minerals Program, the wording 'by-product' is going to require different standards than combustion waste."[114] Representative Bost went on to explain what "a coal mine facility wanting to dispose of coal combustion waste" would have to do.[115] Representative Deering also confirmed with Representative Bost that under the amendment, coal combustion waste "could be used for structural fill to be used for filters in sanitary landfills."[116] The legislative history shows that the General Assembly was focused on mine disposal and the use of coal ash in sanitary landfills, not unpermitted onsite coal ash disposal, when the sponsor explained that the fix was necessary for "the current disposal program to continue."[117]

MWG also tries to use the 2019 Coal Ash Pollution Prevention Act ("CAPPA") as evidence of legislative intent to abrogate the Board's longstanding interpretation of Section 21(d).[118] But the amendment of Section 21(d) was a very small part of a comprehensive legislative package that created a statewide coal ash impoundment program to mirror federal coal ash regulations.[119] It did not seek to create a loophole for unlimited onsite coal ash disposal, but instead was designed to increase environmental protections with respect to coal ash.

Not only is MWG wrong about the legislative history, but there is also no conflict between Sections 21(d)(1)(i) (as limited by the *ComEd* decision to "minor amounts" of waste)

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[114] Midwest Generation, LLC's Mot. for Leave to File, *Instanter*, its Reply in Supp. of its Mot. in *Lim.* to Exclude Evid. of the Need for a Remedy at Certain Areas at Three Stations, Ex. 4: 89th Ill. Gen. Assem., House Proceedings at 72 (Apr. 26, 1996) (Rep. Bost) at 72 (emphasis added).
[115] *Id.* at 72-73 (emphasis added).
[116] *Id*. at 75.
[117] MWG Post-Hr'g Br. at 30 (quoting 89th Ill. Gen. Assem., Senate Proceedings at 27 (Mar. 22, 1996) (Sen. Luechtefeld)). MWG also argues that the purpose of the amendment adding 21(r) was to allow coal ash to remain in place because "coal ash was being used consistently throughout the state for a variety of construction purposes, including roadbeds, and as fill." MWG Post-Hr'g Br. at 28. However, 21(r)(1) read together with 21(d) only allows onsite storage and disposal (of minor amounts of waste). MWG's examples of offsite uses (e.g., "246,000 cubic yards of fly ash" used in the construction of the Melvin E. Amstutz Expressway, or ash used in the "building of highways like Interstate 55 and the foundation of the Sears Tower") are irrelevant. *Id.* at 28-29. 21(r)(1) doesn't allow for wholesale offsite uses like the Amstutz Expressway or the Sears Tower without limitation and these examples do not support MWG's argument that 21(r)(1) lifted the quantity limitations for onsite storage or disposal of coal ash.
[118] MWG Post-Hr'g Br. at 30.
[119] Pub. Act 101-171 (eff. June 30, 2019).

and 21(r), nor is there a conflict between Sections 21(r) and 21(a).[120] Section 21(a) of the Act prohibits open dumping. 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."[121] Section 21(a) is therefore focused on disposal. Section 21(r), on the other hand, is not limited to coal ash disposal, but also covers coal ash "storage." Section 21(r) clearly does allow for some amount of coal ash to be stored or disposed of onsite, if it falls within the Board's interpretation of Section 21(d)(1)(i)'s exemption for self-generated, onsite waste in minor amounts. Since a harmonious reading of these sections is plainly possible, MWG is wrong to suggest that Section 21(r) contradicted the *ComEd* decision,[122] and there is no reason to speculate about unstated legislative intent.

In the end, the application of Section 21 to this case is not complicated. MWG effectively concedes that we are not dealing with "minor amounts" of waste, stating that coal ash "is seldom found in small quantities."[123] The coal ash at issue here is therefore not eligible for the onsite disposal exemption in Section 21(d)(1)(i), and Section 21(d)(1)'s general prohibition of unpermitted waste disposal applies. Since the coal ash is not eligible for the exemption in Section (d)(1)(i), it is also not eligible for the exemption in Section 21(r)(1), and Section 21(r)'s general prohibition of unpermitted coal combustion residual ("CCR") storage or disposal applies. Ultimately, the coal ash disposal in MWG's open dumps (historic ash areas) is prohibited by all of these subsections—21(a) (open dumping), 21(d) (unpermitted storage, treatment or disposal of waste) and 21(r) (unpermitted storage or disposal of coal combustion waste). There is no conflict, and the 21(a) open dumping violations found by the Board must stand.

V. MWG'S PROPOSED REMEDY IS WHOLLY INADEQUATE

A. Removal is the Appropriate Remedy for Open Dumping Violations.

Given that MWG's open dumping violations stem, in large part, from a failure to remove coal ash from historic ash areas,[124] the remedy that would cause MWG to cease and desist from open dumping is removal. The Board has the authority to order removal and has done so in other

[120] MWG Post-Hr'g Br. at 27 ("Section 21(r) is the provision applicable to the historic fill areas at the MWG Stations, not Section 21(a)").
[121] 415 ILCS 5/3.305 (emphasis added).
[122] MWG Post-Hr'g Br. at 28.
[123] MWG Post-Hr'g Br. at 29.
[124] Bd. Interim Op. and Order, PCB 13-15 at 91 (June 20, 2019) ("MWG did allow consolidation of coal ash by failing to remove it from the fill areas and historical coal ash storage areas, and by allowing contaminants to leak into the environment").

open dumping cases.[125] In the *Johns Manville v. Illinois Department of Transportation* case, the Board clearly articulated the logic behind ordering removal: "IDOT continues to allow open dumping as long as ACM [asbestos containing materials] waste remains in these locations."[126] So too here—as long as MWG's open-dumped coal ash remains in the historic coal ash areas identified by the Board, the open dumping violations continue.

B. Any Remedy that Includes Monitored Natural Attenuation Must Also Include Source Control.

Complainants have explained that Monitored Natural Attenuation ("MNA") cannot be a stand-alone remedy for coal ash contamination, and multiple MWG witnesses agreed.[127] Yet MWG continues to argue that "the Stations fall within the conditions identified by USEPA for reliance on MNA."[128] MWG is misreading United States Environmental Protection Agency ("EPA") guidance. MWG cites a list of EPA factors for evaluating whether MNA is "appropriate."[129] The EPA factors do not help MWG for two reasons—first, MWG's proposed remedy fails the factors on their own terms, and second, the factors are not meant to be read in isolation but are instead part of a broader framework that also includes source control.

First, the MWG coal ash units fail to meet at least three of the EPA factors, including the very first factor ("[w]hether the contaminants present in soil or groundwater can be effectively remediated by natural attenuation processes").[130] As Complainants explained in our initial Post-Hearing Remedy Brief, inorganic contaminants like those at issue at the MWG plants are

[125] *See, e.g., People v. Intra-Plant Maint. Corp.*, PCB 12-21 at 11 (July 25, 2013) (ordering respondents to "cease and desist" from open dumping by removing the waste); *People v. J&F Hauling, Inc*., PCB 02-21, 2003 WL 728350, at *7 (Feb. 6, 2003) ("[W]ithin nine months J&F must remove the remaining open waste from its property to a properly permitted landfill").
[126] *Johns Manville v. Ill. Dep't of Transp.*, PCB 14-03, 2016 WL 7384358, at *21 (Dec. 15, 2016). *See also Johns Manville v. Ill. Dep't of Transp.*, PCB 14-03, at 5 (Aug. 3, 2023) ("As long as ACM waste remains on the subject property, IDOT's alleged violations continue"). Although the Board did not order removal in this case, that is presumably because the U.S. EPA had already done so, and a cleanup had already occurred, before the Board issued its remedy order. *Johns Manville v. IDOT*, PCB 14-03, at *4 (Dec. 15, 2016); *Johns Manville v. IDOT*, PCB 14-03, at 5 (Aug. 3, 2023) (cleanup was "largely completed" as of roughly 2016).
[127] Compls.' Post-Hr'g Br. at 45-46. *See also* May 18, 2023 Hr'g Tr. at 118:1-5 (MWG witness Richard Gnat testifying that "[Y]ou know, just standard monitored natural attenuation remedies aren't -- you have to have something additional in terms of source control, removal, whatnot, to augment that"); June 12, 2023 Hr'g Tr. at 202:23-203:5 (MWG witness Michael Maxwell testifying that "MNA is the process that's part of the evaluation of the GMZ. Typically, I mentioned the cap example. The cap is the active management aspect and the monitoring goes with that in order to evaluate whether or not the cap is actually having, in this example, the intended benefit").
[128] MWG Post-Hr'g Br. at 42.
[129] MWG Post-Hr'g Br. at 42 (citing MWG SOF 1022, which in turn cites Ex. 1104 at Comp_67366).
[130] Ex. 1104 at Comp_67365.

unlikely to be effectively remediated by natural attenuation processes.[131] This is especially true of pollutants like boron and sulfate, which are not subject to radioactive decay or immobilization.[132] Indeed, MWG's liability-phase expert John Seymour agreed that boron and sulfate are good coal ash indicators in part because they are so mobile.[133] MWG's proposed remedy also fails the sixth factor ("[w]hether the estimated timeframe of remediation is reasonable").[134] The record shows that MWG and its consultants never estimated a timeframe of remediation[135]—they have no idea how long it will take to restore groundwater quality—so MWG's proposed remedy automatically fails this factor. And MWG's proposed remedy also fails the seventh factor ("[t]he nature and distribution of sources of contamination and whether these sources have been, or can be, adequately controlled").[136] The record shows that MWG has failed to control any of the historic ash areas at its plants to date.[137] Going forward, MWG's proposed remedy would not include any source control on historic ash areas with one exception, and even that exception (a cap over the FSFA Area at Waukegan) is not "adequate" source control.[138] In addition, MWG is now planning to abandon one of the major source control requirements of the Compliance Commitment Agreements—the prohibition on using the ponds for permanent disposal.[139] In sum, a fair reading of the EPA factors for MNA, as applied to the MWG ash dumps and MWG's proposed remedy, leads to the conclusion that MNA is not appropriate at these sites.

The second reason why EPA's MNA factors do not help MWG is that the factors are only one part of a broader guidance framework. MWG fails to mention that the list of factors is immediately preceded by the following bold-font statement:

[131] Compls.' Post-Hr'g Br. at 45.
[132] 80 Fed. Reg. 21,301, 21456 (Apr. 17, 2015) ("[t]he high mobility of boron and sulfate explains the prevalence of these constituents in damage cases that are associated with groundwater impacts.").
[133] Feb. 2, 2018 Hr'g. Tr. at 258:1-16.
[134] Ex. 1104 at Comp_67365.
[135] *See, e.g.*, June 14, 2023 Hr'g Tr. at 13:17-14:15.
[136] Ex. 1104 at Comp_67366.
[137] Compls.' Post-Hr'g Br. at 10-12, 54-62.
[138] Compls.' Post-Hr'g Br. at 43-44. MWG is attempting to postpone even that inadequate source control. MWG Post-Hr'g Br. at 47 (citing June 13, 2023 Hr'g Tr. at 157:22-158:4) ("Weaver cautioned that, due to the pending federal and state rules for historic areas, MWG should not install the cap at this time.").
[139] *Id*. at 44-45.

> EPA expects that MNA will be most appropriate when used in conjunction with other remediation measures (*e.g.,* source control, groundwater extraction), or as a follow-up to active remediation measures that have already been implemented.[140]

So even if a site were to meet the EPA factors for MNA, it would still be subject to the broader requirement for source control or other active remediation measures. And again, MWG has failed to institute source control at any of the historic ash areas at its plants.

C. The Board Must Not Credit Claims of Compliance with Unwritten Rules.

MWG's argument that future compliance with rules that have not been promulgated constitutes "proper technical relief"[141] is plainly without merit. Even if MWG's promises to comply were credible,[142] the content of these future rules, and the basic question of whether they will be promulgated at all, renders the entire argument speculative and unreliable. Because they are so speculative, both this Board and Illinois Courts have consistently declined to presume future compliance with unwritten rules.[143]

D. MWG's Proposed Remedy for the Waukegan Former Slag/Fly Ash Storage Area is Inadequate and Unsupported by MWG's Own Expert Testimony.

Complainants have explained that a cap over the FSFA Area at Waukegan (described by MWG as the "FS Area") will not work, primarily because it will not stop ongoing leaching from saturated ash below the water table.[144] Complainants have also explained that MWG's experts failed to conduct the modeling necessary to predict how the proposed cap will affect local conditions.[145] Finally, Complainants have explained the one relevant case study in the record shows that a cap might actually makes things worse by increasing the amount of time that groundwater is contact with ash.[146]

To justify its preferred remedy, MWG misrepresents its own experts' testimony. The Weaver witnesses did <u>not</u> conclude that a cap over the FSFA Area would "driv[e] groundwater

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[140] Ex. 1104 at Comp_67365.
[141] MWG Post-Hr'g Br. at 45.
[142] Of course, they are not when offered in the context of an enforcement action for failure to comply with existing laws and regulations.
[143] *See, e.g.*, *Vill. of N. Aurora v. Ill. Env't Prot. Agency*, PCB 89-66, Bd. Op. and Order at 8 (Feb. 8, 1990) ("The Board declines, as unjustifiably speculative, to determine whether North Aurora would be in future compliance with the expected federal standards"); *Citizens Utils. Co. of Ill. v. Ill. Pollution Control Bd.*, 134 Ill. App.3d 111, 115 (1985) ("If ever the prospect of a future change in the law were justification for non-compliance with the law as it currently exists, such a rule cannot apply on these facts where the prospect of change is so speculative").
[144] Compls.' Post-Hr'g Br. at 43-44.
[145] *Id*. at 37-38, 43-44.
[146] *Id*. at 37-38, 43-44.

constituents to below Class I standards,"[147] nor could they have. In the testimony cited by MWG, the Weaver witnesses only stated that a cap "will help us drive the groundwater conditions to a condition below the Class 1 groundwater standards quicker than if nothing was done."[148] And in the section of the Weaver report cited by MWG, the authors state that a cap "is expected to reduce the time required for natural attenuation to restore groundwater concentrations to Class I Groundwater Quality Standards."[149] The Weaver witnesses appear to believe that concentrations are naturally declining, and that a cap will accelerate that process. This is not the same as suggesting that a cap alone will drive the restoration of groundwater quality. In any case, the underlying premise (naturally improving groundwater quality) is entirely unfounded, and the record shows that the Weaver witnesses have no idea how well the cap will work, because they did not do the modeling necessary to make that kind of prediction:

- The Weaver witnesses themselves testified that, at Waukegan, more trends were increasing than decreasing.[150] So conditions are not improving, and there is no "natural attenuation" for a cap to accelerate.
- The Weaver witnesses calculated that a cap would reduce the amount of precipitation percolating through the FSFA Area, but they did not estimate whether the cap would reduce leaching of pollutants from coal ash,[151] even though they are familiar with models that can be used to make such an estimate.[152]
- The Weaver witnesses did not estimate how long the cap would take to achieve compliance,[153] so they have no quantitative basis for saying that the cap will reduce the time needed to restore groundwater quality.

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[147] MWG Post-Hr'g Br. at 46-47.
[148] June 13, 2023 Hr'g Tr. at 157:18-21 (emphasis added)).
[149] Ex. 1701 at MWG13-15_81469.
[150] June 13, 2023 Hr'g Tr. at 145:18-145:20.
[151] *See* June 13, 2023 Hr'g Tr. at 286:6-286:18
("Q: Okay. So the HELP model doesn't estimate changes in leaching behavior, for example; is that right?
A: No, it doesn't. It simply models what the cap design you input how much infiltration and passage of water through that cap you're likely to see.
Q: Okay. So you can use the HELP model to calculate how much infiltration would change, but the HELP model doesn't give you a number for how much leaching would change, is that right?
A: Right. The HELP model simply looks at the infiltration through the cap.")
[152] *See id*. at 286:19-288:1
(Q: Okay. Are there other models that would be able to estimate changes in leaching behavior?
A: There would be models that you could attempt to use . . .)
See also id. at 287:17-288:1
(Q: And MODFLOW is -- I believe MODFLOW is one of those groundwater fate transport models that you were talking about earlier today?
A: That's correct.
Q: So that's the kind of model that you could use to estimate changes in leaching behavior?
A: Theoretically, that could be applied given the circumstances and the type of outcomes or the types of outputs you were looking for.).
[153] June 14, 2023 Hr'g Tr. at 13:17-14:15.

- Most importantly, the Weaver witnesses failed to account for leaching from the saturated coal ash below the water table at the FSFA Area,[154] which is a source of contamination even if a cap reduces the infiltration of precipitation.

Therefore, there is no basis to conclude that a cap will restore groundwater quality. Given the presence of a large volume of ash that will be subject to lateral infiltration of groundwater with or without a cap, it seems more likely that a cap will not restore groundwater quality. In fact, the record shows that a cap may even make things worse by increasing the amount of time that groundwater is in contact with coal ash.[155]

And nowhere did MWG's experts conclude, as MWG claims, that the ash below the water table in the FSFA Area at Waukegan "does not contain any significant level of constituents."[156] MWG appears to be inventing this testimony. What the Weaver witnesses actually said is that "there's a finite amount of inorganics that are contained in that ash that will leach out over time, and that amount of leaching will diminish with the passage of time."[157] They did not say that the amount of inorganics has become insignificant, or estimate how long it might take for that to happen. The expert testimony by MWG is also demonstrably false – record evidence shows that this ash does contain levels of constituents that are not only "significant," but also in excess of site remediation objectives. Specifically, when MWG's consultants conducted three leach tests of the ash in the FSFA Area, they all exceeded the Site Remediation Objectives ("SROs") for boron and molybdenum, and one exceeded the SRO for arsenic.[158]

In sum, the record and testimony in this case show that the coal ash buried at the FSFA Area is sitting in groundwater, that it is leaching coal ash pollutants at levels that exceed MWG's own SROs, and that MWG's preferred remedy will not stop that process and may make it worse. MWG's experts did not conclude that the ash below the water table only has insignificant amounts of coal ash constituents, nor did they conclude that a cap would drive groundwater quality below groundwater standards; even if they had made such statements, the record would not support either conclusion. The only way to reliably address the ongoing contamination from

[154] June 13, 2023 Hr'g Tr. at 285:3-286:5.
[155] Compls.' Post-Hr'g Br. at 43-44.
[156] MWG Post-Hr'g Br. at 47.
[157] June 13, 2023 Hr'g Tr. at 159:16-159:19.
[158] Ex. 1517 (leach test results); June 13, 2023 Hr'g Tr. at 259:16-261:19 (Weaver witnesses acknowledging that all of the relevant leach tests exceeded the SROs for boron and molybdenum); *see also* Ex. 1701 at MWG13-15_81487 (Weaver summary of leach test results).

the Waukegan FSFA Area—and the only remedy that would also cure MWG's open dumping violations—is to remove the coal ash from its present unconfined and water-logged location.

VI. THE BOARD CAN MANDATE THAT A PARTY TAKE SPECIFIC ACTIONS

Section 33(a) of the Act provides for the Board to "enter such final order, or make such final determination, as it shall deem appropriate under the circumstances."[159] There is no question that "[t]he Board…lacks the injunctive authority of the circuit courts."[160] However, under Section 33(b) of the Act, the Board is delegated the power to issue a "cease and desist" order which allows it to not only order a stop to violations but also craft a remedy that includes the steps that the violator is required to take to bring an end to the violations.[161]

MWG disagrees and attempts to argue that the Board's cease and desist authority is much narrower than the Board laid out in *Sierra Club v. Springfield*. MWG relies on *People v. Agpro* for its argument[162] even though *People v. Agpro* relates to the Board's authority under 42(e), not 33(b). MWG argues that there is no distinction between Section 42(e)'s use of the word "restrain" and Section 33(b)'s use of the words "cease and desist." MWG is incorrect, not just because of the different language but also because of the different applicability of the two provisions. Section 33(c) applies to all Board orders, including those in enforcement suits brought by citizens, while Section 42(e) applies only to civil actions by the State's Attorney or Attorney General for injunctions. The scope of injunctions under 42(e) is then further limited by the term "restrain." This context, plus the additional limitations contained in Section 42(e), demonstrates that 33(b) and 42(e) and are not analogous. *People v. Agpro* is not on point regarding Section 33(b) "cease and desist" orders.

MWG also attempts to minimize the holding in *Discovery South Group* where the Appellate Court held that the Board has broad remedial authority.[163] The Appellants in *Discovery South Group* argued that the remedy that the Board ordered went "beyond the scope of the

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[159] 415 ILCS 5/33(a); *Sierra Club v. Springfield*, PCB 18-11, Bd. Interim Op. and Order at 31 (citing 415 ILCS 5/33(b)) ("The Board's enforcement order 'may include' a direction to cease and desist from violations.").
[160] *Id.* at 30.
[161] *Id.* at 31 (citing *People v. Jersey Sanitation Corp.*, PCB 97-2, slip op. at 3-4, 38-39 (February 3, 2005) ("Illinois decisions reflect the generally acknowledged authority of the Board to take whatever steps are necessary to rectify the problem of pollution and to correct instances of pollution on a case-by-case basis."); *Disc. S. Grp., Ltd. v. Pollution Control Bd*., 275 Ill. App. 3d 547, 559 (1st Dist. 1995) (cited in *Sierra Club v. Springfield*, PCB 18-11, Bd. Interim Op. and Order at 31); *see also People v. Poland*, PCB 98-148, 2003 WL 21995867, at *11 (Aug. 7, 2003) (stating that "[t]he Board has broad authority to take whatever steps are necessary to rectify the problem of pollution…").
[162] MWG Post-Hr'g Br. at 50-51.
[163] MWG Post-Hr'g Br. at 51, n.27.

Board's powers."[164] The Appellate Court disagreed and concluded that "[t]he Board's final order is an exercise of the Board's power to order compliance."[165] MWG incorrectly argues that the Appellate Court's statements are dicta.[166] The statements are part of the legal reasoning required to make a judgment in the case. If the Court came to the opposite conclusion—that the Board had exceeded the scope of its authority—the Court would have, presumably, overturned the Board's decision. The Court needed to find that the Board acted within the scope of its authority to uphold the Board's decision. MWG also argues that without more explanation of the appellant's argument, it is not possible to interpret the decision.[167] No further explanation is needed to understand a beyond-the-scope-of-authority argument nor is any "interpretation" of the Court's decision needed. The appellant made a straightforward argument, the Court addressed it head on, and it is good law.

MWG next argues that the Board's remedial orders in specific cases hew to the Board's limited remedial authority.[168] MWG argues that in *People v. Poland,* the Board avoided ordering a remedy in a manner that was "mandatory" and, instead, the Board selected Respondent's remedy because, in doing so, there was a voluntary nature to the remedy.[169] However, nowhere in the *People v. Poland* order does the Board say that it is selecting the Respondent's remedy to avoid the "mandatory" nature of the People's remedy.[170] If MWG were correct in this proposition, then the Board would always have to select the respondent's proposed remedy or give the respondent a choice between ceasing the violations (and presumably ceasing business operations) or the imposition of a proactive remedy. But this is not the case in enforcement actions before the Board. The Board itself said that it "has broad authority to take whatever steps are necessary to rectify the problem of pollution and correct instances of pollution on a case-by-case basis. This includes a final order exercising the Board's power to order compliance with the

[164] *Disc. S. Grp., Ltd.*, 275 Ill. App. 3d at 559.
[165] *Id* at 560.
[166] "Dictum is an abbreviation of the Latin phrase 'obiter dictum.' As a legal term, …a dictum is any statement or opinion made by a judge that is not required as part of the legal reasoning to…make a judgment in a case." Legal Info. Inst., *.Dictum*, Cornell Law School, *available at* https://www.law.cornell.edu/search/site/_dictum?f%5B0%5D=bundle%3Awex_cck&retain-filters=1 (last visited Mar. 1, 2024).
[167] MWG Post-Hr'g Br. at 51, n.27.
[168] MWG Post-Hr'g Br. at 51-52.
[169] *Id.*
[170] *People v. Poland,* PCB 98-148*,* 2003 WL 21995867, at *9-11 (Aug. 7, 2003).

Act."[171]

Similarly in *Hoffman v. Columbia*, the Board also does not say that it is selecting the Respondent's remedy to avoid the "mandatory" nature of the Complainant's remedy.[172] The Board only noted that the Board "is limited to reducing the noise that has been demonstrated to be causing the nuisance … [and that] not all the requested control mechanisms are necessary in this case … ."[173] Thus, the Board identified the selected remedies for purposes of narrowly tailoring the remedy to the violations and not for the "voluntary" nature of the remedies.

MWG also cites to *Kaeding v. Pollution Control Board* to support its argument that the Board's cease and desist authority is narrow.[174] *Kaeding* does not support MWG's position. To the contrary, the *Kaeding* court confirms a broad grant of power to the Board.[175] The Board's power would be unreasonably hindered if it were limited to only remedies that violators themselves volunteered or were provided in a choice between ceasing the violations (which potentially involves ceasing some or all business activities) or some other proactive remedy.[176]

VII. SECTION 33C FACTORS

A. Character of Injury and Degree of Injury.

In discussing the character and degree of injury, MWG first points out that no one is drinking the contaminated water from MWG's sites and concludes that there is no harm as a result.[177] The Board, on the other hand, has found that Class I groundwater is being impacted, it exceeds Groundwater Quality Standards, and that renders the groundwater undrinkable.[178] As the Board correctly noted earlier in this case,

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[171] *Id.*, at *11 (citing *Disc. S. Grp. v. Ill. Pollution Control Bd.*, 275 Ill. App. 3d 547 (1st Dist. 1995)).
[172] *Hoffman v. City of Columbia,* PCB 94-146, 1996 WL 633343, at *17-19 (Oct. 17, 1996).
[173] *Id.*
[174] MWG Post-Hr'g Br. at 51, n.27.
[175] *Kaeding v. Pollution Control Bd.,* 22 Ill. App.3d 36, 38 ("The Supreme Court of Illinois in *City of Waukegan v. Pollution Control Board* (1974), 57 Ill.2d 170, 311 N.E.2d 146, has held, however, that the legislature has conferred upon the Illinois Pollution Control Board those powers that are reasonably necessary to accomplish the legislative purpose of the administrative agency; specifically the imposition of monetary 'penalties' for violation of the Environmental Protection Act, and necessarily the power to order compliance with the Act."); *see also Roti v. LTD Commodities*, 355 Ill.App.3d 1039, 1053 (2nd Dist. 2005) ("Section 33 of the Act vests the Board with wide discretion in fashioning a remedy.").
[176] *See* MWG Post-Hr'g Br. at 52 (citing *Hoffman v. Columbia*, PCB 94-146, 1996 WL 633343, *12 (Oct. 17, 1996) and *Roti v. LTD Commodities*, 355 Ill.App.3d 1039, 1054 (2nd Dist. 2005)). This is convenient for MWG who has already ceased ash-generating business activities at three out of four plants and ceased actively adding ash to ponds at those three planst.
[177] MWG Post-Hr'g Br. at App. A, App. B, MWG SOF 76, 161, 262, 361, 485, 709, 727, 803, 878, 931.
[178] Bd. Interim Op. and Order, at 11, 77-79 (June 20, 2019).

> a lack of current receptors at the four sites does not equate to an absence of environmental harm. The focus of this enforcement action, the adopted regulations in Part 845, and the rulemaking sub-docket in R20-19A is the preservation of the water, land and air of the State for future use.[179]

The Board and the Illinois General Assembly have already concluded that contaminating groundwater is an environmental injury.[180]

MWG argues this factor should weigh in MWG's favor and attempts to abdicate responsibility for the onsite coal ash impacts seen in the groundwater monitoring by pointing to the active ash ponds not being the source.[181] However, it does not matter whether the source of contamination is the active ash ponds, inactive ash ponds, or historic ash areas, or all of the above. The salient point is that coal ash at the MWG sites is contaminating groundwater. As the Board correctly stated in 2019, "[i]t is immaterial whether any specific ash pond or any specific historic ash fill area can be pinpointed as a source to find MWG liable.[182] Further, at Waukegan, Maria Race and MWG environmental consultants concluded that onsite coal ash is a source of contamination.[183] Ms. Race acknowledged that the initial groundwater results for MW-05 were consistent with her knowledge of an "old historic area."[184] Thus, even if the source at Waukegan is not the East and West Ponds, it is still an onsite source for which MWG is responsible.

In addition, in multiple Alternate Source Demonstrations ("ASDs"), MWG consultants repeatedly pointed to other onsite sources. MWG consultant Richard Gnat suggested that "another potential historical source in the vicinity of the ash ponds" was a possible source of coal ash constituents found in the groundwater.[185] The conclusion of the Waukegan ASD reiterated that the source was "other potential historical sources."[186] The Will County ASD even pointed to the presence of "ash leachate" in certain wells.[187] The Powerton ASD noted that the monitoring

[179] Bd. Order, PCB 13-15 at 6 (Dec. 15, 2022).
[180] Bd. Order, PCB 13-15 at 6 (Dec. 15, 2022); 415 ILCS 5/3.430.
[181] MWG Post-Hr'g Br. at 54.
[182] Bd. Interim Op. and Order, PCB 13-15 at 79 (June 20, 2019). MWG also argues that "the potential for injury is further reduced by the fact that three of the Stations have ceased burning coal completely, and therefore have ceased generating CCR." MWG Post-Hr'g Br. at 54. This would affect use of the coal ash ponds going forward, but for the historic ash areas and ponds that still contain coal ash and have not been emptied, changes in generation of coal ash make no difference.
[183] Bd. Interim Op. and Order at 67 (June 20, 2019) (discussing MW-05).
[184] Jan. 30, 2018 Hr'g Tr. at 162:4-16.
[185] Ex. 1315 at MWG13-15_70528; Ex. 1316 at MWG13-15_65105; Ex. 1317 at MWG13-15_65462; Ex. 1318 at MWG13-15_67198; Ex. 1320 at MWG13-15_69519.
[186] Ex. 1318 at MWG13-15_67203.
[187] Ex. 1320 at MWG13-15_69522.

wells at issue "are completed within areas of historical fill material placement which includes ash."[188] MWG's ASDs disprove MWG's own argument that it is not responsible for the source of the groundwater contamination at its plants. If the sources are in the vicinity of the ash ponds, MWG is still responsible and this factor weighs against MWG. [189]

Further, the fact that we cannot conclusively determine whether the sources at each site are onsite ash ponds or historic ash areas (or both) is precisely why an investigation is necessary—to ensure that every source is addressed. MWG argues that "[t]he MWG Stations have been extensively investigated[.]"[190] That may be true, but even if the stations have been investigated extensively, they have not been investigated adequately. The record shows that MWG has studiously avoided investigations of the historic ash areas identified by the Board, with one exception (the FSFA Area at Waukegan). Even after the Board specifically faulted MWG for not investigating these areas in its 2019 Order,[191] MWG has done virtually nothing to correct its error, which is one reason why MWG continues to be in violation of Illinois' open dumping prohibition. The character and degree of the injury factor supports Complainants' requested relief of a combination of investigation and removal of the sources of the groundwater contamination at all four plants.

B. Social and Economic Value.

Complainants discussed the "social and economic value" factor in our initial Post-Hearing Remedy Brief and will simply point out, again, that MWG's statistics are from 2020 and no longer reflect current conditions at the plants.[192] Three of the four plants have ceased coal or natural gas operations, retired units, cut jobs, and as a result no longer create the value discussed in MWG's initial Post-Hearing Brief or Brian Richard's expert report.[193] MWG's stations no longer create 1,300 jobs statewide but "created over 1,300 jobs statewide"—past tense.[194] MWG

[188] Ex. 1316 at MWG13-15_65108; *see also* Ex. 1316 at MWG13-15_65110; Ex. 1317 at MWG13-15_65674.
[189] MWG misstates the applicable federal standard for ASDs. According to MWG, "[t]he federal CCR rule does not require that the alternate source be identified." This is not true. The U.S. EPA has confirmed specifically regarding the ASD for the Waukegan Station that it must identify an alternate source. *See* U.S. EPA, Proposed Denial of Alt. Closure Deadline for Waukegan Generating Station at 39 (July 5, 2023), *available at* https://www.regulations.gov/document/EPA-HQ-OLEM-2023-0209-0001 (("A successful ASD will demonstrate that a specified source other than the CCR unit is responsible for the [exceedance]"); *id*. at 43 ("MWG failed to identify an alternate source.").
[190] MWG Post-Hearing Br. at 32.
[191] Bd. Interim Op. and Order, PCB 13-15 at 79 (June 20, 2019).
[192] Compls.' Post-Hr'g Br. at 17-19.
[193] MWG Post-Hr'g Br. at 55-57.
[194] MWG Post-Hr'g Br. at 57.

explicitly acknowledges that Mr. Richard's figures are out-of-date and cites no legal support for its assertion that the Board should consider the facilities' social and economic value at the time of the violations. To the contrary, Board authority on this point indicates that the Board considers the source's value "at the present time."[195] This conclusion has been echoed in other Board cases.[196]

Joliet is not operating, so under Board precedent, it is of little value.[197] According to MWG, "[e]ven though the Joliet 29 Station is not presently generating electricity, the Station still requires a staff, composed largely of Illinois residents, who will take care of the facility and its future use was unknown at the time the hearing."[198] MWG provides no figures for the size of the staff "tak[ing] care of the facility"—presumably quite small since Joliet 29 is not operating at all—and provides no figures for the salary paid to that staff. In addition, a completely unknown future use is of no value, especially since it contains multiple large coal ash dumps that have not been properly closed. In fact, properly cleaning up the ash would increase, not decrease, employment at the plants. It is reasonable to conclude that the Joliet 29 Station has no social or economic value.

In addition, MWG provides no figures for the value of the facilities as currently operating so any value is speculative.[199] MWG provides no figures for future jobs, salaries, or direct, indirect or induced value as battery storage facilities. MWG provides no concrete evidence that the plans for battery storage will come to fruition.[200] The plans for battery storage and thus an economic or social value based on battery storage is speculative. The Board considers economic and social value "at the present time" and not speculative future economic or social value.

Moreover, Board case law indicates that it is not the whole facility that should be weighed but the polluting unit at the facility. In *People v. Community Landfill*, the Board

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[195] *Citizens of Burbank v. Clairmont Transfer Co.*, PCB 84-125, 1986 WL 27205, at *8 (Dec. 18, 1986) ("Concerning the second factor, the Board finds that Clairmont is no longer socially or economically valuable, as it has ceased to operate at the facility and is presently in the process of liquidation. If the facility had been viable and operating at the present time, the Board would find some social and economic value of the pollution source.").
[196] *People v. Cmty. Landfill Co., Inc.,* PCB 03-191, 2009 WL 1747988, at *28 (Board ruling in favor of the People who argued that sources that have ceased operations have no social or economic value); *see also Wells Mfg. Co. v. Pollution Control Bd.*, 73 Ill. 2d 226, 235-236 (Illinois Supreme Court looked at the number of persons employed by the defendant and whether the defendant was an important supplier to the market).
[197] *People v. Cmty. Landfill Co.,* PCB 03-191, 2009 WL 1747988, at *28.
[198] MWG Post-Hr'g Br. at 59.
[199] MWG Post-Hr'g Br. at 58-59.
[200] *Id.*

concluded that waste treatment operations that no longer accept waste have no social or economic value.[201] As a result, even if MWG's operating facilities have value, the actual sources of contamination—the inactive ponds and historic ash areas—do not have any social or economic value. Only the ponds that are still accepting ash, the Ash Surge and Ash Bypass Basins at Powerton, might continue to have any value.[202] Every other pond has no value. Finally, the Board concluded in *IEPA v. Bernardi* that open dumps have negative value.[203] All the areas that the Board has found to be open dumps[204] have negative social and economic value.

Finally, the figures that MWG provides for the tax payments are also out of date.[205] MWG states that these figures are also based on "2020 alone."[206] As discussed above, three of the four MWG plants have ceased coal or natural gas operations, retired units, cut jobs and as a result will no longer pay taxes at the same level as 2020. As a result, the social and economic value of the facilities does not weigh in Respondent's favor.

C. Suitability to the Location.

Complainants covered this factor at length in our initial Post-Hearing Remedy Brief and will not repeat that discussion here except for one element—environmental justice. Consideration of environmental justice impacts has increased in recent years and especially in the 50-100 years that MWG's plants operated. In recent years, the General Assembly has increased its focus on environmental justice, especially in the context of coal ash. That emphasis can be seen in the language of the CAPPA.[207] The legislature, in enacting the CAPPA, recognized the importance of protecting and improving the "well-being of communities in this State that bear disproportionate burdens imposed by environmental pollution."[208] CAPPA requires the identification of areas of environmental justice concern in relation to surface CCR impoundments and prioritization of CCR surface impoundments in those areas when they are required to close.[209] For far too long, pollution has overburdened minority and low-income

[201] *People v. Cmty. Landfill Co.,* PCB 03-191, 2009 WL 1747988, at *28.
[202] MWG Post-Hr'g Br., App. A, App. B, MWG SOF 65, 154, 168, 173, 179, 691, 694.
[203] *Ill. Env't Prot. Agency v. Bernardi*, PCB 75-447, 1977 WL 9936, at *2 ("We are dealing with simply an open dump, which has a highly negative social and economic value.").
[204] Bd. Interim Op. and Order, PCB 13-15 at 86-91 (June 20, 2019).
[205] MWG Post-Hr'g Br. at 57-58.
[206] *Id.* at 57.
[207] Complainants are not arguing for the application of CAPPA in this proceeding. Complainants cite CAPPA merely to demonstrate the legislature's emphasis on the importance of environmental justice considerations, especially when addressing coal ash sources of contamination.
[208] 415 ILCS 5/22.59(a)(5).
[209] *Id*. 5/22.59(g)(8), (9).

communities, and CAPPA recognizes the need to prioritize environmental justice.

Three of the four MWG plants at issue in this proceeding are located in designated areas of environmental justice concern.[210] MWG's discussion of the prevalence of Superfund sites in Waukegan as a justification for a less-stringent remedy (e.g., capping the FSFA Area instead of removing the ash) is directly contrary to environmental justice principles.[211] MWG suggests that Waukegan, a community already overburdened with pollution and toxic waste, should be saddled with more pollution and open dumps instead of less, exacerbating environmental injustice and turning the area into a sacrifice zone. Arguing that any of the environmental justice communities in which these three plants are located are suitable to the location because they are industrial communities, contain Superfund sites, or are already polluted will perpetuate the status quo in which low-income individuals and people of color bear a disproportionate share of pollution, an outcome that the Illinois General Assembly seeks to avoid.

D. Technically Practicability and Economic Reasonability.

MWG argues that its proposed remedy is technically practicable and economically reasonable. It is, of course, true that doing practically nothing is technically practicable and economically reasonable for MWG but the cases that MWG cites for supporting its remedy, *Hoffman v. Columbia* and *Gott v. M'Orr Pork*, are not analogous. The remedy rejected in those cases was moving the whole facility and all operations, not removing just the source of pollution.[212] Complainants have not requested moving the entirety of any of the plants. Complainants have only requested the removal of the ponds consistent with what MWG agreed to in the CCAs and also removal of certain discreet historic ash areas where the ash is in contact with groundwater.

MWG also cites *People v. Poland*, but that case is distinguishable. In *People v. Poland*, the Board concluded that "potential environmental harm in this instance is minimal."[213] Here, by contrast, the Board has correctly found "ongoing environmental harm at the four Stations," in the

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[210] Ill. Env't Prot. Agency's Pre-Filed Answers*, In re Standards for the Disposal of Coal Combustion Residuals*, R2020-019 at 181-82 (Aug. 3, 2020) (for Joliet and Waukegan designation); *see* Ill. Env't Prot. Agency EJ Start Tool, *available at* https://www.arcgis.com/apps/webappviewer/index.html?id=f154845da68a4a3f837cd3b880b0233c (last visited Dec. 18, 2023).

[211] MWG Post-Hr'g Br. at 59-60.

[212] *Hoffman v. City of Columbia,* PCB 94-146, 1996 WL 633343, at *11-12 (Oct. 17, 1996); *Gott v. M'Orr Pork, Inc.,* PCB 96-68, 1997 WL 85191, at *18 (Feb. 20, 1997).

[213] *People v. Poland*, PCB 98-148, 2003 WL 21995867, at *10.

form of multiple pollutants that are harmful to human health at levels that would be unsafe for human exposure.[214]

MWG repeatedly misstates that one of the Section 33(c)(iv) factors is whether the remedy is "technically practical and economically reasonable."[215] By suggesting that the factor requires the remedy to be technically practical and economically reasonable, MWG is changing the meaning of the factor. Section 33(c)(iv) in fact requires the Board to consider "the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source."[216] Practicable is defined more narrowly than practical.[217] Practicable means "capable of being put into practice or of being done or accomplished."[218] Practical means "useful" or "not theoretical or ideal."[219] Practicable is a synonym of feasible, while practical is not.[220] In other words, when MWG argues that a remedy is "impractical", it means that remedy might not be useful but what MWG fails to assess, and what the Section 33(c) factor requires assessment of, is whether that remedy is possible.[221] By only assessing usefulness, MWG and the Weaver witnesses failed to assess whether it would be technically feasible to conduct any further investigations. Nonetheless, all the previous investigations that have been conducted of certain ash fill areas (e.g., the Waukegan FSFA Area) demonstrate that it would be technically feasible to investigate the areas that have yet to be assessed: Joliet 29 Northeast Ash Landfill (the Northeast Area), Northwest Area, Southwest Ash Landfill (the Southwest Area), Coal Ash in Fill Areas Outside Ash Ponds; Powerton East Yard Runoff Basin, Coal Ash Fill Throughout the Site, Areas Where Coal Ash Cinders Were Stored

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[214] Bd. Order, PCB 13-15 at 5-6 (Apr. 16, 2020). For the Waukegan plant, the IEPA has similarly determined that there is ongoing environmental harm. *See* Ex. 1408 at 20, para. 57 ("The detection of CCR related constituents in excess of applicable groundwater protection standards shows that Grassy Field presents the environmental and human health risks").
[215] MWG Post-Hr'g Br. at 62; *see also id*. at 2, 3, 20, 31, 48, 61, 64, 68, 85.
[216] 415 ILCS 5/33(c)(iv).
[217] The Grammarist, *Practicable vs. Practical, available at* https://grammarist.com/usage/practical-practicable/#:~:text=Something%20that%20is%20practical%20is,of%20being%20put%20into%20practice (last visited Feb. 20, 2024).
[218] Merriam Webster Online Dictionary, *Practicable, available at* https://www.merriam-webster.com/dictionary/practicable (last visited Feb. 20, 2024).
[219] Merriam Webster Online Dictionary, *Practical*, *available at* https://www merriam-webster.com/dictionary/practical (last visited Feb. 20, 2024).
[220] The Grammarist, *Practicable vs. Practical, available at* https://grammarist.com/usage/practical-practicable/#:~:text=Something%20that%20is%20practical%20is,of%20being%20put%20into%20practice (last visited Feb. 20, 2024).
[221] *See, e.g.,* MWG Post-Hr'g Br. at 61 ("Weaver concluded that it would be technically impractical and economically unreasonable to conduct any further investigations.").

on Land; Waukegan Coal Ash in Fill Areas; and Will County Former Slag and Bottom Ash Placement Area.

A case cited by MWG, *Holmes Bros., Inc. v. Merlan, Inc*., at the very outset of its initial Post-Hearing Brief, also provides yet another example of how the Board can order an investigation (a necessary first step for remedy in this proceeding) and how an investigation is technically practicable, economically feasible, and passes legal muster.[222]

> We, therefore, will order Merlan to submit a program for the control of this part of the operation, which submission shall include a detailing of what can be done, at what cost, and in what amount of time. One of the areas which should be covered is the technical feasibility and cost of enclosing the stockpile area. It will be ordered that the report should be filed with the Board and the Agency within 45 days from the date of the Board's order … .[223]

The remedy proposed by Complainants—removal of ponds and certain historic ash areas—is consistent with Part 845. MWG will simply need to submit updated permit applications for closure of the ponds under Part 845 and specify removal instead of closure-in-place for any that were already submitted with closure in place as the selected closure method.

MWG argues that "[a]ny order to conduct response actions in … any … area of historic ash, before the pending federal and Illinois rulemakings are finalized would be economically unreasonable and technically impracticable" and "likely to conflict".[224] MWG does not explain how taking the most protective course of action—removal—could ever conflict with pending Illinois or federal rules. Installation of systems, like a pond liner, can understandably conflict with later requirements if the liner doesn't meet the rule's specifications. In its most recent proposed revision to federal coal ash regulations, EPA explained that the definition of coal combustion residual management unit ("CCRMU") would "include any other areas where the solid waste management of CCR on the ground has occurred, such as structural fill sites, CCR placed below currently regulated CCR units, evaporation ponds, or secondary or tertiary finishing ponds *that have not been properly cleaned up*."[225] In other words, in areas where CCR has been properly cleaned up—e.g., by removal—it would not fall within the definition of CCRMU. With removal, there would not be a conflict between a Board-ordered cleanup and

[222] *Emps. of Holmes Bros., Inc. v. Merlan, Inc*., PCB 71-39, 1971 WL 4356 (Sept. 16, 1971).
[223] *Id.,* at *4.
[224] MWG Post-Hr'g Br. at 63.
[225] *See, e.g.,* 88 Fed. Reg. 31982, 32034 (May 18, 2023) (the "Federal Legacy Rule") (emphasis added).

state or federal legacy coal ash rules.

E. Subsequent Compliance.

The final factor that the Board considers in determining a remedy is "any subsequent compliance."[226] Once again, MWG disregards the basic meaning of the terms used in the factors. "Subsequent" means "following in time, order, or place"[227] which, in the context of this case, means following the Complaint in time or at least following the onset of the violations at issue in the complaint.[228] MWG provides us with a long list of activities related to the ash ponds that came before the filing of this Complaint and therefore are not "subsequent" compliance, and were not directed at resolving the violations identified in the Complaint.[229] For instance, MWG points to the hydrogeological assessments and installation of groundwater monitoring at the behest of IEPA, all around 2010, as somehow "subsequent" compliance with statutes and regulations identified in a Complaint that was not filed until 2012. MWG also points to numerous pond relining projects that took place in 2010 or earlier, all before MWG had any monitoring results that indicated violations.[230] This is not independent action that brought about compliance and is therefore not subsequent compliance for purposes of Section 33(c).

MWG also points to the state and federal coal ash rules and MWG's "work required to comply to each similar but not identical rule"[231] as subsequent compliance. Yet again, these are not efforts to come into compliance with the laws at issue in the Complaint—the Illinois Environmental Protection Act and Groundwater Quality Standards.[232] Efforts towards compliance with state and federal coal ash rules should carry no weight under Section 33(c) when MWG has not achieved compliance with the Act or the Groundwater Quality Standards and cannot point to any specific efforts directed at coming into compliance with the regulations and laws in play in this proceeding.

IEPA v. Barry makes it very clear as to when subsequent compliance weighs in favor or

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[226] 415 ILCS 5/33(c).
[227] Merriam Webster Online Dictionary, *Subsequent, available at* https://www.merriam-webster.com/dictionary/subsequent (last visited Feb. 20, 2024).
[228] *People v. QC Finishers Inc.,* PCB 01-07, 2004 WL 1615869, *14 (July 8, 2004); *see also Ill. Env't Prot. Agency v. Barry*, PCB 88-71, 1990 WL 271319, at *52 (May 10, 1990) ("Where the courts and the Board have considered this factor the respondent had complied with the Act and regulations either before the complaint was filed or at least before the Board's decision.").
[229] MWG Post-Hr'g Br. at 65.
[230] MWG Post Hr'g Br. at App. A, App. B, MWG SOF 21, 95, 96, 285, 286, 448, 531, 544, 599, 600, and 602.
[231] MWG Post-Hr'g Br. at 65.
[232] 415 ILCS 5/12(a), 12(d), 21(a); 35 Ill. Adm. Code 620.

against a Respondent.[233] Since MWG has not taken independent action to bring about compliance and compliance with the Act and Groundwater Quality Standards has not been achieved, this factor weighs against MWG and in favor of a higher penalty.

VIII. SECTION 42(h) PENALTY FACTORS

In its initial Post-Hearing Brief addressing the penalty calculation, MWG relies on a series of factual misstatements, misstatements of law, and biased expert testimony from Gayle Koch, in an effort to counter the clear facts in the record. In the following sections, Complainants address each of these issues in turn.

A. MWG's Attempts to Reduce the Timeline of Its Noncompliance Rely on Misstatements of Law and Misleading Statements of Fact.

In its discussion of the duration and gravity of violations, MWG throws out a series of nonsensical ideas for how to elide the fact that its units have been out of compliance with Illinois Law for over a decade.

i. The existence of GMZs at Joliet 29, Will County, and Powerton stations has no impact on Complainants' maximum penalty calculation.

MWG first argues that the Section 12(a) liability for civil penalties should end at Joliet 29, Will County, and Powerton as of the date they entered into GMZs.[234] But nothing in the GMZ program indicates that it is intended to grant a site owner a blanket shield from liability for any contamination at a site: here, the GMZs arose from CCAs specifically targeting MWG's ash impoundments; they do not mention, much less address, historic ash or other ash that may be scattered across the sites.[235] Indeed, it would be absurd to allow a regulatory remediation program focused on cleaning up one part of a site to shield the site owner from liability for contamination found in an entirely different part of the site. Since we do not know how much groundwater contamination at each site comes from units that were not addressed by the CCAs that created the GMZs, there is a very good reason to maintain MWG's Section 12(a) liability for that groundwater contamination even after the GMZ start date.

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[233] *Ill. Env't Prot. Agency v. Barry*, PCB 88-71, 1990 WL 271319, *52 (1990) ("For this reason, the penalty calculation will not be reduced since this is not a situation where the respondent's independent acts, rather than enforcement, has brought about compliance.").

[234] MWG Post-Hr'g Br. at 67. As an initial matter, Complainants note that the estimated penalty *already* acknowledges the GMZs by excluding the multiple years of Part 620 groundwater quality standards that MWG exceeded; this is part of why Complainants' calculation of a maximum statutory penalty was conservative. Compls.' Post-Hr'g Br., App. 2: Statutory Maximum Penalty Calculation.

[235] Exs. 242, 254, 276.

Broader legal principles also weigh in favor of including 12(a) violations in the maximum penalty calculation even after a GMZ is established at a site. As Complainants explain in Section II.B., regulatory programs may not modify statutory obligations; that claim is a perversion of the proper relationship between statutes (which are absolute) and regulations (whose purpose must always be to appropriately implement a statute). To the extent possible regulatory provisions should be read as not expanding nor narrowing any statutory provisions. Thus, there is no basis for MWG's claim that, because of its entry into GMZs at three of the four plants, it should be avoid its ongoing culpability under Section 12(a). This is particularly true because Section 12(a) violations are not exclusively reliant on exceedances of Part 620 standards; as explained in Complainants' opening brief, the Section 12(a) violations are based on a combination of Part 620 exceedances and exceedances of the 90th percentile of background levels.[236] Exemption from Part 620 standards therefore does not negate the Section 12(a) violations the Board has identified. Maintaining 12(a) penalties in the calculation is also consistent with the stated purpose of the GMZs, as this Board has already held *in this case*: "[c]ompliance with a permitted GMZ would provide . . . immunity from violating the Part 620 standards but not Section 12(a)."[237] Complainants have already accounted for MWG's effective immunity from Part 620 exceedances by excluding them from the penalty calculation; nothing justifies doing the same with 12(a) violations.

In addition, MWG simply ignores its liability under Section 21(a), a statutory provision that is entirely separate from Section 12(a) and Part 620 groundwater quality standards.[238] MWG's numerous violations of Section 21(a) must also be included in any penalty calculation, and they are not affected by the GMZs.

ii. There is no basis for the Board to give MWG a free pass for its continued noncompliance during bankruptcy.

MWG also argues that the Board should exclude from penalty calculations the period when MWG was in bankruptcy proceedings.[239] In support of this argument, MWG offers no factual support, and no legal citations. MWG does not even offer the discharge petition of the bankruptcy proceeding, which would provide information on the details and outcome of the

[236] Compls.' Post-Hr'g Br., App. 2: Statutory Maximum Penalty Calculation.
[237] Bd. Interim Op. and Order, PCB 13-15 at 77 (June 20, 2019) (internal quotes omitted).
[238] MWG Post-Hr'g Br. at 67.
[239] MWG Post-Hr'g Br. at 68.

proceeding, including which liabilities were or were not maintained coming out of bankruptcy.[240] The only "evidence" it offers is the testimony of MWG's own hired expert, who has no legal basis for her claim that it would be "unreasonable" to assess penalties based on noncompliance during a bankruptcy proceeding that did not discharge environmental liabilities.

The Board correctly concluded that the bankruptcy court's order "does not purport to prohibit the imposition of penalties upon a showing that MWG has violated the Act….The Board retains authority under the Act to impose penalties in this case if warranted…".[241] There is no evidence of the bankruptcy discharging any environmental liabilities faced by MWG, and no evidence that the bankruptcy proceeding prevented MWG from improving its management of coal ash at the four plants, so there is no legal basis for the Board to mitigate any penalty based on the bankruptcy proceeding. Nor is there any precedent for such an outcome; indeed, there are multiple examples of bankrupted polluting entities nonetheless being held responsible for the environmental degradation they caused.[242] MWG is no longer in bankruptcy and has not been for many years, but it has continued to fail to remediate contamination at the four plants. Because MWG's failure to remediate did not stem from the bankruptcy, but was in fact ongoing before, during and after bankruptcy, the bankruptcy proceedings should not be a basis to mitigate penalties.

iii. Failing to penalize MWG for its continued noncompliance during the course of this proceeding would reward MWG for its refusal to take responsibility for contamination at the plants.

MWG argues that the very existence of this enforcement matter for the past ten years should shield it from liability for its misdeeds.[243] Again there is simply no legal basis for MWG's request. The case MWG cites, *People ex rel. Raoul v. Lincoln, Ltd.*, is nonprecedential due to operation of Illinois Rule 23 as explained above,[244] and should therefore be disregarded by the Board. Here, MWG had multiple avenues available to it to attempt to remediate the worst of the

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[240] *Id.*
[241] Bd. Order, PCB 13-15 at 15 (April 17, 2014) (internal citations omitted).
[242] *See, e.g., People v. Cmty. Landfill Co.*, PCB 197-93, 2012 WL 1227674, at*15 (Apr. 5, 2012) ("The Board concludes that neither the involuntary dissolution of CLC nor the bankruptcy filing of Robert Pruim should affect the scope of the Board's apportionment of civil penalty."); *People v. Michel Grain Co., Inc.,* PCB 96-143, 1996 WL 454972, at *6 (Aug. 1, 1996) ("Status as a debtor in bankruptcy does not authorize a company to maintain a current nuisance or otherwise excuse it from current compliance with the environmental laws of that state. (*Ohio v. Kovacs*, 469 U.S. 274, 285 (1985).").
[243] MWG Post-Hr'g Br. at 68.
[244] *People ex rel. Raoul v. Lincoln, Ltd.*, 2021 IL App (1st) 190317-U; *see also supra* at n.34.

contamination its sites have caused; indeed, as Complainants have already explained, remediation of contamination during litigation is explicitly considered as part of the due diligence factor discussed below.[245] If the Board ignores the past decade of inaction by MWG, it will only strengthen the incentive corporate polluters already have to delay, obfuscate, and do nothing in response to enforcement suits, while tying Illinois courts up in endless litigation and appeals.

Moreover, MWG has played a huge role in the delay of the case. MWG implies that the case has been delayed largely due to a combination of Board decisions and Complainants' delays, and then overstates the length of those delays.[246] In reality, the Board's timeline for reaching decisions accounts for at most a year of delay, and Complainants account for only another four months.[247] Meanwhile, at every stage of this litigation, MWG has dragged its feet and worked to delay resolution of Complainants' claims, through requests for excessively long briefing schedules,[248] re-litigation *ad nauseum* of Board decisions,[249] and multiple motions to stay the case entirely, even prompting Complainants to seek sanctions to prevent further delay by MWG.[250] If MWG is excused for its significant share of the delay in this proceeding by avoiding penalties, it will be rewarded for its foot dragging, which is not an outcome the Board should allow.

B. Demonstrating Harm Does Not Require Proof of Current, Active Exposure.

MWG also argues, yet again, that the gravity of harm is limited because exposure to potable drinking water wells is limited.[251] MWG has repeatedly refused to acknowledge the severity of its violations, and to take responsibility for groundwater contamination, an issue that prompted the Illinois legislature to adopt the Groundwater Protections Act.[252] The Board has

[245] Compls.' Post-Hr'g Br. at 54-55.
[246] MWG Post-Hr'g Br. at 68.
[247] MWG references a delayed January 2022 hearing, but Complainants are only aware of a planned January 2023 hearing that had to be pushed back due to a personal emergency impacting one of Complainants' chief counsels.
[248] *See, e.g.*, Midwest Generation, LLC's Mot. for Extension of Time to File Post-Hr'g Br., PCB 13-15 (Oct. 16, 2023).
[249] *See infra* Section VI.D.
[250] Compls.' Mot. for Sanctions and Mem. in Supp. of Mot. for Sanctions, PCB 13-15 (Feb. 18, 2022), at para. 1-10 (listing the several times MWG asked to stay proceedings). The single delay in this case precipitated by Complainants was to the January 2023 hearing due to a personal emergency, which did not delay the case by "six to eight months" as MWG claims, because the rescheduled hearing occurred *only four months later*.
[251] MWG Post-Hr'g Br. at 67.
[252] 415 ILCS 5/3.430; *see infra* Section VI.A.

already conclusively determined that connection to an active drinking water well is not a precondition for demonstrating harm,[253] and so its absence cannot insulate MWG from penalties.

C. Gayle Koch Has Offered Opinions That Go Beyond Her Area of Expertise.

MWG relies extensively on the expert testimony of Gayle Koch in concluding that it demonstrated due diligence in its management of the four plants, and that the economic benefit it accrued from its noncompliance was only $52,958.[254] Among Ms. Koch's claims is one claim that Complainants agree with; namely, that the value of expert testimony is only as strong as the demonstrated impartiality of that expert.[255] However, Ms. Koch is far from impartial; in order to put her client in the best possible light, Ms. Koch has consistently opined on issues that go far beyond her expertise, and has made numerous unsubstantiated assumptions, and has ultimately produced a fundamentally flawed and unreliable estimate of MWG's economic benefit

i. Ms. Koch has opined on matters that are outside the scope of appropriate expert testimony, and outside the scope of her stated expertise.

Ms. Koch has also offered several opinions on legal matters on which she has no expertise. For instance, she offered an "opinion" that it is unreasonable for courts to assess penalties accrued during bankruptcy periods, because "during that time MWG carried very large negative income numbers."[256] In reaching this opinion, Ms. Koch did not provide any evidence that she had any expertise in bankruptcy proceedings; instead Ms. Koch offered a lay opinion largely on a matter of law.

The same problem with Ms. Koch's bankruptcy testimony crops up repeatedly in other contexts. Ms. Koch's testimony that the economic benefit analysis should assess MWG's economic benefit from delayed compliance only up to the date of the GMZ initiation at Joliet 29, Powerton, and Will County; and up to the liability determination cutoff for Waukegan[257] is a clearly incorrect legal conclusion that aligns with MWG's false view of the case but ignores ongoing water pollution and open dumping violations. Ms. Koch is similarly not offering anything like proper expert opinion when she opines that MWG should not be punished for historic ash that was placed before MWG acquired the four plants.[258] And Ms. Koch has even

[253] Bd. Order, PCB 13-15 at 6 (Dec. 15, 2022).
[254] MWG Post-Hr'g Br. at 71-74.
[255] *Id.*
[256] June 15, 2023 Conf. Hr'g Tr. at 132:14-19.
[257] Ex. 1901 at MWG13-15_82219.
[258] June 15, 2023 Conf. Hr'g Tr. at 79:18-81:21.

reached the mystifying conclusion that a penalty would serve no purpose because "from the Board's order it appears [MWG] is following what the regulators would like it to do."[259] This opinion is clearly belied by IEPA's violation notices issued to MWG, by the Board's finding of numerous, widespread, and ongoing violations in the 2019 Interim Opinion and Order, and the fact that these same violations are still ongoing five years later.

ii. Ms. Koch's focus on on-time versus delayed compliance costs is inapposite.

Among Ms. Koch's criticisms of Mr. Shefftz (which are discussed further below) is her contention that Mr. Shefftz made a mistake in not offsetting MWG's economic benefit by ash liner and groundwater monitoring costs that MWG might have avoided in an on-time compliance scenario.[260] As an initial matter, both Ms. Koch and Mr. Shefftz made clear their understanding, based on the BEN Model, that any actual costs that might have been avoided in an on-time compliance scenario should be credited against the economic benefit of noncompliance. Mr. Shefftz also made clear that he was not qualified to opine what costs should qualify for that designation; he relied on instructions from Complainants' counsel.[261] And yet, Ms. Koch accused Mr. Shefftz of erring in not including certain offsetting costs, despite having no particular expertise in knowing whether those costs should qualify for that designation.[262]

Ms. Koch's focus on offsetting liner and groundwater monitoring costs runs directly contrary to longstanding Illinois legal precedent. In *Illinois v. Pandhandle Eastern Pipeline Co.*, the Board refused to allow a defendant to offset its economic benefit calculation with costs that could have been avoided in an on-time compliance scenario.[263] As part of that determination, the Board noted that "[a]ny extra compliance costs from [delayed compliance] are self-imposed and exist solely because the violator did not pay to comply on time."[264] This decision was used as part of the basis for a subsequent case, in which an Illinois appellate court affirmed the Board's decision not to offset a defendant's costs to account for additional (solvent) costs that would not have been expended in an on-time compliance scenario.[265] In reaching that conclusion, the court

[259] June 15, 2023 Conf. Hr'g Tr. at 85:22-89:4 (demonstrating not only that Ms. Koch held this opinion when deposed in the course of this litigation, but that she tried to walk the opinion back on the stand when asked about it by Complainants' counsel).
[260] Ex. 1901 at 23-24.
[261] June 15, 2023 Conf. Hr'g Tr. at 62:15-63:1; Ex. 1203 at 14.
[262] Ex. 1901 at 19.
[263] *Ill. v. Panhandle E. Pipeline Co.,* PCB 99-191, Bd. Op. and Order at 32 (Nov. 5, 2001).
[264] *Id.*
[265] *Toyal Am., Inc. v. Ill. Pollution Control Bd.*, 2012 IL App (3d) 100585, ¶ 52 (2012).

acknowledged that the BEN model, which Mr. Shefftz helped develop and Ms. Koch used in her analysis, suggests that such costs should be offset—and then pointed out first that this offsetting is not mandatory and second that "the BEN Manual is not binding upon the Board."[266] This Board is not bound by the BEN Manual, but it is bound by controlling precedent. Thus, even if the Board were to accept MWG's contention that certain ash liner and monitoring costs would have been avoided in an on-time compliance scenario (which Complainants do not concede has been adequately demonstrated), Board and state law precedent nonetheless counsel against actually offsetting those costs against an economic benefit calculation.

iii. Ms. Koch's opinions within the scope of her claimed expertise are not supported by the evidence in the record.

Even where she opines on matters ostensibly within her expertise, Ms. Koch's presentation of evidence has been selective and misleading. The best example here comes from Ms. Koch's conclusion that MWG has shown "extensive diligence to comply."[267] Ms. Koch supports her conclusion that MWG exercised due diligence with nothing more than a description of what efforts MWG has undertaken, followed by a statement that "based upon her experience" those efforts are remarkable.[268] Notably absent from this analysis is any mention of the myriad due diligence activities that were not undertaken, and that might have actually remediated the four plants.

Ms. Koch's analysis also misrepresents the voluntary nature of certain compliance activities. Ms. Koch presents in her report a table (Table 1) purporting to show "Timeline of Major Due Diligence/Compliance Activities at MWG Stations," and she introduces the table as demonstrating MWG's "self-assessment program."[269] But when asked about this list at the hearing, Ms. Koch conceded that some of the activities she represented in her report as "major due diligence/compliance activities" were not in fact voluntary; that is, they were required of MWG by a state or federal entity.[270] Ms. Koch failed to describe which activities in Table 1 were voluntary or not, and when asked about this at hearing she was only able to offer her belief that activities labeled as "voluntary" were, in her view, voluntary.[271] This is a significant muddying

[266] *Id.* (quoting *People v. Packaging Personified, Inc.*, Ill. Pollution Control Bd. Op. 04–16 at 37 (Sept. 8, 2011)).
[267] MWG Post-Hr'g Br. at 70.
[268] *Id.*
[269] Ex. 190 at 16-17.
[270] June 15, 2023 Conf. Hr'g Tr. at 91:23-92:2
[271] June 15, 2023 Conf. Hr'g Tr. at 93:15.

of her analysis: the due diligence factor evaluates efforts made by a defendant to comply with the statute that has actually been violated.[272] Here, MWG has remained consistently out of compliance with the statutes at issue in this case; giving MWG credit for mandatory activities undertaken in response to a completely different set of statutory obligations would undermine the meaning of due diligence. Ms. Koch's failure to evaluate or even to denote that distinction undermines the strength of her conclusion.

In addition, Ms. Koch's refusal to consider the Illinois-specific context also improperly biases her assessment of the deterrent effect of a penalty. In her report, Ms. Koch suggests that the deterrent effect of a large penalty would be "questionable" because "[i]t is unlikely that additional coal ash ponds will be built in the future"[273]— while this may be true for the four plants at issue here, it ignores Illinois's very long history of groundwater contamination that prompted the legislature to pass the CAPPA in 2019.[274] In making this evaluation, Ms. Koch apparently did not consider the deterrent effect in relation to all of the existing, active coal ash impoundments and other coal ash disposal areas (or, more broadly, to polluters in other industries).

More evidence of Ms. Koch's unreliability even within her stated expertise, in service of her client's interests, comes from some of her baseless critiques of Complainants' witness Jonathan Shefftz. For instance, Ms. Koch criticized Mr. Shefftz in her report for his selection of MWG's parent company NRG's Weighted Average Cost of Capital ("WACC") as a better approximation for MWG than a generic market value.[275] After Mr. Shefftz explained in his responsive report that while he agreed NRG was an imperfect analogy it was better than a generic market WACC,[276] Ms. Koch acknowledged in her deposition that she was "persuaded by" Mr. Shefftz's explanation and agreed that NRG was a better choice than the generic market (even if it was not a perfect approximation). When asked about this testimony at the hearing, Ms. Koch refused to confirm this, and had to be reminded through a recitation of her deposition

[272] *People v. IronHustler Excavating, Inc.*, 2022 IL App (3d) 210518-U, ¶ 38 (2022) (giving credit to the defendant for "act[ing] with diligence in removing the debris [that brought it out of compliance in the first place] and bringing the site into compliance with the Act").
[273] Ex. 1901 at 27.
[274] S.B. 9, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).
[275] Ex. 1901 at 24-25.
[276] Ex. 1203 at 15-16.

testimony.[277] The selection of a WACC ended up being an issue Mr. Shefftz and Ms. Koch largely agreed on.

iv. Ms. Koch's opinion on MWG's economic benefit was derived entirely from the Weaver witnesses, whose testimony is also demonstrably unreliable.

Fundamentally, Ms. Koch's opinion on MWG's economic benefit is not reliable because it is derived from the proposed remedy put forth by the Weaver witnesses. As both Ms. Koch and Mr. Shefftz have made clear in their testimony, the economic benefit calculation arises from the value of the remedy that should have been conducted. Thus, the value of Ms. Koch's analysis is directly tied to the quality of her inputs. As Complainants explained, the Weaver witnesses' proposed remedy will not resolve the ongoing groundwater contamination at the four plants because it omits, among other things, a serious effort to remove coal ash from groundwater and otherwise reduce leaching from historic ash areas.[278] As a result, any economic benefit estimate based on their proposed remedy is a gross underestimate and useless to the Board.

D. As Complainants Have Extensively Briefed, Mr. Shefftz Has Offered the Board a More Helpful Estimation of Economic Impact than Ms. Koch Given the Uncertainties that Remain in this Case.

In its discussion of MWG's economic benefit from having delayed compliance with Illinois law, MWG raises the same arguments that parties have both briefed at least six times each, including in the initial post-hearing briefs.[279] As that briefing makes clear: 1) Mr. Shefftz appropriately relied on reasonable inferences from the record for his remedy cost input, particularly given uncertainty around the actual remedy; 2) Mr. Shefftz's use of simplified expenditure estimates in the absence of the availability of actual remedial costs is consistent with regular practice among experienced economic and financial experts in his field; 3) Mr. Shefftz's economic expertise is independent of the specific inputs he selected for his analysis, distinguishing it from the cases MWG has cited in its misguided effort to eliminate his testimony; and 4) unlike Ms. Koch, Mr. Shefftz has gone out of his way to improve the utility of his testimony for the Board, by explaining how updating the inputs he used would impact his final numeric conclusions;[280] in particular, he makes clear that any increase or decrease in total

[277] May 15, 2023 Hr'g Tr. at 110:10-112:1, 113:22-117:2.
[278] *See infra* Section V.
[279] MWG Post-Hr'g Br. at 72, 75-82; Compls.' Post-Hr'g Br. at 62-67.
[280] May 16, 2023 Conf. Hr'g Tr. at 63:20-65:16.

remedy cost will result in a proportional increase or decrease in his determination of MWG's economic benefit.[281]

Furthermore, neither of MWG's two additional case citations on this point (i.e., those that were not in previous rounds of briefing on this issue) are any more helpful to MWG's position than the cases it has previously cited (and to which Complainants have already responded). First, *Perona v. Volkswagen of America, Inc.* was specifically about the standard for summary judgment expert testimony as opposed to trial testimony and involved an expert assessment whose entire value was contingent on underlying facts that it lacked.[282] Second, *People v. Burhans* makes clear that an expert must only rely on information experts in their field would reasonably rely on;[283] and that is exactly what Complainants have demonstrated, through the specific testimony of Mr. Shefftz on this issue. Again, Mr. Shefftz's testimony on this topic is more reliable than Ms. Koch's, both because he has more targeted and extensive experience in the field, and because unlike Ms. Koch, his testimony is limited to areas in which he has expertise.

More broadly, MWG asked its expert, Ms. Koch, to offer her expert assessment that Mr. Shefftz has made choices as an economic expert that are inexcusable, and which are grounds for the Board to completely disregard his opinions.[284] Ms. Koch complied, but as Complainants pointed out in previous briefing:

> Mr. Shefftz has provided extensive testimony on the record explaining why he felt it was appropriate to rely both on information from Table 6 of Dr. Kunkel's Remedy Report and on reasonably tailored assumptions provided by Complainants' counsel. May 17, 2023 Conf. Hr'g Tr. at 12:18-15:13. As that testimony makes clear, in Mr. Shefftz's decades-long career as a financial expert, he has regularly relied both on and analyses from technical experts on representations from legal counsel about what the appropriate timeframe for his analysis might be. *Id.* This has been his regular practice in state, federal, and administrative proceedings, and he has never had an opinion excluded for any reason relating to the adequacy of his analysis or appropriateness of his selected inputs. And again, Mr. Shefftz's testifying experience in the economic field is

[281] Compls.' Post-Hr'g Br. at 66-67; Compls.' Resp. to Midwest Generation, LLC's Appeal of the Hr'g Officer's Ruling Denying its Objection to Jonathan Shefftz's Ops., PCB 13-15 (Aug. 10, 2022).
[282] *Perona v. Volkswagen of Am., Inc.*, 2014 IL App (1st) 130748, ¶ 51 (2014).
[283] *People v. Burhans,* 2016 IL App (3d) 140462, ¶ 30 (2016).
[284] MWG Post-Hr'g Br. at 77 (referencing Ms. Koch as opining that "an expert who relies primarily on representations of an attorney to form their opinion provides little assistance: relying on 'advocacy pieces of information,' produces 'advocacy testimony,' not 'expert testimony'"); *Id.* at 79 (referencing Ms. Koch as speaking to what is "widely accepted practice among economic-benefits experts").

> exceptionally broad: he has testified dozens of times in federal, state, and administrative proceedings. . . .
> [This experience is] likely much more extensive than that of Ms. Koch. He has testified "several dozen times" exclusively on financial matters, whereas Ms. Koch has testified a few dozen times on a dizzying range of topics, which constitute some combination of technical and economic issues. May 16, 2023 Hr'g Tr. at 128:12-131:5; June 15, 2023 Conf. Hr'g Tr. at 9:15-24. And Mr. Shefftz helped develop U.S. EPA's BEN Model that Ms. Koch used unquestioningly in her analysis. Shefftz Initial Report at 3; Ex. 1901, Expert Rep. Prepared by Gayle Schlea Koch at 26 (Apr. 22, 2021).
> Mr. Shefftz has explained that it is common practice for financial experts to rely both on inputs from experts (whether testifying or not), and from legal counsel. Ms. Koch claims to be shocked by Mr. Shefftz's practical perspective on the matter. But the available evidence suggests that Mr. Shefftz's experience and perspective is likely more reflective of the general practice specifically among financial experts than Ms. Koch, given that Ms. Koch's apparent practice is to maintain technical expertise in multiple fields at once. Thus, to the extent the Board relies on representations from an expert in this case as to typical or appropriate economic expert behavior, Mr. Shefftz is a more reliable source than Ms. Koch.[285]

Finally, MWG discusses at length the practical challenge faced both by the Board and by Mr. Shefftz and Ms. Koch in evaluating MWG's economic benefit from delayed compliance, which is that the benefit of that delayed compliance depends entirely on what the Board determines the remedy should be in this case, and neither expert could possibly have known this value in advance of preparing their expert reports.[286] Ms. Koch's estimation of economic benefit offers the Board no value, because it is based on a set of actions that will not come close to remediating contamination at the four plants. Mr. Shefftz's estimation offers the Board direct value in the event the Board orders complete removal; and it offers the Board contextual value in the event it orders a different remedy. Should the Board seek additional testimony on the calculation of MWG's economic benefit after a remedy is selected, it has the authority to do so under its general authority to hold proceedings.[287] But in the end, as Complainants explained in our initial Post-Hearing Remedy Brief, the economic benefit value is a *floor* for the Board's penalty determination, meaning that any penalty amount over MWG's economic benefit is permissible, up to the maximum statutory penalty. Thus, the Board has the tools before it to

[285] Compls.' Resp. to Midwest Generation, LLC's Appeal of the Hr'g Officer's Ruling Denying its Objection to Jonathan Shefftz's Ops., PCB 13-15 at 10-12 (Aug. 10, 2022).
[286] MWG Post-Hr'g Br. at 81-82.
[287] 35 Ill. Adm. Code 101.106(b).

determine a legal penalty, notwithstanding inevitable uncertainty regarding MWG's economic benefit of noncompliance.

E. MWG Has Not Engaged in Good-Faith Compliance Efforts to Evaluate or Address Contamination at the Plants Independently of Prodding from the Illinois EPA.

MWG spends significant time discussing prior cases in which a company's good-faith efforts to clean up their pollution resulted in reduced penalties.[288] However, as Complainants have extensively documented, MWG has not demonstrated good faith in cleaning up the four plant sites; so that precedent does not apply to the situation here.[289]

F. Deterrence of Environmental Misdeeds Requires that MWG Be Held Liable for Misdeeds By its Predecessor Owner of the Four Plants.

Finally, MWG suggests once more that the deterrence value of a penalty is somehow mitigated by the fact that MWG did not directly deposit the "historic" coal ash at the four plants.[290] This suggestion is completely unsupported by caselaw, as evidenced by the fact that MWG does not offer any precedent for this astonishing suggestion. It is also completely unsupported by the record, as evidenced by the fact that MWG has offered no evidence that MWG did anything other than take full control and ownership of the four plants, and MWG's expert Ms. Koch was unable to offer any additional context. To the contrary, courts have consistently held that, absent specific provisions in the sale of real property, all liability must transfer directly to the new owners.[291] MWG's suggestion is also dangerous. If the Board adopts some version of MWG's suggestion here, i.e. reducing a penalty for successors in interest who purchase properties subject to potential environmental liabilities, it would allow companies facing major environmental liabilities to offload those liabilities by transferring a diminished version of them to future site owners. This would in turn make it nearly impossible to hold polluters accountable and the public would be left with the clean-up costs. MWG's suggestion

[288] MWG Post-Hr'g Br. at 82-84.
[289] Compls.' Post-Hr'g Br. at 6-8, 54-62, 69-75.
[290] MWG Post-Hr'g Br. at 82-83.
[291] *Ill. Env't Prot. Agency v. Rawe*, AC 92-05, 1992 WL 315780, *3-5 (Oct. 16, 1992); *People ex rel. Ryan v. McFalls*, 313 Ill. App.3d 223, 226-27 (2000); *People v. Inverse Invs., LLC*, PCB 11-79, 2012 WL 586821, at *9 (Feb. 16, 2012); *see also People v. Michel Grain Co.,* PCB 96-143, 2002 WL 2012414, at *3-4 (Aug. 22, 2002); *Meadowlark Farms, Inc., v. Ill. Pollution Control Bd.*, 308 N.E.2d 829, 836-37 (Ill. App. Ct. 5th Dist. 1974); *Lincoln*, 70 N.E.3d at 678; *People v. State Oil Co.*, PCB 97-103, 2003 WL 1785038, at *15, 24-25 (Mar. 20, 2003); *Allaert Rendering, Inc. v. Ill. Pollution Control Bd.*, 414 N.E.2d 492, 494-95 (Ill. App. Ct. 3rd Dist. 1980) (cited in Bd. Interim Op. and Order at 91 (June 20, 2019)).

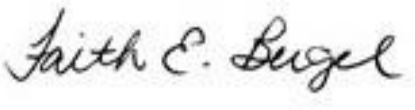
here is inconsistent with established Illinois law, and it would lead to the evisceration of environmental compliance incentives in the state of Illinois.

IX. CONCLUSION

MWG's Post-Hearing Brief doubles down on the same misrepresentations and excuses that have formed the core of its case from the start. None of MWG's suggested "corrections" to the Board's Interim Opinion and Order have any merit, and MWG's discussions of the Section 33(c) and Section 42(h) factors rest on misapplication of both the record and legal precedent. In short, nothing in MWG's Brief alters the remedial and penalty options that were laid out in Complainants' initial Post-Hearing Remedy Brief. Complainants respectfully request that the Board enter an order adopting the relief detailed in Complainants' Initial Post-Hearing Remedy Brief.

Dated: March 4, 2024

Respectfully submitted,



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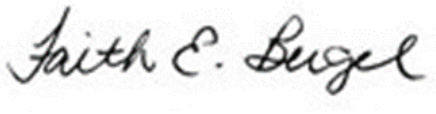
CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of the **COMPLAINANTS' POST-HEARING REMEDY RESPONSE BRIEF** before 4:30 p.m. Central Time on March 4, 2024, to the email addresses of the parties on the attached Service List. The entire filing package, including attachments, is 54 pages.

Respectfully submitted,



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