BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Attached Service List

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

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 4, 2024

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3400
Chicago, IL 60603
(312) 251-5255
jn@nijmanfranzetti.com
sf@nijmanfranzetti.com
kg@nijmanfranzetti.com

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605
Brad.Halloran@illinois.gov

Albert Ettinger
7100 N. Greenview
Chicago, IL 60626
Ettinger.Albert@gmail.com

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Greg.wannier@sierraclub.org

Megan Wachspress
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Megan.wachspress@sierraclub.org

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing for Midwest Generation, LLC's Objections to Complainants' Post-Hearing Brief and Midwest Generation, LLC's Post Hearing Response was filed electronically on March 4, 2024 with the following:

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

and that true copies of the pleading were emailed on March 4, 2024 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

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

TABLE OF CONTENTS

Midwest Generation, LLC ("MWG") is the only party in this case that has provided the Illinois Pollution Control Board ("Board") with credible expert testimony on the question of appropriate relief, as requested by the Board. Interim Order, p. 92. Complainants abandoned their liability-phase expert, James Kunkel, and the Board allowed them to bring in a substitute, subject to the condition that the new expert's opinions "rely, amplify, elaborate or build upon the opinions and reports already produced by the prior expert, Mr. Kunkel." *Sierra Club v. Midwest Generation, LLC*, Order, p. 12 (Oct. 5, 2023). But Complainants made no effort to familiarize their new expert, Mark Quarles, with Kunkel's prior work. Quarles "had not read Mr. Kunkel's reports nor reviewed his testimony from the previous hearings." *Id.*, p. 11, 13. The Board, citing Complainants' failure to follow its clear directions for appropriate substitute-expert testimony, "determine[d] that little weight will be given to [Quarles's] opinions and reports." *Id.* at p. 17.

The only other expert Complainants presented, Jonathan S. Shefftz, did not offer any opinions. He instead, by Complainants' own admission, merely offered a "framework" for performing an economic benefits model (using a proprietary method that is not in the record.) Comp. Resp Op. MWG Interlocutory Appeal, at 3 (Aug. 10, 2023). He simply provided a computation engine into which Complainants suggest that the Board could eventually put "final inputs." *Id.* at 4. As MWG explained in its Post-Hearing Brief, this is neither fact evidence, nor an opinion – it is "expert testimony in non-opinion form." MWG 2024 Br. at 81, citing *Fed. R. Evid.* 702 (1972 Comm. Note). And Complainants admit that the "sole purpose" of Shefftz's testimony was to share that "framework" – though Complainants still have not shared the *actual* software needed to perform the calculations. Comp. Remedies Prehearing Memo, at 8 (Apr. 21, 2023).

In contrast, MWG presented comprehensive and extensive evidence that its proposed remedy will address the alleged violations and no penalty is warranted. MWG established that the character and degree of the injury is low and there is minimal risk to human health and offsite receptors while its proposed remedy takes effect. MWG established through unrebutted expert testimony that the Stations have significant economic and social value. It is also undisputed that the Stations have priority of location by their very nature of being at their locations for decades and are suitable for their locations by being zoned industrial and surrounded by industry. MWG's technical experts, Douglas Dorgan and Michael Maxwell of Weaver Consultants ("Weaver") the only experts that merit any weight, demonstrated that their proposed remedy will address the alleged violations and is technically practical and economically reasonable. MWG showed that it took extensive compliance measures, beginning long before there was any knowledge of any violations and continuing to this day.

MWG's economic expert, Gayle Koch, conducted an economic benefit analysis based upon admissible evidence, including Weaver's expert report, and concluded that MWG may have received a nominal economic benefit. Any penalty that is more than the nominal benefit Koch calculated would be punitive and against the Board's policy to not "penalize those who are

honestly trying," which as MWG has established, is certainly the case here. *Employees of Holmes Bros. v. Merlan, Inc.*, PCB71-39 (Sept. 16, 1971), *slip-op*., p. 5. Indeed, as the first Board Chair, David Currie stated, "…all that can be expected is a good faith effort." 70 Nw. U. L. Rev. 389, 431 (1976). Moreover, any significant penalty could have a deleterious effect on compliance with the Illinois Environmental Protection Act ("Act") and Board rules, because it "would discourage all those who act in good faith to bring an end to their pollution problems." *Employees of Holmes Bros.*, p. 5; 415 ILCS 5/ *et seq*.

The preponderance of the evidence demonstrates that the Board must adopt the remedy as presented by MWG. Indeed, as described below, a finding for Complainants here would be against the manifest weight of evidence. 415 ILCS/41(b).

I. OBJECTIONS TO COMPLAINANTS POST-HEARING BRIEF

Complainants' post-hearing brief simply fails to cite to any credible or admissible expert testimony or evidence to support their demand for a removal remedy or their incredulous suggestion of a minimum of $41 million penalty. Their brief makes assertions and contentions that Complainants had the opportunity to support during the hearing with expert testimony, *but they did not*. And now MWG has been deprived of an opportunity to test these wild assertions through *Frye* challenges and cross-examination. *People v. McKown*, 226 Ill. 2d 245 (2007). Board proceedings do not come with training wheels. The consequences of failing to follow procedural and evidentiary rules are just as straightforward and unavoidable as the rules themselves. The Board already demonstrated this when it sidelined Quarles' reports and testimony because of Complainants' failure to follow expert-substitution rules.

The parties agreed not to present closing arguments at the close of the hearing, instead choosing to submit post-hearing briefs for their closing argument. It is axiomatic that a closing argument must be based on the evidence admitted in the case. *Bulleri v. Chi. Transit Auth.*, 41 Ill. App. 2d 95, 104 (1st Dist. 1963). "Although counsel is allowed to draw all reasonable inferences from the evidence during closing arguments, she is not permitted to misrepresent the evidence, argue facts not in evidence, or create her own evidence." *Los Amigos Supermarket v. Metro. Bank & Tr. Co.*, 306 Ill. App. 3d 115, 129 (1st Dist. 1999) (internal quotes omitted). And it is especially inappropriate for the attorney to proffer themselves as *ersatz* expert witnesses, immune from both *Frye* and cross-examination by opposing counsel.

Because Complainants' post-hearing brief is, in effect, their closing argument, MWG objects to and asks that the Board disregard the numerous unsupported claims and assertions in Complainants' brief as well as their attempts to proffer new evidence, and new, unqualified,

technical opinions from counsel in a post-hearing brief. [1]

A. Objection to Complainants Introduction of a Removal Remedy Because There is No Evidence in the Record to Support

For the first time, Complainants demand a removal remedy for the MWG Stations in their post-hearing brief. Comp. Br. pp. 2, 29-31, 32-38. Complainants presented no expert testimony showing that this is recommended or appropriate. Rather, the single person they presented that *could* have proposed such a remedy, Quarles, stated that he did *not* recommend a removal remedy, nor even assess it as a remedy. 5/15/23 Tr., p. 176:5-178:1. Complainants' "presumption" that carrying out a large-scale removal might end the environmental injuries contemplated by the Board's 2019 and 2020 Orders is not supported and is not a substitute for evidence or informed analysis by an expert. MWG objects to these unsupported statements of counsel and asks that the Board disregard them.

B. Objection to Complainants Claim of Open Dumping at Joliet 29 Because the Claim is not in the Complaint

As MWG noted in its post-hearing brief, the Amended Complaint does not allege open dumping at Joliet 29. MWG Br. at 17. *See also* 1/19/2017 Board Order, at 1 n.2 ("Citizen Groups do not allege open dumping at Joliet 29.") To the extent that Complainants' post-hearing brief seeks remedies for open dumping at Joliet 29, it is introducing unnecessary and prejudicial confusion to the case by requesting relief that the Board cannot grant in this proceeding. *City of Pekin v. IPCB,* 47 Ill. App. 3d 187, 192 (3d Dist. 1977). A party cannot be found liable for conduct not alleged to be actionable in the complaint. *Id.* at 192 (defendant cannot be found liable for violating cover requirements, where no such violation exists in the complaint).

The Amended Complaint's general prayer for "such other relief as the Board deems just and proper" does not cure that error. And even if it did, a "general prayer for relief" is only sufficient to warrant "a judgment that is supported by the facts alleged in the complaint if those facts are proved by evidence." *Fritzsche v. LaPlante,* 399 Ill. App. 3d 507, 522 (2d Dist. 2010), *citing Cnty. of Du Page v. Henderson,* 402 Ill. 179, 191 (1949). The Amended Complaint "do[es] not allege open dumping at Joliet 29." 2017 Order, at 1 n.2 (Jan. 19, 2017). Nor has evidence been introduced showing that the historical ash at Joliet 29 is causing groundwater contamination. Rather the evidence shows that the areas are *not* causing groundwater contamination. MWG 2024 Br., §V.E.ii.

Because any finding of open dumping at Joliet 29 was not alleged and is void, the Board cannot grant the relief Complainants demand at the Joliet 29 Station.

C. Objection to Complainants Reference to "MWG's … nature of its relationship to its

[1] While a motion to strike is often used to address improper comments during an oral closing argument, because closing arguments are in writing here and because this is not a jury case, the Board is able to assess these stated objections based on the evidence before it, and determine what statements made by Complainants are unsupported and should be disregarded. If the Board prefers a separate motion to strike, Respondents will timely submit the motion.

corporate owner" in Disregard of Prior Rulings

Parties cannot use closing arguments to make a last-ditch effort to introduce evidence already deemed inadmissible. *Cancio v. White*, 297 Ill. App. 3d 422, 431 (1st Dist. 1998). The Board has twice told Complainants that MWG's corporate relationships are irrelevant to this proceeding. Order Denying Inter. App., at 7-8 (Sept. 9, 2021) & Order, at 11 (Dec. 15, 2022). Yet, Complainants raise it again. The record does not contain "evidence and testimony" regarding these topics. Comp. Br., p. 52. It is another unsupported statement by counsel and is offered in flagrant disregard for the Board's prior rulings. It should be disregarded.

D. Objection to Reliance on Public Comments Because They are not Evidence

The Board's rules on public comments in an adjudicatory proceeding are clear: While the Board encourages public participation and the Board may consider them, the Board is unambiguous that "factual statements made during public remarks are not evidence in the proceeding." 35 Ill. Adm. Code 101.110(d)(3) (emphasis added). In their brief, Complainants repeat various public comments as "evidence" of the unsuitability of the MWG Stations to the area. Comp. Br. 27-28. Under the Board's rules, these statements are not "evidence," and the Board should disregard them as evidence of the suitability or unsuitability of MWG Stations.

E. Objection to Admission of and Complainants' Reliance on Exhibit 1408

MWG continues to object to the admission and reliance on the Exhibit 1408, the Agency's Recommendation in PCB21-3, because it is not reliable or relevant. The Recommendation contains unverified assertions that MWG was preparing to rebut in that separate matter. Allowing the incorporation of testimony on one side of an issue, without the opposing evidence, is akin to admitting an alleged scientific report without the opportunity to cross examine or dispute it. The decision is prejudicial and impermissible. Moreover, the issue presented to the Board in PCB21-3, whether the Waukegan Former Slag Area ("FS Area") is a CCR surface impoundment, is not relevant to the groundwater allegations here. Indeed, IEPA stipulated in that case that the presence or absence of groundwater contamination is not relevant to whether the area is deemed to be an impoundment.

F. Objection to Complainants' Factual Claims That Have No Evidentiary Basis

Many of Complainants' claims in their post-hearing brief are not based on any evidence in the record. Because they are without a basis, the Board should disregard them in their entirety.

i. No Evidence to Support the Claim That "Groundwater quality has generally not been improving at the four plants"

The Board has been provided with extensive groundwater testing for multiple constituents, taken from multiple locations, at multiple times, at multiple sites. To pull the signal from the noise, MWG's experts from Weaver applied a "Mann-Kendall" trend analysis to that data. 6/12/23 Tr.,

p. 234:1-6. The Mann-Kendall trend analysis is a quantitative non-parametric test which provides information on the trends in the groundwater data, and it is a robust method to assess whether a remedy is effective. 6/12/23 Tr., p. 226:22-228:5. IEPA often uses it to evaluate the effectiveness of a corrective action. 6/12/23 Tr., p. 228:15-24.

The analysis showed that the groundwater conditions at the Stations are improving. 6/12/23 Tr., p. 234:1-6. Complainants had every opportunity to proffer expert testimony advising the Board on how to conduct a "Mann-Kendall" trend analysis, or producing different results produced by a different quantitative non-parametric test. They did not.

Instead, their post-hearing brief offers the conclusory assertion that: "Groundwater quality has generally not been improving at the four plants." Comp. Br. at 7. That is not a legal argument or a reasonable inference; it's simply wrong. Indeed, their assertion that the record contains "trend analyses showing that most data are not improving" relies on a baseless claim that the only valid trend result is the "statistically significant downward trend." *See id*. at 7-8.

Moreover, their brief's claim that the Weaver data set was somehow "skewed" or "distorted" has no basis. Comp. Br., p. 48. Complainants could have re-done the statistical analysis to prove that assertion, but they did not. Nothing in the record, nor in their brief, supports either claim. In fact, Complainants conveniently ignore Weaver's testimony on these exact issues that defeat Complainants' unsupported claims.[2]

This is Complainants' belated attempt to introduce what should have been expert testimony regarding specialized analytical techniques by an attorney who is not qualified as an expert witness. MWG objects to its inclusion. The Board should ignore it (and all other attempts to circumvent *Frye* and MWG's right to cross-examine witnesses) and accept Weaver's unrebutted conclusion regarding the improving groundwater conditions at the Stations.

ii. No Evidence that Shefftz's Calculation was Based on the "Best Available Cost Estimate"

Complainants insist that Shefftz's calculations of economic benefit are based on the "best available cost estimate," for a remedy, apparently attempting to sidestep the fact that the calculations are required to be based on the *lowest* cost remedy. Comp. Br. at 64; *see infra* at §VIII.C; 415 ILCS 5/42(h)(3). Similar references to this purported "reasonable estimate" appear on other pages. *Id*. at 67. According to Complainants' brief, this estimate can be found on page 22 of Shefftz's report. Comp. Ex. 1201. But there is no "cost estimate" on that page of the report - just Shefftz referring to a cost estimate prepared by "James R. Kunkel" in a 2015 report. *Id*. at 22. Complainants have already admitted to the Board that Kunkel's 2015 report is not in evidence. Comp Resp. Opp. Interlocutory Appeal, at 8 (Aug. 21, 2023). Shefftz admitted that he cannot

[2] On redirect, Weaver specifically disputed each of the purposed "skewed" results and showed how the Mann Kendall analysis was accurate; it was also consistent with previous trend analysis conducted by MWG expert John Seymour. 6/14/23 Tr., p. 74:14-75:5; MWG Ex. 906 & 1701; MWG 2024 Br., §VIII.C.ii, & *infra* §VIII.C.i.

provide an "independent expert opinion on the cost estimates that were prepared in that report." Comp. Ex. 1201, p. 22.

Nothing in the record supports a claim that the remedy cost estimate Shefftz relies on is the "best available;" in fact, "best available" is not even a term used in the Act. 415 ILCS 5/42(h). Complainants' expert was required to use the "lowest" cost remedy for its analysis, pursuant to the Act. They failed to even consider any other remedy, let alone the Weaver remedy that is in the record. *Infra* at §VIII.C, MWG 2024 Br., §VIII.C.

Indeed, to justify Shefftz's reliance on Kunkel's hearsay, not-admitted, cost-estimate, Complainants assured the Hearing Officer that Kunkel's report (and the estimates inside it) was "not being offered for the truth of anything in the report." Comp. Resp. Mot. Exclude Kunkel Report, at 2 (May 12, 2023). They cannot now rely on those estimates in their closing, much the less misrepresent them as the "best available cost estimate."

iii. No Evidence that Removal Can be Done Without Affecting Plant Operations

To dispute MWG's economic value calculations, Complainants incorrectly assert that, because operations at the Stations have changed, their new, unsupported proposal for a removal action would not interfere with "plant operations" at the four Sites, and further that the value that MWG's power-generation operations created over the last decade is no longer accurate. Comp. Br. at 17, 21. These claims are presented without citation to anything in the record, because there is nothing in the record to support them. In fact, the only evidence in the record is that of MWG's prior expert John Seymour, as reviewed by Weaver. That evidence is clear that the impacts of a removal remedy on the Stations would be significant, costly, and take an inordinate amount of time to conduct. MWG Ex. 903, pp. 63-69. By logic, even though some of the operations at the Stations have changed, the Stations still have active alternative operations that would be impacted. *Id.* Complainants made no effort to present evidence on this point, and Complainants failed to present any expert testimony supporting a removal remedy. There are thus no "reasonable inferences" the post-hearing brief can draw about the effect such a remedy would have on the operations of Powerton, or any other station.

iv. No Evidence that the Historic Areas at Joliet 29 are Causing Contamination

Complainants' claim that the historic areas at Joliet 29 must be removed or investigated has no support in the record. Comp. Br., p. 33, 41. There is no evidence in the record that the historic areas at Joliet 29 are causing contamination. Rather the only evidence in the record is that they are not. *See* MWG 2024 Br. §§II.A. iii & III.D. Groundwater at Joliet 29 has consistently met applicable standards. In fact, the only area where standards were exceeded was investigated and found to be naturally occurring. *Id*, §§II.A.ii, V.A.ii.

v. No Evidence that CCR in Contact with Groundwater is More Harmful

Complainants' claim that CCR in contact with groundwater is *per se* harmful (Comp. Br., p. 35-38) is baseless, and there is no evidence in the record to support the claim. Weaver, the only experts to whom the Board will give any weight, testified that contact with groundwater does not necessarily require removal or indicate greater harm. 6/12/2023 Tr., p. 242:14-24. Weaver looked at the actual data and explained how the groundwater and CCR can be managed. Monitored natural attenuation ("MNA") is a method to manage the conditions. 6/12/23 Tr., p. 243:23-244:4. There is no evidence in the record that states the opposite. Complainants try to point to the USEPA's interpretation of the federal CCR rule. Comp. Br., p. 35-38. But that is also not in the record and is merely language from the preamble, which is not an operative part of the rule. *Nat'l Wildlife Fed'n v. EPA*. 42, 286 F.3d 554, 569-570 (D.C. Cir. 2002).

vi. No Evidence to Support Complainants' Claims about Remedy Procedures

Even while admitting that their expert (who is entitled to little weight) provided no testimony about the scope, extent, timing or type of any investigation of the Stations and ignored the 20+ years of sampling data already collected by MWG, Complainants' counsel attempts to provide their own testimony about how an investigation should proceed – by using specific LEAF tests. Comp. Br., p. 11. There is nothing in the record to suggest that LEAF tests are the only acceptable leaching tests. In fact, as Richard Gnat testified, Illinois law still *requires* use of a different leaching method. 5/17/23 Tr., p. 96:16-22; 415 ILCS 5/3.135. As MWG explained, the LEAF test is merely another tool to get an understanding of how materials might mobilize various constituents under a range of pHs. 6/12/23 Tr., p. 62:1-11.

Similarly, without any evidence, Complainants' counsel asserts that a remedy should include removal of poz-o-pac liners from the CCR surface impoundments due to the presence of "ash." Comp. Br., p. 34. There is nothing in the record that supports that claim. Instead, MWG Ex. 1605, admitted without objection, includes an expert report that proves the opposite. MWG Ex. 1605, MWG13-15_122687, *citing its* Ex. 25, Exponent Report, MWG13-15_122897-122906; 415 ILCS 5/3.142. Dr. Mateusz Radlinski, an expert in concrete and cement-based materials, explained that poz-o-pac is formed by a chemical reaction (i.e., the pozzolanic reaction) between lime and fly ash which forms a hardened cementitious paste. *Id,* MWG13-15_12289-122899. The pozzolanic reaction of lime and fly ash fundamentally alters the chemical composition of the mixture to form a cementitious matrix that binds and holds the aggregate particles together. *Id.* Because of the changes in chemical composition and physical encapsulation of the raw CCR ingredients, Dr. Radlinski concluded that poz-o-pac does not meet the definition of CCR. *Id*, MWG13-15_122899. This is undisputed and is the only expert analysis in the record. Complainants cannot invent new facts and theories in their closing brief.

II. APPLICABLE BURDEN OF PROOF AND STANDARD OF REVIEW

Complainants seem to be arguing that they can simply "punt" to the Board and that Complainants have no burden to present evidence supporting a remedy. Comp. Br. at 5. That is simply not the case. There is no question that when a party asks the Board to determine a remedy, the party must identify the remedy and carries the burden of showing its sufficiency, technological practicability, and economic reasonableness. See, e.g., *People v. J&F Hauling*, PCB 02-21, at 4-5 (Feb. 6, 2003) (Agency provides testimony justifying removal remedy); *Vil. of Matteson v. World Music Theater*, PCB 90-146, at 36 (Apr. 25, 1991) (interim order) (Board notes that testimony by respondent's sound technician would support remedy); *People v. Poland*, PCB 98-148, 2003 Ill. ENV LEXIS 457, at *23-25 (Aug. 7, 2003) (Board accepts remedy proposed by respondent's testifying expert). Here, Complainants completely failed to identify a remedy or show its sufficiency, technological practicability, and economic reasonableness. Complainants cannot now argue for a remedy that was never presented or challenged.

Complainants' further incorrectly state that they do not bear the burden of proof on the factors the Board may consider in assessing a remedy that is presented to it. Comp. Brief p 5. Section 31(e) of the Act provides a partial outline of each side's burden of proof. 415 ILCS 5/31(e). Though Section 31(e) does not say so directly, courts have inferred that complainants bear the burden of proving aggravating factors, such as unsuitability and economic benefit. *E.g., Wells Mfg. Co. v. IPCB.*, 73 Ill. 2d 226, 237 (1978) (Agency did not meet its "burden of establishing" that respondent lacked priority of location). Conversely, to the extent that some Section 33(c) factors counsel mitigation, the respondent may carry the burden of proof for those. *Ford v. EPA*, 9 Ill. App. 3d 711, 720-21 (3d. Dist. 1973).

Complainants also claim, without any citation, that the Board need not apply a preponderance-of-evidence standard at this stage and seem to suggest the Board has no applicable standard to apply at all. Comp. Br, at 5. Again, this is wrong. The Board is clear that the preponderance-of-evidence standard governs this proceeding. Interim Order (June 20, 2019), at 9. In any case, Complainants purported made-up removal remedy cannot meet either a preponderance-of-evidence standard or *any* standard because Complainants have nothing in the record to support the remedy they propose for the first time. As such, Complainants' remedy case fails even under the more generous standard of "manifest weight of evidence." *See* 415 ILCS 5/41(b). Complainants have not provided any expert testimony supporting a remedy that would resolve the violations identified in the 2019 and 2020 Orders. For example, Complainants presumption that their unsupported removal remedy will be "effective" is just wishful thinking masquerading as legal argument. Comp. Br. at 64. It certainly cannot be mistaken for "evidence in the record." 415 ILCS 5/41(b). There is no expert supporting the claim and no analysis of the time, extent, cost, or environmental impact of a removal – let alone whether removal would address groundwater conditions resulting from past conditions.

Complainants' failure to produce admissible expert testimony for a remedy leaves the manifest weight of evidence on MWG's side of the scale. In *Wells Manufacturing Co. v. IPCB*, the Illinois Supreme Court found a Board decision to be contrary to the manifest weight of evidence. 73 Ill. 2d at 235-36. The facts of that case are similar to the facts here. The respondent was the only party to provide evidence related to the degree and character of the injury; the Agency relied exclusively on "lay witness testimony." *Id.* at 234. The Agency also failed to successfully refute the respondent's evidence of economic value. *Id.* at 235-36. And, though the Agency maintained that the respondent's priority-of-location had been invalidated by upscaled operations, the evidence supporting that claim amounted to little more than "sketchy references." *Id.* at 236. When evidence does not support a suggested remedy, it is against the manifest weight of evidence and is not acceptable.

As the following sections explain, Complainants' efforts at presenting a remedy and purported penalty are little more than general platitudes, "sketchy references" in the record, and are unsupported by any expert opinion that has any weight. Any order by the Board that adopts Complainants' baseless claims would be invalid because it would be against the manifest weight of the evidence. 415 ILCS 5/41(b).

III. ONLY MWG HAS PROPOSED A REMEDY THAT ADDRESSES THE ALLEGED VIOLATIONS

The comprehensive remedy proposed by Weaver is the only proposed remedy supported by an expert opinion that carries weight for the Board. As Weaver testified, the Stations have been extensively investigated for decades, creating a large database. Weaver's analysis of that database demonstrates that there is more than sufficient data to formulate a remedy that is technically feasible, economically reasonable and likely to bring MWG into compliance with 12(a), 21(a), and the groundwater regulations. *See* MWG 2024 Br., §V.A. Based upon the extensive data, Weaver conclusively demonstrated that the groundwater conditions are improving through MNA, which the Board recognizes can last for many years. Board 2020 Opinion, p. 13; MWG 2024 Br., §§ V.B & V.E.i. Because the MNA process is "by its nature a long one," Weaver also conducted a risk analysis to confirm the absence of risks to offsite receptors while the MNA was working. Board 2020 Opinion, 13, MWG 2024 Br., §V.C. Notably, Complainants make no comment on the risk analysis in their brief, implicitly conceding that Weaver's analysis demonstrates the absence of risk to offsite receptors, including the adjacent surface waters and public health.

The Weaver remedy also takes into account and relies on the federal and Illinois CCR rules, which will resolve any of the contamination that may be coming from the CCR surface impoundments. MWG Br. §V.D. In fact, Complainants' dismissal of MWG's work pursuant to the two rules is mystifying. Comp. Br. 55. In effect, Complainants are suggesting that MWG should violate the Act and the Board's regulations and move forward with closure of the CCR surface

impoundments without a permit. Under Section 22.59(b)(2), no person may modify or close a CCR surface impoundment without a permit from the Illinois Environmental Protection Agency ("IEPA"), and under Part 845, no one may perform a corrective action without a permit. 415 ILCS 5/22.59(b)(2); 35 Ill. Adm. Code 845.200(a)(3). Without a permit from IEPA, MWG is barred from taking any corrective actions at its CCR surface impoundments. Complainants' claim that MWG could "do something" is simply false.

Similarly, while Complainants rely upon USEPA's proposed rule to regulate CCR management units ("CCRMUs") to bolster their claim that a removal of the CCR is required, they intentionally ignore that when the CCRMU rule is passed, it will address the supposed harms they seek remedying for the areas of historic ash. Comp. Br., 36. MWG agrees that the proposed federal and state rules apply to MWG's historic areas of ash, and when those rules are passed, MWG will comply. SOF 1162-1172. But it is not prudent and against expert advice to conduct corrective actions at the areas of historic CCR while the rules are pending. SOF 1049, 1175-1176; 6/13/23 Tr., p. 157:22-158:21 & 6/14/23 Tr., p. 97:23-98:22; MWG Ex. 1701, MWG13-15_81470.

In comparison, Complainants' "remedy" does not satisfy the requirements of a remedy. As discussed in the objection above, Complainants' "remedy" to remove all the CCR proposed in their brief is based on nothing but argument. No expert, facts or evidence were ever presented to support their proposed remedy of a complete removal of all ash. On its face, the Board should reject their proposed "remedy" because there is no evidence to support the proposal. Indeed, it would be against the manifest weight of the evidence if the Board were to accept it. The same is true for their demand for a nature and extent investigation. No facts or evidence that the Board would give any weight support their claim for a nature and extent study, and the manifest weight of the evidence, through the extensive studies conducted at each of the Stations and Weaver's opinion, demonstrates that no further studies are required.

Even if the Board were to consider Complainants' vague remedy proposal, which it should not, its completion would not cure the violations described in the Board's Orders. First, a duplicative and superfluous nature-and-extent study will not cure the violations, and there is no evidence in the record that removal would hasten the resolution of the alleged violations. Moreover, even if there is a removal, that would not immediately cure any 12(a) violation. Instead, any removal would rely on MNA just like MWG's proposal, except that MWG's remedy is demonstrably technically feasible and economically reasonable, and supported by evidence in the record. Moreover, at least at Waukegan, the upgradient source will continue to contaminate the groundwater regardless of a removal remedy. 6/14/23 Tr., p. 79:22-80:5, 84:17-85:6.

IV. COMPLAINANTS' ERRORS ON WEAVER'S ANALYSIS

Complainants' brief demonstrates a lack of understanding about the process of investigating and analyzing an industrial site to prepare a technically feasible and economically reasonable

remedy that addresses the historic site conditions. That lack of knowledge causes them to make baseless and misleading representations of Weaver's analysis that require correction.

A. No Basis for Claims that Additional Investigations are Required at the MWG Stations

Complainants' claim that further investigation is required at each of the Stations is baseless and without sufficient expert support. The only expert that merits any weight by the Board, Weaver, evaluated the extensive investigations at the MWG stations for over two decades and concluded that there is appropriate information to create a remedy. Knowing that the Board rejected their own expert's opinion, Complainants intentionally misstate testimony by Weaver and deceptively rely on general testimony by lay witnesses that are unrelated to MWG's stations. Comp. Br., p. 13, 38.

In a particularly egregious example, Complainants falsely assert that Weaver thought an investigation like the one conducted at the FS Area "would have been useful" at the historic areas of ash. Comp. Br. 13. This is a gross mischaracterization of testimony, and it is clear that Complainants know this because they cite to three pages of the hearing transcript to support that single phrase. 6/13/23 Tr. P. 250:1-253:9. Weaver actually stated that they had "a lot of historic information already" for the Stations, and while the pending federal and state CCR rules may require additional investigation, that does not mean that additional information is required or necessary. 6/13/23 Tr. P. 250:8-20; 252:7; 6/14/23 Tr., p. 90:21-23. As Weaver explained, it is not the customary practice nor practical to conduct a grid like investigation in every location there may be ash. 6/14/2023 Tr., p. 91:1-7. In fact, Weaver stated that in their experience, they have never seen an instance where a full site would be investigated with a grid. *Id.*, 91:8-10. It is no surprise that Complainants' expert, Quarles, suggested additional investigation because he had no idea of the extent of investigation that had already been performed. He admitted that he had not reviewed the decades of data and investigation that already existed. 5/15/23 Tr., p. 180:2-5, 204:23-204:4, 225:11-13, 226:13-227:9, 228:2-229:3.

Complainants' reliance on Sharene Shealey's testimony to suggest she believed additional investigation is required disingenuous at best. Comp. Br., p. 42. Shealey, who is not an expert, stated her general thoughts about a hypothetical site and a hypothetical corrective action. She explained that MWG conducted an investigation at the Waukegan FS Area so that it could potentially conduct a corrective action (the Weaver remedy of a proposed cap); but MWG could not act without Agency agreement. 5/19/23 Tr., p. 11:8-12:1; 6/14/23 Tr., p. 201:1-6. Shealey never stated that the MWG Stations required additional investigation.

Complainants also falsely state that no comprehensive sampling of the historic areas at Joliet 29 has been done. Comp. Br. 40. They ignore the extensive investigation conducted by KPRG in the Northwest Area, which concluded that all but a small area met the coal combustion by-product criteria established under the Act, with a high degree of statistical certainty. SOF 141-143, 771-

775.[3] Complainants further ignore Richard Gnat's testimony about the Northeast area at Joliet 29 – that ash in the area is not ubiquitous, that the area contains river spoils, and that river sediments are not impacted. SOF 125-128, 740-745, 749-751, 759, 760. The Southwest area is partially addressed by the environmental restrictive covenant due to contamination from an adjacent property - another remedial tool already in place that Complainants ignore for all Stations. SOF 885.

Complainants' claim that data gaps need to be filled is defeated by Weaver's expert testimony. Weaver explained that even if there are some data gaps at a Station, the extensive information collected at each of the Stations, was "sufficient, useful, and of sufficient quality to allow [them] to evaluate remedies and the relief that goes with that as prescribed by the Board." 6/14/23 Tr., p. 65:20-66:10. Moreover, any data gaps may be filled as part of the corrective action, but Weaver testified that it was not practical nor typical to fill in every data gap. 6/12/23 Tr., p. 225:3-12. Complainants again have no expert testimony to support this claim of data gaps.

Further, the cases that Complainants rely upon to support their contention that the Board could blindly order "an investigation" are inapplicable. In those cases, the Board was presented with expert testimony that the Board concluded merited weight, or the parties stipulated to the investigation. *Lake Cnty. Forest Pres. Dist. v. Ostro*, PCB92-80 (March 31, 1994), *slip-op,* p. 4, 12 (Lake County presented testimony by its environmental consultant, which was part of the record that showed the barrels leaked); *Zarlenga v. P'ship Concepts*, PCB89-169 (IEPA Noise Tech. Advisor testified on behalf of complainants that the noise was a problem, but the Board rejected his recommended remedy because it was based on insufficient evidence), *Svoboda v. DuPage Pub. Works* Dept, PCB77-328 (Oct. 25, 1978) (There was no dispute that sewage would back-up into the complainants' homes and the respondent conceded that they did not know the reason). Here there is nothing equivalent. Instead, Weaver, the only expert testimony that merits any weight, concluded that that no further investigation is required. *See also* MWG 2024 Br., §V.A.

B. Weaver's Remedy Will Address the Board's Findings in Its Interim Order and the Constituents in the Groundwater

Complainants' claim that the Weaver Remedy would not cure every violation identified in the Board's Interim Opinion is based on a taken-out-of-context snip-it of Weaver's testimony. Comp. Br., p. 43. In fact, Weaver stated that pursuant to the Board's order, which was to "determine the appropriate relief," they focused "on an appropriate remedy that's protective of human health and the environment." Interim Order, p. 92; 6/14/23 Tr., p. 64:1-65:3. Weaver further explained that their focus was globally on what is protective of human health and the environment, and their remedy considered the IEPA-approved groundwater management zones (GMZs), the ongoing

[3] Complainants also dismiss without basis MWG's investigation around MW-9 to confirm the constituents in the groundwater were not due to its operations, but instead found to be naturally occurring. *See* MWG Br., §II.A.ii.

MNA, and the groundwater trends. 6/14/23 Tr., p. 65:8-10; MWG Ex. 1701, MWG13-15_81422. By addressing the Board's request to "determine the appropriate relief," the Weaver remedy addresses the Board's findings in the Interim Order.

Indeed, Weaver's remedy addresses all of the Board's valid findings[4] and will address the concentrations in the groundwater by (1) recommending MWG continues to comply with the federal and state CCR rules for both CCR surface impoundments and the CCRMUs when they are finalized, (2) confirming that the concentrations in the groundwater at the Stations continue to decrease, demonstrating that MNA is occurring, (3) demonstrating that there is no risk to off-site receptors while the MNA mechanisms work (which are long by their nature), and (4) recommending additional corrective action at the one area of historic ash that did not demonstrate a sufficient improvement, despite being impacted by off-site sources. MWG 2024 Br., §V.

C. Weaver Did Not Rely on the CCAs for Corrective Actions at the CCR Surface Impoundments

Complainants falsely claim that the Weaver remedy relies on the CCAs for the regulated CCR surface impoundments, and that Weaver did not specify a remedy for the impoundments. Comp. Br. at 44. That is another gross misrepresentation of Weaver's testimony. As Weaver explained at the hearing, they did not specify an additional remedy for the CCR surface impoundments because remedies for those units are already underway pursuant to the federal and state CCR rules. 6/12/23 Tr., p. 208:22-209, 241:1-13, 255:4-11; 6/13/23 Tr. p. 83:11-16; 118:9-119:4, 156:2-9; MWG Ex. 1702, p. 31, 50, 49, 69, 89. Fundamentally, Complainants misunderstand the CCAs and seem to argue that the CCAs supersede both the federal and state CCR rules promulgated long after the CCAs were entered into. Comp. Br., p. 44-45, 66-67. That is absurd, and Complainants provide no legal basis for that conclusion. *See infra* §VIII.G.

Indeed, throughout their brief Complainants attempt to undercut the federal and Illinois CCR rule process and requirements by ignoring their existence where it is convenient. For example, Complainants demand, as part of their unsupported removal remedy, that the CCR surface impoundments close by removal of CCR, ignoring that MGW cannot undertake any closure until it receives a permit from IEPA pursuant to Part 845. Further, under Part 845, all closure alternatives must be evaluated in an alternative closure analysis, which includes an evaluation of risks posed to the community by a closure and the difficulty of implementing a closure method. 35 Ill. Adm. Code 845.710(b). Complainants do not provide a solution for how the Board can order a removal of the CCR in the CCR surface impoundments in compliance with Part 845. Just like MWG, the Board is bound by the requirements of Part 845 and cannot order MWG to take actions that would violate the applicable laws.

[4] As MWG stated in its brief, and the above objections, the Board's finding of open dumping at Joliet 29 is void because it was never claimed in the Complaint. *See* Objection I.C; MWG 2024 Br., §III.A.

D. No Basis for Claim that an Engineered Cap Over the FS Area Would Not Work

Complainants' claims that an engineered cap for the FS Area might not be effective are also baseless. Weaver's expert opinion demonstrates that an engineered cap over the FS Area will eliminate infiltration of precipitation, reducing it by 99%, driving the groundwater constituents below the Class I standards. 6/13/23 Tr., p. 157:8-21; MWG Ex. 1701, MWG13-15_81469. No expert opinion with any weight rebutted this opinion.

Instead, the only evidence Complainants rely upon to claim that a cap might be ineffective for the FS Area (the EPRI report) is entirely inapplicable. Comp. Ex. 1103. The EPRI report concerns CCR surface impoundments, and the FS Area is not a CCR surface impoundment. 6/13/23 Tr., p. 167:4-7. Complainants' "expert," conceded that he was not aware that the FS Area was not a CCR surface impoundment and had not assessed whether the area was a CCR surface impoundment. 5/15/23 Tr., p. 215:6-11. For that reason alone, the Board should disregard Complainants' Exhibit 1103. Even if the Board were to give the study any further consideration, it was purely academic. The EPRI study merely conducted predictive modeling to project what they thought would happen if a cap were installed over a large CCR impoundment. Comp. Ex. 1103 at Comp_65982; 6/13/23 Tr., p. 165:21-166:2. But, as Quarles agreed, the study showed a cap was never installed over the CCR surface impoundments, so the study's predictions on the effect of a cap were merely a guess. Comp. Ex. 1103; 5/15/23 Tr., p. 220:4-6.

E. The Weaver Trend Analysis Demonstrates MNA is Working and the Undisputed Risk Analysis Demonstrates the Absence of Risk During the MNA Process

Complainants' use a large portion of their post-hearing brief to argue that Weaver's Mann-Kendall trend analysis – which shows that groundwater is improving at the Stations – must be inaccurate. While their effort is understandable – why have a removal remedy if the MNA is already working and conditions are improving – Complainants' effort fails. Complainants once again rely on counsel's claims, have no expert support, and completely ignore Weaver's testimony refuting each of their arguments. Complainants' failure to even acknowledge Weaver's responsive testimony is misleading.

Both IEPA and USEPA accept MNA as the strategy for sites like the Stations when the concentrations in the groundwater are decreasing. MWG 2024 Br., §V.E.i. Here, the trend analysis in the groundwater at the Stations proved that concentrations in groundwater are decreasing. 6/12/23 Tr., p. 249:4-9, 6/13/23 Tr., p. 70:5-18; MWG Br., §V.B. As the Board recognizes, the process of MNA "can be, by its nature, a long one," and "can last for many years." Board 2020 Order, p. 13. Weaver's risk analysis establishes that there is no potential harm to human health or offsite receptors so that MNA can continue to work without posing a risk. MWG 2024 Br., §V.B. Complainants' silence on Weaver's risk analysis speaks volumes.

While Complainants attempt to raise criticisms about Weaver's Mann-Kendall trend analysis

in their post-hearing brief, Complainants ignore the fact that Weaver's testimony negates every one of the purported criticisms. It is telling that Complainants did not ask their "expert" Quarles, to evaluate the trend analysis, further proving that the Board was correct to give him no weight. Instead, Complainants attempt to go it alone. As would be expected, their attempts to criticize the highly technical analysis (which requires an expert opinion) fall short.

i. Weaver Properly Relied on the Downgradient Wells

Complainants first criticism - that Weaver should have used different wells in the Mann-Kendall analysis - fails to recognize the purpose of a trend analysis. Weaver used the downgradient wells to evaluate whether the MNA mechanisms onsite are working. As Weaver explained, the important wells to consider, and the wells commonly accepted by the USEPA and IEPA, are the downgradient wells because the downgradient wells will show whether MNA is occurring or not. 6/12/23 Tr., p. 237:14-22, 6/13/23 Tr., p. 32:1-3; 237:19-22; 6/14/23 Tr., p. 71:16-72:11, 76:14-19. Complainants' counsel claims that Weaver should have included upgradient wells (MW-2 at Will County and MW-5 at Waukegan), but that would not provide any information on whether MNA is occurring before the groundwater flows offsite. 6/14/23 Tr., p. 76:3-10. In fact, Weaver explained that another upgradient well at Waukegan (MW-6) was not part of the trend analysis because in addition to being located on the upgradient boundary of the Station, there is no CCR in the boring log. 6/14/23 Tr., p. 78:8-15, 79:11-19; Ex. 1310, MWG13-15_118492; Ex. 1331, MWG13-15_110872. Weaver testified that any elevated concentrations in MW-6 are from the tannery site to the west. *Id.*; 6/14/23 Tr., p. 79:20-80:5. Weaver further described that contamination from the Tannery will continue to migrate on to MWG's property, a fact Complainants intentionally ignored. 6/14/23 Tr., p. 79:22-80:5, 84:17-85:6. In any case, Weaver's trend analysis for the Waukegan Station found that the concentrations were decreasing slightly, just not quickly enough, explaining their recommendation for additional corrective action. MWG Ex. 1702, p. 84; 6/13/23 Tr., p. 145:10-146:14; MWG 2024 Br., §V.F.

ii. Weaver Relied upon the Wells That Are Consistently Downgradient

Complainants also attempt to find fault with Weaver's determination of the upgradient and downgradient wells by pointing to elevations on a ***single date*** of the groundwater flow at three of the Stations. Comp. Br. p. 47. But, as any expert would tell you, a "sample size of one is rarely, if ever, sufficient." *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 818 (7th Cir. 2010). The Board is well aware that MWG has sampled the groundwater on a quarterly basis for over ten years at each of the Stations. Interim Order, p. 22; Comp. Exs. 1301-1328. To determine the correct downgradient wells, Weaver "looked at an evaluation of the data as a whole and looked to identify those wells that were downgradient most consistently," and with the "predominant groundwater flow direction." 6/13/23 Tr., p. 228:10-231:17. Thus, while the groundwater flow at certain wells may appear to have a downgradient component on the single date of the individual flow maps

Complainants pulled, Weaver explained it was only at that "one point in time," on that "particular drawing", or "on this particular date." 6/13/23 Tr., p. 228:10, 228:21, 229:24; 230:21. Because the predominant groundwater flow direction at those wells was the opposite direction, Weaver properly did not consider them downgradient. *Id,* 231:15-17.

Moreover, even though Complainants *think* certain discrete wells should have been included based upon a single data point and without expert support, Complainants do not explain how they think Weaver's trend analysis would change if they were. For example, at both MW-5 at Joliet 29 and MW-2 at Powerton there is no evidence that there is groundwater contamination at either well, as a result the trend analysis would not change, and further supports that MNA is occurring. Comp. Ex. 1303, MWG13-15_118148; Comp. Ex. 1310, MWG13-15_118248. In any case, Seymour conducted the same trend analysis on all the wells and came to a similar conclusion. MWG Ex. 906. Complainants did nothing.

iii. Weaver's Reliance on All the Data for the Trend Analysis Was Valid

Similarly, Complainants concern that Weaver included both the dissolved and total metals sample results in the Mann-Kendall analysis is misplaced. Notably, their claim that the dataset could be distorted or skewed is merely a conclusion by counsel, unsupported by any evidence. Complainants could have presented an expert to evaluate the trend data – but they chose not to, hoping the Board would accept their unsupported claim as true. If an expert were to present a conclusion without any basis, their conclusion would be considered wholly uninformative and entitled to no weight. *Weigel v. Target Stores*, 122 F.3d 461, 469 (7th Cir. 1997). Here, the Board should similarly give no credence to Complainants' counsel's baseless claims on the dataset.

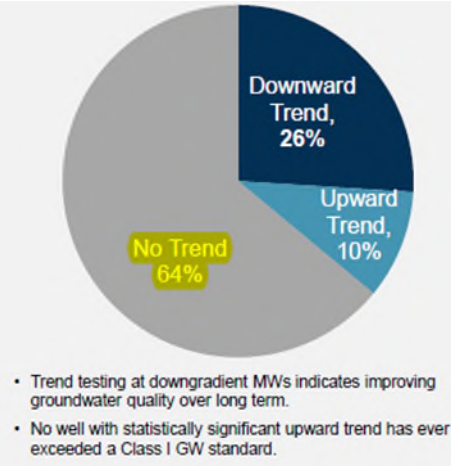
Regardless, Weaver resolved Complainants' criticism. Weaver explained that they used both the dissolved and total metals data to be "thorough and include a thorough analysis..." 6/14/2023 Tr., p. 73:7-13. And even when Weaver removed all the total metals data where there was corresponding dissolved data, the trend analysis showed that the conclusions on the trends were the same, demonstrating that the results are neither distorted nor skewed. 6/14/23 Tr., p. 74:14-75:5. Complainants conveniently ignore this testimony and by doing so mislead the Board.

iv. Weaver Included the No Trend Data in Its Trend Results

The most obvious demonstration of Complainants' misunderstanding of the groundwater trend analysis is their false claim that Weaver "omitted data showing no trend from their comparisons of the trend results." Comp. Brief 48. ***Both*** the Weaver report and their presentation include the "No Trend" data. An excerpt of Weaver's expert report is copied below, where the "not trend" results are highlighted.

- Joliet 29: Of the 132 trend tests performed, 64% exhibited no trend, 26% exhibited a downward trend (11/34 statistically significant downward), and 10% exhibited an upward trend. Of the data where a trend was observed, 72% of the trends are downward and 28% upward.
- Powerton: Of the 233 trend tests performed, 64% exhibited no trend, 30% exhibited a downward trend (25/70 statistically significant downward), and 6% exhibited an upward trend. Of the data where a trend was observed, 82% of the trends are downward and 18% upward.
- Will Co.: Of the 140 trend tests performed, 57% exhibited no trend, 27% exhibited a downward trend (13/38 statistically significant downward), and 16% exhibited an upward trend. Of the data where a trend was observed, 63% of the trends are downward and 37% are upward.
- Waukegan: Of the 135 trend tests performed, 60% exhibited no trend, 19% exhibit a downward trend (9/26 statistically significant downward), and 21% exhibited an upward trend. Of the data where a trend was observed, 48% of the trends are downward and 52% are upward.

MWG Ex. 1701, MWG13-15_81461. Weaver's presentation also included the "no trend" data. As an example, the Joliet 29 groundwater trend testing diagram is excerpted below, with the "no trend" highlighted:



MWG Ex. 1702, pp. 26, 45, 64, 84. Indeed, Complainants citation in their FN 255, a quote from the Weaver expert report, ***does not*** state that Weaver excluded the "no trend" data. Rather it explains that many of the "no trend" results were because a majority of the data was "non-detect." MWG Ex. 1701, MWG13-15_81461.

If Complainants' issue is that they think Weaver stated that all the "no trend" data reflects non-detects, Complainants' claim is also false. Weaver consistently stated that a ***majority*** of the no-trends results were non-detect. Weaver further examined the no-trend data to confirm it was comprised of a majority of non-detect results. For example, in the Joliet 29 data, 58% of the no-trend results were related to non-detect data. 6/13/23 Tr., p. 28:10-16; *see also* 6/13/23 Tr., p. 73:20-22, 106:6-12; 146:23-147:3 (At Powerton, Will County, and Waukegan a "majority" of the no trends were because the data were non-detect). Indeed, on cross-examination, Weaver specifically stated that they did not say 100% of the no-trend data was a result of a non-detect, and Complainants' counsel conceded that point agreeing that Weaver had said only in "most instances

it's flat because there were non-detects." 6/13/23 Tr. P. 16-22. In fact, even the percentages in Complainants' brief, that 17%-32% of the no trend results were not due to non-detects, prove that a ***majority*** (*i.e.,* 68%-82%) of the results were due to non-detect. Comp. Br. at 49.

Even in those instances when a no trend result was entirely comprised of detections, the detections were below the groundwater standard. In their brief, Complainants point to arsenic in MW-4 at the Joliet 29 Station, which showed "no trend" and also had 100% detections. Comp. Brief, FN 257 citing 6/13/23 Tr. P. 210:22-211:16; MWG 1701, MWG13-15_81517. In the specific graph for total arsenic in MW-4 at Joliet 29, 100% of the arsenic detections were far below the Class I standard of 0.01 mg/l (ranging from approximately 0.0010 - 0.0025 mg/l) 6/14/23 Tr., p. 70:14-20; MWG Ex. 1701, at MWG13-15_81535, 35 Ill. Adm. Code 620.410.[5] Similarly, Complainants cite to questions about dissolved barium in MW-07 and total boron in MW-4 at Joliet 29, which also had "no trend" results with 100% detections. Comp. Br., FN257. For both, the specific graphs showed that all of the detections were far below the Class I standard (dissolved barium at MW-07 = ~0.07 - 0.18 mg/l, std: 2 mg/l; MWG Ex. 1701, MWG13-15_81541); (total boron at MW-04 = ~0.30- 0.55 mg/l, std: 2 mg/l; MWG Ex. 1701, MWG13-15_81559); 35 Ill. Adm. Code 620.410. Complainants mislead the Board by suggesting there is some relevance to their criticism when there is none.

v. No Basis that Only the "Statistically Significant" Downward Trend is Valid

Finally, Complainants provide no basis or citation in the record for their claim that the only valid results to consider from the Mann-Kendall trend analysis should be the statistically significant downward trends. Comp. Br., p. 49. Complainants have no expert making this claim and no support in the record. The evidence in the record, from Weaver, refutes the claim. Weaver explained how the Mann-Kendall analysis is performed, how its results are considered, and how each of the findings, even "no trend" are relevant. MWG 1701, MWG13-15_81460; 6/12/23 Tr, p. 227:4-228:5, 234:1-9. Again, if an expert were to present the claim that counsel made here, without any basis, their claim would be considered wholly uninformative and entitled to no weight. *Weigel*, 122 F.3d at 469. Here, Complainants provide no basis to disregard valid data showing that the concentration trends at the Stations are decreasing.

Any finding that groundwater is not improving based on each of these baseless claims would be against the manifest weight of the evidence.

V. COMPLAINANTS' COUNSEL'S SUGGESTED REMEDY WRONGLY ASSUMES THAT THE BOARD HAS THE POWER TO ISSUE MANDATORY INJUNCTIONS

Complainants' counsel are asking for a remedy that the Board cannot grant. Section 33 gives the Board broad powers to impose penalties and issue cease-and-desist orders. But it cannot

[5] The specific slope and detection data for the trend analysis was included in the Weaver report as backup information. 6/14/23 Tr., p. 68:12-69:8; MWG Ex. 1701, MWG13-15_81520-82171.

compel a party to perform a remedy through a mandatory injunction because "it lacks the injunctive authority of the circuit courts." *Sierra Club, et al. v. City of Springfield*, PCB 18-11, at p. 30 (Interim Opinion and Order, June 17, 2021). *See also Dayton Hudson Corp. v. Cardinal*, PCB No. 97-134, 1997 Ill. ENV LEXIS 488, *18 (Aug. 21, 1997) ("[T]he Board does not have the authority to award injunctive relief"); *Clean the Uniform Company v. Aramark Uniform & Career Apparel, Inc.*, PCB, 03-21, at 3 (Nov. 7, 2002) ("The Board is not authorized to grant injunctive relief.").

Even though Complainants were party to *City of Springfield*, their post-hearing brief neglects to address the Board's statement on the outer boundaries of its statutory power. They do not even identify a statute that would allow the Board, a "creature of statute" with no extratextual powers, to order the removal remedy Complainants promote. *Modrytzkji v. City of Chicago*, 2015 IL App (1st) 141874, ¶10.

To the extent Complainants' brief implies that the power to issue cleanup orders was established by *People v. J&F Hauling, Inc.*, they are mistaken. Comp. Br. at 33 n.152, citing PCB No. 97-134, 2003 Ill. ENV LEXIS 56 (Feb. 6, 2003). First, *J&F Hauling* was essentially a default judgment: The respondent refused to participate in the enforcement proceedings. 2003 Ill. ENV LEXIS 56, at *11 ("J&F has failed to provide any evidence at the Board's hearing and has failed to file a post-hearing brief."). Cases where only one side bothers to show up are not compelling precedents. Even still, in that case, the State of Illinois presented an expert to testify on the removal remedy they proposed. *Id.* at *8-9. That never happened here.

Second, *J&F Hauling* predates the Illinois Supreme Court's *Agpro* decision by two years. *People v. Agpro, Inc.*, 214 Ill. 2d 222 (2005). So, to the extent that *J&F Hauling* reflects a belief that the Board's power to issue cease-and-desist orders encompasses mandatory injunctions and removal actions, that reasoning did not survive the Court's rejection of similar logic in *AgPro*. See MWG Br. at 50-51. That is why more recent Board decisions like *City of Springfield* make plain that it cannot order mandatory injunctions.

Third, and most importantly, the Board's powers come from the Act, not its own precedents. Complainants' failure to cite *any* statutory authority is inexcusable. Their contention that Section 21(a) has a "presumed" remedy makes the absence of citations to statute even more questionable. Comp. Br. at 64. How can the Act have "presumed" remedies when it does not even say that the Board has the power to compel performance? The General Assembly's drafters knew how to grant such powers: Section 45(d) of the Act specifically discusses "the State" bringing actions under Section 42(e) "seek[ing] to compel the defendant to remove the [openly dumped waste] or otherwise clean up the site…" 415 ILCS 5/42(e). The Act never assigns the Board a similar power to "compel" parties to perform certain acts; only to make them "cease and desist." In any case, as discussed below (*see infra* p. 45), there is no presumed remedy for open dumping violations.

MWG's post-hearing brief notes that the Board's acknowledgment that it cannot issue

mandatory injunctions creates no serious deficit in its enforcement powers. MWG 2024 Br. at 51-52. The respondent, upon being found to be in ongoing violation of the Act, has ample incentive to resolve the issue. *J&F Hauling* is best understood as one of several precedents showing the Board handing the violator a roadmap, showing them the route, and (in that case) allowing them nine months to get to the destination. *See* 2003 Ill. ENV LEXIS 56, at *12.

But *even if* the Board can order a party to cease and desist from violating the Act, that does not mean that it can dictate how that cessation occurs. *See Roti v. LTD Commodities*, 355 Ill. App. 3d 1039, 1054 (2d Dist. 2005) (noting that respondent only had to perform Board's sound-suppression remedy if it thought it "would be in its best business interest"). While following the Board's instructions will often be the respondent's "best business interest," when those interests lie elsewhere, the Board's unquestioned powers to award monetary penalties and issue prohibitory orders creates ample incentive for the respondent to select effective and expeditious alternative remedies like the Weaver Remedy. The Board need not stray from the Act to accomplish its objectives.

In any event, even if the Board wants to claim a new power to compel performance of a particular remedy, this case is a poor vehicle. The "roadmaps" in cases like *J&F Hauling* and *City of Matteson* were developed by qualified experts who testified at hearings. *J&F Hauling*, 2003 Ill. ENV LEXIS 56, at *7-9; *City of Matteson*, PCB 90-146, at 42-13. Here, Complainants failed to accomplish that. The Board should not compel MWG to perform Complainants' remedy when Complainants have not bothered to substantiate the effectiveness or feasibility of that remedy, and their only "expert" (whose opinion deserves no weight) openly stated he was not recommending a removal remedy. 5/15/23 Tr., p. 176:5-178:1.

VI. A NATURE-AND-EXTENT STUDY IS NOT NECESSARY OR APPROPRIATE

Complainants demand for a nature and extent study shifts the burden and forces work on others that they should have done themselves. First and foremost, Complainants' expert who recommended the nature and extent investigation (and who is entitled to little weight) failed to consider the 20+ years of data that already exist for the Stations. That failure makes the recommendation questionable on its face. If Complainants believed that additional data were necessary in certain locations, they could have sought access to conduct their own sampling pursuant to a Rule 214(a) subpoena. They did not. They could have objected when the Hearing Officer set a discovery schedule for the remedies phase that did not include time to conduct investigations. They did not. Their overbroad demand to "investigate" as a remedy, while ignoring all prior investigations at the Stations, is galling. As Weaver explained, MWG's Stations have been *extensively* investigated for at least two decades. MWG Ex. 1702, p. 12, 35, 55, 73; 6/12/23 Tr., p. 277:11-24; 6/13/23 Tr., p. 95:15-23, 131:18-132:7; MWG Ex. 1701, MWG13-15_81444-81459; MWG Br. §V.A. Weaver's report included maps that showed that the Stations are riddled with

sample locations for the many investigations that have occurred at the Stations. MWG included the maps as Appendix D to its post-hearing brief. *See also* MWG Ex. 1702, p. 12, 35, 55, 73. Complainants conveniently ignore these data because it defeats their claim that further investigations are needed.[6]

By demanding IEPA's involvement in the nature-and-extent study, Complainants introduce even more potential for delay. The only set process available to request participation by IEPA that has been introduced into the record is the Illinois Site Remediation Program, the exact program Weaver's remedy follows. If Complainants are trying to prolong these proceedings, they could not do better than attempting to secure a Board Order that requires MWG to commandeer IEPA.

VII. THE MATERIAL WEIGHT OF EVIDENCE RELATING TO THE SECTION 33(C) FACTORS SUPPORTS THE WEAVER REMEDY

As discussed above, Complainants have not proposed a supportable remedy, so the Board need go no further in its analysis of which remedy qualifies as technically practical and economically reasonable. In any case, the Board should adopt MWG's remedy as proposed by the experts at Weaver because it is the only technically feasible and economically reasonable remedy presented to the Board.

Complainants misinterpret the Section 33(c) factors, essentially rendering their arguments for each of those factors irrelevant. Section 33(c) asks the Board to look at the broader picture *before* finding a violation or picking a remedy. That is why the Board must look at the "character and degree" of injury, whether the pollution "source" (not the pollution itself) has economic value, whether the respondent's operations are suitable for their location, including whether they were there first, and whether the respondent took action. 415 ILCS 5/33(c). Indeed, Complainants appear to misinterpret these factors because they cannot get around that MWG demonstrated, (1) the harm is low through its undisputed risk analysis and lack of receptors and the duration is short because of the GMZs, regulatory changes, and this case, (2) the unrebutted expert opinion that the Stations had and have economic and social value, (3) that the Stations have priority of location and are located in primarily industrial areas, and (4) that MWG has taken extensive corrective actions. *See* MWG 2024 Br., §VII.A. VII.B., VII.C., & VII.E.

A. There is No Evidence that Complainants' Proposal for Site-Wide Removal is

[6] Complainants cite to *Zarlenga v. P'ship Concepts*, PCB 89-169, 1992 Ill. ENV LEXIS 536, *1-2 (July 30, 1992) to suggest that the Board has an implied power to order remedial investigations. As MWG noted in its post-hearing brief, Professor Currie indicated that this is not how the Board incentivizes remedial investigations—the Board's power to issue "prohibitory orders" does not extend that far. MWG Br. at 51, citing David Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw. U. L. Rev. 389, 425, 447 (1976). No Illinois court has ever confirmed that this non-textual power exists. In other cases Complainants cite for this proposition, the investigation was required by a settlement agreement *voluntarily* entered into by the respondents. *See Lake Cnty. Forest Preserve Dist. v. Ostro*, 1994 Ill. ENV LEXIS 703, *1 (June 23, 1992); *IEPA v. Baird Chem., Inc.*, 1973 Ill. ENV LEXIS 275, *4-5 (Oct. 25, 1973).

Technically Practical or Economically Reasonable

Complainants' claim - that an undefined, unsupported removal of all the CCR at the MWG Stations is technically practical and economically reasonable - fails on its face. First, there is no expert testimony that removal is technically feasible and economically reasonable. In fact, their only "expert" to testify on any remedy, who the Board has held deserves little weight, specifically stated he *was not* recommending a removal remedy. 5/15/23 Tr., p. 176:5-178:1. Quarles also admitted that he had not assessed the many issues relating to a removal – such as air pollution from the truck traffic removing the CCR, or the quantities of the CCR for removal. *Id*. Complainants cite to a single outdated table, without any context, showing that a few CCR surface impoundments were initially planned to be closed by removal. Second, Complainants do not even address the massive scope of the removal remedy Complainants appear to suggest here. Complainants' reliance on an undated table of ponds has no relation to the technical impracticability of the wide-scale removal Complainants propose at the MWG Stations. Third, the issue of ash removal from the ponds is addressed by MWG's continued and required compliance with the federal and Illinois CCR rules. The Board should not circumvent existing regulatory requirements based on Complainants' counsel's unsupported and undefined suggestion that a removal remedy might be possible. The only evidence in the record by three expert witnesses is that removal is not technically practical nor economically reasonable.

i. An Outdated Table of CCR Surface Impoundments Without Context Does Not Demonstrate Removal is Technically Practical or Economically Reasonable

Because they have no expert testimony to support a removal remedy for the CCR impoundments, Complainants rely upon a table in Quarles's report that they claim lists CCR surface impoundments to be closed by removal. Comp. Br. at 29. Correctly, Complainants acknowledge the Board will give Quarles's report, including Table 1, little weight. Comp. Br., FN135.[7] But even if the Board were to look at the Table, it is out of date and does not support Complainants' argument that removal of the MWG ponds is technically practicable or reasonable. Indeed, Quarles testified he did not know the date of the information in the table. 5/15/23 Tr., p. 179:2-3. He also agreed that he had not updated the table of information, including the information about MWG's CCR surface impoundments, despite knowing that updated information was publicly available. *Id.* P. 179:14-180:5. If Quarles had bothered to check, he would have found that at least three of the MWG CCR surface impoundments on Table 1 (one at Waukegan and two Will County) will not be closed by removal but will be closed in place with an engineered cap. MWG Br., Appen. B, SOF 1146, 1154. Moreover, the Ash Bypass Basin and Ash Surge Basin are

[7] Complainants state in FN135 that the Board's decision to give little weight to Quarles was somehow mistaken – yet it was an issue wholly in Complainants control. As the Board found, it was Complainants' choice to ignore the Board's decision directing them to build on the opinions of their first expert.

not going to be closed. Instead, both will be retrofitted, which Quarles also failed to check. SOF 827, 1137; 5/15/23 Tr., p. 184:18-24, 186:12-15. At least two of the other "CCR surface impoundments" on the Table are not even impoundments but are defined as CCR landfills.[8] It is disturbing that Complainants continue to rely on Table 1 and present it to the Board as truthful when Complainants heard the testimony to the contrary. Because Table 1 is inaccurate, the Board should disregard the information in its entirety.

Moreover, even if the information in Table 1 was accurate (which it is not), the 127 CCR surface impoundments in Table 1 are merely 18% of the total number of CCR surface impoundments throughout the United States.[9] Because Complainants identified a small minority of the CCR surface impoundments in the US that will be closed by removal, it follows then that it is more likely than not that the significant majority (over 80%) will be closed in place with an engineered cap. In other words, in consideration of the entire universe of CCR surface impoundments throughout the nation, Table 1 demonstrates that overall, closure in place is more technically practical and economically reasonable.

Finally, merely because some other company in some other state elects to close a single pond by removal does not mean that closure by removal is technically practical and economically reasonable in this case. That conclusion depends on many factors, including the size of the ponds, the contents of the ponds, and the availability of other ponds or landfills to consolidate the CCR for closure in place. There is nothing in Table 1 or otherwise in the record related to those factors. For example, two of the ponds on Complainants' Table 1 are only being closed by removal because their contents are being placed in an adjacent pond for a consolidated closure in place.[10] In short, a basic table of a small number of CCR surface impoundments in the United States, without any further information, fails to demonstrate that closure of the MWG CCR surface impoundments by removal is technically feasible and economically reasonable.

ii. MWG's Routine Ash-Pond Maintenance Does Not Equate to Full-scale Pond Removals Under the Rules

Complainants then argue that removal of the ash ponds is technically practicable and reasonable because MWG has performed scheduled ash removals for maintenance. Comp. Br. at 30. This effort to equate MWG's routine removals of ash for maintenance purposes with a full-

[8] Both the Beneficial Use Storage Area and the PCS Beneficial Use Storage Area at the Prairie Creek Generating Station are CCR landfills, https://ccr.alliantenergy.com/PrairieCreek?utm_source=WS&utm_campaign=PrairieCreek&utm_source=WS&utm_campaign=PrairieCreek

[9] USEPA identified approximately 680 CCR surface impoundments across the nation; https://www.epa.gov/coalash/effort-assess-coal-combustion-residuals-disposal-units

[10] Prairie Creek Generating Station – Written Closure Plan – 2018 Revision, p. 4; https://ccr.alliantenergy.com/prairiecreek/landfill/closurepostclosurecare (The Prairie Creek Generating Station removed the CCR from both the Beneficial Use Storage Area and the PCS Beneficial Use Storage Area and consolidated the CCR in four adjacent CCR surface impoundments for closure in place),

scale pond closure by removal is baseless. Closure by removal would be required to comply with the Federal and State CCR rules. It is like comparing the annual cleaning out of a closet to make room for new purchases to adding an addition to a house to gain more space for an expanding family. One is routine and has no permit or regulatory requirements, the other generally happens once and is subject to specific permitting and regulatory requirements.

Routine removals for continued operations are entirely different than a closure by removal pursuant to the federal and Illinois CCR rules. MWG conducted routine removals for maintenance to provide space to continue using the ponds when the Stations operated. SOF 103, 174, 185, 204, 303, 391, 734, 825.[11] Because the ponds were lined and to prevent liner damage, the routine removals would leave ash on the sides and on the bottom in addition to leaving the warning and cushion layers in place. 1/31/18 Tr., p. 110:19-111:21. The routine removals did not require any permit from a regulatory agency, did not require removal of the liners and the associated equipment, and did not include any reporting requirements.

By comparison, full-scale closure by removal pursuant to Part 845 is extensive. Primarily, before any closure by removal project, MWG must be granted a permit by IEPA, and as was stated during the hearing, IEPA has not issued a single permit for closure of any CCR surface impoundment to date. 415 ILCS 5/22.59(b)(2); 35 Ill. Adm. Code 845.200(a); SOF 1156. Even if the Agency were to start issuing permits, closure by removal pursuant to Part 845 requires removal of all CCR, CCR residues, the containment system components including the liner and any contaminated underlying soils, and all impoundment structures and ancillary equipment. 35 Ill. Adm. Code 845.740(a). It also requires a transportation plan and monthly reporting. 35 Ill. Adm. Code 845.740(c), (d). In any case, the closure requirements for the CCR surface impoundments are dictated by Part 845, and MWG has submitted the permit applications for the closure or retrofit of its surface impoundments. Surely Complainants are not suggesting that the Board should issue an order in this case that ignores the regulatory process it enacted when it promulgated Part 845?

Complainants cite a single case to support their argument that MWG's pond maintenance means that complete pond removal is technically practicable. Comp. Br. at 31, citing *Krautsack v. Patel*, PCB95-143, 1997 Ill. ENV LEXIS 483 (Aug. 21, 1997). That case is entirely inapplicable. First, that opinion concerned an *unopposed* partial motion for summary judgment where the Board entered an order to remove a small quantity of contaminated soils. *Krautsack v. Patel,* PCB95-143, 1997 Ill. ENV LEXIS 483 (Aug. 21, 1997). Following the Board's order, the respondent only asked the Board to give it more time to comply with the order – but it never objected or appealed the Board's decision, indicating that it agreed with (and thus did not oppose) the Board's conclusion. *Krautsack v. Patel,* PCB95-143, Respondent's Motion for Extension of Time to

[11] The routine removals continue to occur at Powerton Ash Surge Basin because the basin continues to receive ash. SOF 823.

Comply, Jan. 5, 1998. That is not the case here, where MWG has presented expert evidence and testimony that supports a feasible remedy that does not include removal. Second, in that case, the volume of contaminated soil to be removed was minor – approximately 1,750 cubic yards. *Krautsack v. Patel*, PCB95-143, 1997 Ill. ENV LEXIS 483, *13. As such, the Board could easily find that it was technically practical and economically reasonable to remove. By comparison, Pond 1S at Will County, only one of MWG's ponds (and one of its smallest), is ten times larger at 17,037 cubic yards. Comp. Ex. 1332, MWG13-15_126013.

iii. Removal of All CCR is not Technically Practical nor Economically Reasonable

The evidence in the record overwhelmingly demonstrates that Complainants' proposal to "remove everything" is not technically practical nor economically reasonable. MWG's first expert, John Seymour, specifically evaluated the technical practicability and reasonableness of a large-scale ash removal. He concluded that such a remedy would be economically unreasonable and technically impracticable due to the excessive costs and negative impact on the surrounding community. MWG Ex. 903, pp. 63-69 As ordered by the Board, Weaver reviewed and drew upon Seymour's report and agreed with his conclusion. 6/12/23 Tr., p. 256:4-8, 262:19-264:7. Complainants have no evidence in the record to dispute this conclusion. Similarly, MWG's economic expert, Koch, testified that site-wide removals are the worst-case scenarios at any site, and not the lowest cost option for achieving compliance. 6/15/23 NDI Tr., p. 31:1-4; MWG Ex. 1901, MWG13-15_82214-82215. Rather, a site-wide removal is one of the most expensive remedies Koch was aware of, making it economically unreasonable. 6/15/23 NDI Tr., p. 31:1-7, 58:19-2; *see also* MWG Br. §VII.C.ii.

Complainants' demand for an order for a complete removal is also technically impractical because it would force MWG to be in violation of Section 22.59 of the Act. Under that Section, MWG cannot conduct any closure activity, such as a removal, without a permit from IEPA.

B. Complainants' Proposal for a Nature Extent Investigation is Technically Impractical and Economically Unreasonable

Other than general platitudes, Complainants provide no basis that site-wide nature and extent investigations at each of the MWG Stations are technically practical or economically reasonable. Comp. Br. at 31-32. Instead, Complainants merely point to other Board cases where an investigation was found to be appropriate. As explained above, those cases are entirely inapplicable here because in those cases the Board was presented with expert testimony that the Board concluded merited weight, or the parties stipulated to the investigation. *Supra* at IV.A. Other than claiming that the Board may order an investigation, Complainants fail to present how they think any investigation would work. They provide no specifics on the scope of the investigations and how disputes over the scope of the investigations or interpretation of the results would be resolved. Indeed, as MWG explained in its post-hearing brief, Complainants' proposal

for additional investigations provides the Board no end to this matter. *See* MWG 2024 Br. §§ V.H., VII.D.iv.

Weaver explained that the MWG Stations have been extensively investigated, thus no additional investigation was required to develop a remedy (*i.e.*, additional investigations are not practical nor reasonable). 6/14/23 Tr. p. 91:1-7. Weaver noted that Complainants' "expert" Quarles did not even bother to review the extensive volume of data collected at the MWG Stations, demonstrating that Quarles's recommendation for a nature and extent investigation is baseless. 6/12/23 Tr., p. 267:17-268:10; MWG Ex. 1701, MWG13-15_81438. Instead, because of the extensive data collected at the MWG Stations, Weaver was able to assess remedies appropriate for each of the Stations, an opinion shared by the two prior experts. 6/12/23 Tr., p. 226:4-11, 6/13/23 Tr., p. 81:21-82:9, 115:1-116:22, 168:15-169:169:9, 6/14/23 Tr., p. 66:6-9; *see also*, MWG Br. §§V.A., V.G., & VII.D.

C. Weaver's Unrebutted Risk Analysis and the Absence of Current and Future Threats Demonstrates that the Injury is Low

Complainants' interpretation of Section 33(c)(i), that a violation is "per se" a grave injury, is unfounded and not based on the language in the statute. Instead, Section 33(c)(i) directs the Board to look at the "character and degree" of injury. Here, the unrebutted evidence demonstrates that the character and degree is low because of the absence of risk to offsite potable water, the absence of evidence that the Stations' groundwater could ever be used, and the two unrebutted risk analyses.

i. Section 33(c)(i) Requires Board to Evaluate the *Degree and Character* of Injury

Complainants are wrong to claim that the Board's finding of groundwater violations means that a "cognizable" injury is present and that harm is grave. Comp. Br. at 14, 17. Their claim centers around the theory that if a law was violated, then an injury exists "per se." Id. at 16. Per se means "by himself or itself; in itself; taken alone; inherently; in isolation; unconnected with other matters." *Black's Law Dictionary*, Rev. 4th ed. (emphasis added). In other words, according to Complainants, there's an injury because there is a violation; and the *character* of the injury is "unconnected with other matters." Complainants fail to explain how a "per se" injury that is "unconnected" to any known present-day harms can have *any* degree or character, much the less constitute a "grave injury to, [and] interference with the protection of the health, general welfare and physical property of the people." Comp. Br. at 17.

But Section 33(c)(i) of the Act is not a yes/no question asking whether the Board found a violation. Indeed, the Board recognizes that some violations simply do not produce appreciable harm. *E.g., IEPA v. Ficklin*, PCB 79-271, at 4 (Nov. 20, 1980) (character and degree of injury of an emission was minimal because the alleged odors from the waste did not impact neighbors); *People v. CSX Transportation, Inc.*, PCB 07-16 (July 12, 2007) (character and degree of injury

slight because spill occurred on industrial site). Instead, it evaluates the "character and degree" of injury, which in this case means assessing matters such as whether the groundwater contamination threatens potential receptors, or whether there's *actually* a reasonable likelihood that the contamination could have an observable impact on local water supplies.

To the extent that Complainants shed any light on the subject at all, they do no more than admit that no actual injury has occurred *yet*. Indeed, even their first expert agrees that drinking water was never endangered, and that fact was confirmed by Complainants' counsel. SOF 485, 709; 6/12/23 Tr., p. 220:7-9. To the extent that there may be a *risk* of injury in the future, Complainants failed to provide expert testimony showing even a *remote* likelihood that an injury would occur before the Weaver Remedy is complete. Instead, Complainants speculate that it is possible that the groundwater could be used in the future. But Complainants' claims of the risk of harm because of the potential loss of future use as potable water has no support. There is no evidence in the record that the groundwater at the Stations *could ever* be used as a potable water source. Merely because the concentrations in the groundwater are compared to the Class I standard does not mean that the groundwater would qualify as potable water. Section 620.210 of the Board's rules specify the requirements for a Class I Potable Resource Groundwater. 35 Ill. Adm. Code 620.210. The requirements include that the groundwater is located 10 feet or more below the land surface, and is either (1) within a minimum setback zone of a potable water well, (2) contains at least 5 feet of unconsolidated sand, gravel, or sand and gravel, that contains 12% or less fines (as specified by an ASTM standard), (3) within 10 feet or more of sandstone, or (4) is within a geologic material that is capable of a sustained yield of 150 gallons per day or has a specific hydraulic conductivity. *Id*. Complainants did not establish that the groundwater at any of the Stations qualifies as potable water under Section 620.210 of the Board rules. Rather, there is evidence that they do not. *E.g.*, Comp. Ex. 1332, MWG13-15_125646. (Groundwater at Will County Station less than 10 feet below land surface).

ii. Complainants Do Not Dispute the Risk Analysis Showing the Absence of Risk

Most importantly, Complainants do not dispute Weaver's risk analysis, which conclusively demonstrated the absence of risk to potable water and off-site receptors, including surface water. As Complainants acknowledge in their brief, the Board is concerned with the "threat," "risk" or "potential" for harm. *Sierra Club v. MWG*, Orders (Apr. 17, 2014, Dec. 15, 2022); Weaver's unrebutted analysis addresses the Board's concerns for the risk, threat and potential for harm from the conditions in the groundwater while the MNA mechanisms progress.

Weaver's risk analysis proved that there is no risk to offsite receptors, which supports the conclusion to allow the MNA mechanisms to continue to work over time. 6/12/23 Tr., p. 220:5-6

& 6/13/23 Tr. p. 84:1-7, 104:10-105:4; MWG Ex. 1702, p. 25, 44, 63.[12] Weaver compared the concentrations to the applicable surface water standards, or water quality criteria, which was another conservative choice because it assumed that the surface water was at the location of the groundwater well. 6/13/23 Tr., p. 34:3-14, 38:1-7, 78:13-19, 80:15-23. By the very nature of the comparison to the established standards, even if the surface water were a potable water source (such as Lake Michigan), Weaver's analysis established that there is no risk to the potable surface water. *See* MWG 2024 Br., §V.C.

Complainants did not present *any* risk analysis, despite being presented with two from MWG's experts, conclusively demonstrating that they do not dispute the conclusion of the absence of risk. For that reason alone, it would be against the manifest weight of the evidence to find that the conditions in the groundwater pose a risk to offsite receptors requiring a remedy more than recommended by MWG.

iii. Board's Decision in *Poland* Confirms That the Injury is Low

Conspicuously, Complainants' discussion of the "grave" injury at issue in this case fails to compare MWG to past violators where the Board has found an injury. *See* Comp. Br. at 14-17. That is because MWG has little in common with the violators in this Board's precedents. MWG is not subjecting its neighbors to heavy black smoke. *Standard Scrap Metal Co. v. Pollution Control Bd.* 142 Ill. App. 3d 655, 663 (1st Dist. 1986) (emitted heavy black smoke, up to 100% in opacity, including blocking a driver's view on the neighboring highway). MWG is not causing or threatening to harm wildlife. *Archer Daniels Midland v. IPCB*, 119 Ill. App. 3d 428, 433 (4th Dist. 1983) (respondent's illegal discharges of oily scum produce fish kills). Indeed, the *one case* Complainants cite, *Cent. Ill. Pub. Serv. Co. v. Pollution Control Bd*. does not discuss the application of the 33(c) factors at all. *See* Comp. Br. at 16 n.21, citing 116 Ill. 2d 397 (1987). Instead, the Illinois Supreme Court was evaluating whether the Board was required to promulgate procedures before considering a petition for site-specific standards, and if not, whether the Board's denial of a petition was arbitrary and capricious. *Id.*, 401-402. The single quote Complainants pulled was merely dicta on the definition of water pollution. *Id*. at 409.

As stated in MWG's post-hearing brief, the most suitable comparison case is *People v. Poland*, PCB 98-148 (Aug. 7, 2003). MWG Br., p. 51-52. There, the respondent presented a suitable remedy to the Board that was offered through an expert's testimony. The respondent's expert remedy presented a more reasonable option than the complainant's demand to carry out a removal action. *Id.* at 10-12. The Board selected the respondent's remedy, in part, because the complainant had failed to show that there was any injury to health, welfare and property, or evidence of environmental harm. *Id.*

[12] MWG's initial expert also conducted a risk analysis, which was unrebutted, that came to the same conclusion. MWG Ex. 903, Appen. B.

The Board correctly applied Section 33(c)(i) in *Poland* and furthered the purposes of the Act by using its technical expertise to select a reasonable conclusion. It should do the same here.

D. Complainants' Interpretation of Economic Value of a Pollution Source is Wrong

i. Externalities Are Not Used to Calculate Socio-Economic Value

MWG presented testimony from an expert witness, Dr. Brian Richard, who testified to the significant social and economic value created by the Stations. Complainants did not present their own expert. Nonetheless, their post-hearing brief now claims that Dr. Richard *should* have accounted for the groundwater impacts identified in the Board's 2019 and 2020 orders and concluded that the Stations created little or no value. Comp. Br. at 17-18. That is not correct. Section 33(c)(ii) does not use environmental injury as an input for the economic value of a pollution source. IMPLAN - "the most commonly used economic impact model in the country" - also does not use environmental harm as a relevant input. 6/15/23 Tr., p. 12:3-19. Nor is there evidence that any other economic-value models assess them. As such, Dr. Richard's testimony that negative externalities are "a separate issue" and do not play a role in assessing economic value, was unrebutted and credible. *Id*. at 52:11. Because "social and economic value" is not a defined term under the Act, the Board should follow the expert community's generally accepted definition.

To the extent that Complainants cite to cases discussing how environmental harm can "undermine" a pollution source's economic value, they misread these holdings. Comp. Br. at 18. Complainants seem to argue that environmental injuries get counted twice: during the Section 33(c)(i) analysis, and then again as part of Section 33(c)(ii). That is not what the Act instructs. The Board treats the Section 33(c) factors equally and does not apply arbitrary multipliers when weighing them. First each factor is determined. Then the Board considers whether its decision is reasonable in light of those factors.

None of the cases Complainants cite double-count environmental injury as part of socio-economic value. For example, in *Standard Scrap Metal Co. v. Pollution Control Bd.*, a case cited by Complainants, the First District agreed with the Board's finding that the respondent's business "provides social and economic value in that it employs individuals and serves the steel manufacturing industry." 142 Ill. App. 3d 655, 663 (1st Dist. 1986). This negates Complainants' notion that any violation, no matter how small, requires the Board to ignore the respondent's social and economic value, no matter how large.

Complainants also seem to argue that the Board will only look at the economic value if the "pollution source" operates in full compliance with applicable rules and regulations. Comp. Br. at 18. That places far too much weight in one-sentence, conclusory statements in a handful of prior decisions. Those cases are distinguished on their facts because the respondents were actively

engaged in unpermitted or poorly run facilities – not just that they had caused contamination.[13] It is obvious that the Board evaluates the social and economic value of businesses that *have violated the law*. In Complainants' reading, Section 33(c)(ii) would produce the same, meaningless, answer every time: "The "pollution source' generated pollution, or risked pollution, and so it has no value." That is not a proper reading of the Act. *See People v. Tarlton*, 91 Ill. 2d 1, 5 (1982) (judges must avoid "constructions of a statute which would render any portion of it meaningless or void"). And, as before, according to the only economic-value expert in the record, Dr. Richard, a business's compliance (or noncompliance) with applicable rules and regulations is not a relevant input for IMPLAN, the most commonly used analytical tool in the country.

Finally, it is materially unfair to say that MWG's value, which MWG has proven through expert analysis of financial data, could be significantly offset through injuries that even Complainants label as "per se" in nature. Comp. Br. at 16. Complainants have had every opportunity to quantify the injuries they allege. Most prominently, they accuse MWG of endangering future Illinoisans' use of water resources. *Id.* at 15-16. They even asked Dr. Richard whether an expert could, hypothetically, put a cost on that kind of injury. 6/15/23 Tr., at 47:15-20. He told them that, though calculating externalities is outside of his expertise, Complainants *could* estimate a cost by looking at the costs the community would incur in finding an alternate source of water. *Id.* at 48:17-20. So, if Complainants believed that MWG's value was outweighed by environmental externalities, they faced no obstacle to quantifying the "grave" injuries they allege. Comp. Br. at 17. They failed to do so here. Valuing abstractions over data and expert testimony "*in the record* of the particular proceeding involved" is contrary to manifest weight of the evidence. 415 ILCS 5/41(b) (emphasis added).

ii. The Board Looks At Violation Dates for Economic Value

During the hearing, Dr. Richard testified that the four Stations generated over $555 million dollars in economic value just in 2020, a year when operations and staffing at the plants was substantially similar to every year between 2010 and 2020. 6/15/23 Tr., p. 23:2-4. Complainants did not object to the relevance of his testimony, nor to the admission of the financial and payroll data he relied upon. In a remedies hearing focused on violations that occurred between 2010 and 2020, how could they?

Only now do Complainants argue that, under their interpretation of Section 33(c)(ii), just the *current* value created by the Stations should matter, and past operations are irrelevant. Comp. Br. at 20. They fail to cite a single Board precedent supporting their interpretation and their

[13]In the cases Complainants cite, there *were* immediate and extensive harms. Comp. Br at 18. For example, in *People v. ESG Watts*, there was leachate and exposed refuse at respondent's landfill subjected neighbors to offensive odors and waste flowing onto their properties. 1998 Ill. ENV LEXIS 42, at *116-17 (Feb. 5, 1998). Similarly, in *People v. Prior*, landfill caused leachate to flow into a creek, caused odors due to exposed waste, and "gaseous emissions [to] bubble from the site." 1995 Ill. ENV LEXIS 662 at *43-44 (July 7, 1995).

interpretation does not track with the rest of their arguments, each of which focuses on the past. Their Amended Complaint is based on water samples taken between 2010 and 2014. Am. Comp. at p. 13-16. The groundwater sampling evidence in the record ends in 2021. Complainants say that the statutory maximums must be based on those past violations. Comp. Br. at 65. When calculating the economic benefit, they demand that the Board work on the assumption that MWG could have begun four sitewide removal projects in 2010, the instant contamination was discovered, even though MWG's expert Koch explicitly rejected such a proposition. Id. at 62. MWG NDI Ex. 1901, MWG13-15_82216, 82220. They have no rational basis for saying that, unlike all these other factors, Section 33(c)(ii) looks only to the present day.

Complainants' present-only interpretation of Section 33(c)(ii) would result in greater punishment of a violator that *reduces* operations following a violation, than one who *escalates* them. They surely would not advance this theory if MWG had scaled up coal-combustion since 2019. Dr. Richard provided the only opinion on economic value in this case, and he looked at the correct data.

iii. Section 33(c)(ii) Evaluates the Value of a "Pollution Source," Not "Pollution"

Section 33(c) asks the Board to look at the broader picture before finding a violation or picking a remedy. That is contrary to Complainants' argument that the Board should look only at the value of the CCR as waste (*i.e.*, the "pollution") and disregard *the Stations'* economic impact (*i.e.*, the "pollution source"). Comp. Br. at 19. The wedge Complainants would drive between the CCR and the $550 million dollars in economic value Illinois residents experienced on an *annual* basis from 2010-2020 is arbitrary and contrary to Section 33(c)'s practical purposes.

Complainants' interpretation defies the plain language of the Act. For the purposes of the violations, the CCR is the pollution. The pollution source, which 33(c)(ii) considers, is the Stations. Pollution cannot be its own "source." *E.g.*, *IEPA v. Allen Barry, PCB*, 88-71, 1990 Ill. ENV LEXIS 465, *147 (May 10, 1990) (looking at value of livestock operation, rather than livestock waste). The Act's drafters chose to say "pollution source," not "pollution," to indicate that Section 33(c)(ii) assesses the value of the business operation responsible for the pollution. *People v. Wildermuth*, 2017 IL 120763, ¶17. ("When construing a statute, [a] court's fundamental objective is to ascertain and give effect to the intent of the legislature.").

Complainants' excerpts from Board decisions make it seem as if it really does look at whether, for example, asbestos waste has "value." Comp. Br. at 19 n. 84, citing *Johns Manville v. IDOT*, PCB 14-03 (Dec. 15, 2016). But there are many examples of court opinions and Board decisions that conduct the analysis correctly and look at the value of the pollution source. *E.g.*, *Wells Mfg. Co.*, 73 Ill. 2d at 235-36 (looking at socioeconomic value of the defendant's parts-supply business, rather than the "value" of its noxious fumes); *People v. State Oil*, 2003 Ill. ENV LEXIS 148, *33 (Mar. 20, 2003) (Board looks at gas station's economic value; rather than the "value" of its leaking

UST); *Allen Barry,* 1990 Ill. ENV LEXIS 465, *147 (May 10, 1990) (looking at value of livestock operation, rather than livestock waste).

What's more, none of the respondents in Complainants' curated decisions provided testimony from an economic-benefits expert utilizing a generally accepted method for calculating economic benefits. Dr. Richard testified that, when using a conventional economic-value model like IMPLAN, he looks at the value of the business entity. Externalities, such as waste are "a separate issue" and do not play a role in assessing economic value. 6/15/23 Tr., at 52:11. Complainants lodged no objection that his testimony was irrelevant for failing to analyze the financials of several thousand cubic yards of coal ash.

In a case where only one party has presented an expert's assessment of the best method for calculating value, the Board should accept Dr. Richard's unchallenged methodology, rather than out-of-context snippets from prior decisions. The manifest weight of evidence compels this.

iv. The Fact that MWG's Operations Did Not Cause the Historical Ash Deposits Does Not Support Greater Penalties

Complainants point out that "the historic ash areas at all four plants do not have any social or economic value because they have not been used or needed for many years." Comp. Br. at 19. That's quite an understatement. MWG never "used or needed" the historical ash deposits because it played no role in creating them—a fact Complainants do not dispute.

Yet from that fact, Complainants somehow conclude that MWG's distance from the acts and omissions that produced the alleged open dumping means that MWG should be punished *more*, not less. They cite no supporting precedents supporting this outlandish notion. If that is truly the case, then it should spark a reevaluation of the Board's current position that Section 21(a) can be violated by parties that neither caused the dumping of waste, nor allowed *others* to dump waste.

E. The Stations and the Weaver Remedy Are Suitable For Their Location, Each Holding Priority of Location

As noted before, Complainants' claim that Section 33(c)(ii) requires the Board to look to the "social and economic value" of the pollution itself would render that factor irrelevant. They adopt a similar stratagem in their discussion of Section 33(c)(iii), insisting that if the pollution exceeds any regulatory limits, then it is always unsuited to the area. Comp. Br. at 23. That is not an appropriate construction. Section 33(c)(iii) cannot be interpreted in a manner that would cause it to produce the same answer every time—that would render it meaningless. *See Tarlton*, 91 Ill. 2d at 5. Worse, it would mean that the Board would simply *ignore* the General Assembly's command to consider "priority of location"— all people that potentially violate the Act would be unsuited no matter what, and a complainant could file a complaint against an industrial property the same day that they purchase the property next door. *See Wells Mfg. Co.*, 73 Ill. 2d at 236 (reversing Board where suitability analysis failed to adequately account for neighbors having purchased

adjoining property despite full knowledge of respondents' manufacturing operations).

The cases cited in Complainants' post-hearing brief do not make a persuasive case otherwise. (See Comp. Br. at 22.) Each case discusses suitability only in passing, as if merely checking a box. *E.g.*, *People v. Cash*, No. 96-75, 1998 Ill. ENV LEXIS 2, *11 (Jan 8, 1998) (two-sentence discussion of suitability with no citations to authority).[14]

These cases are polar opposites of *Allen Barry:* the Board's 82-page treatise on how to set a monetary penalty using Sections 33(c) and 42(h). *IEPA v. Allen Barry*, PCB88-71, 1990 Ill. ENV LEXIS 465 (May 10, 1990). Tellingly, in *Allen Barry's* careful analysis of Section 33, there is no conclusion that "all waste is unsuitable everywhere." *Allen Barry* instead does what the General Assembly intended: It looked at the location and whether the respondent had created a "significant conflict" with neighbors. 1990 Ill. ENV LEXIS 465 at 147-48. In that case it had not, and the same is true here.

i. The Plants Have Priority of Location

Complainants entirely ignore the part of Section 33(c)(iii) that the Board must also consider the "priority of location in the area involved." In fact, when a company was at the location first, the Board gives it even greater weight. *Dettlaff v. Boado*, PCB 92-26 (July 1, 1993) *slip op.* Pp. 9-10 (Board found no violation in part because the respondent was located before complainant purchased their property). The facts related to evaluation of suitability are quite similar to the situation in *Wells Mfg. Co.*, 73 Ill. 2d 226. In that case, IEPA claimed that iron foundry emissions violated the Act and presented the testimony of 22 citizens, including officials from the nearby school. *Id.*, 235. The Illinois Supreme Court reversed the Board's finding of violation, in part because the court found that the foundry had priority of location. *Id*. 236. The Illinois Supreme Court noted that the foundry was zoned industrial and located at its location for decades, long before the residential area and school nearby were built. *Id.* Because of its presence and because there was insufficient evidence to demonstrate that the foundry had increased its operations after the school was built, the Illinois Supreme Court found that the neighbors were "on notice of the possibility that some annoyances present in heavy-manufacturing areas could affect them, and this fact considerably diminishes the potency of their complaints." *Id*.

Here, two of the Stations are undoubtedly there first (Waukegan and Powerton), and the other two have been at their locations for at least 60 years. SOF 64, 152, 256, 356, 717, 798, 873, 927. Also, three of the Stations ceased burning coal, the opposite of increasing their operations, and

[14] *See also Johns Manville v. IDOT*, PCB 14-03 at 18 (Dec. 15, 2016) (four sentences, two of which relate to whether respondent *chose* dumping location); *IEPA v. Forest Elec. Co.*, PCB 86-26 (Nov. 19, 1987) (two sentences, one of which notes lack of evidence about suitability); *People v. AET Envt'l, Inc.*, PCB 07-95, at 17 (Sept. 6, 2012) (two sentences); *Standard Scrap*, 142 Ill. App. 3d at 663-664 (two sentences admitting that location *was* suitable did not mean could be operated without proper pollution controls); *Lake Cnty. Forest Pres. Dist. v. Ostro*, PCB 92-80, 1994 Ill. ENV LEXIS 484, *25 (Mar. 31, 1994) (one sentence, shared with economic-value finding).

there is no evidence in the record that Powerton had increased its operations. SOF 685, 688, 692, 695.

ii. The Presence of Ash Does Not Make the Stations Unsuitable for the Area

It is ludicrous to say that the presence of coal ash at a coal-fired generating station, which generated ash as part of its operations, makes it unsuitable for its location. As stated above, Complainants' interpretation of Section 33(c)(iii), that all alleged contamination automatically means the location is unsuitable would negate the entire meaning of the section. Rather, as explained in *Standard Scrap*, suitability or unsuitability is in part dependent on whether there are controls. 142 Ill. App. 3d 655 (1st Dist. 1986). In fact, a close reading of *Standard Scrap* demonstrates that MWG's stations *are* suitable for their locations.

In *Standard Scrap*, Standard Scrap Metal operated its boiler, incinerators, and furnace without the requisite air permits, without the required control equipment, and open burned, all of which caused it to emit particulates over the regulatory limits. *Id.*, at 657-658. Indeed, Standard Scrap stipulated to many of the allegations. *Id*. at 658. Standard Scrap Metal also ignored the Agency's three-year campaign to engage with it to bring the operation into compliance. *Id*. 658-659. The Agency also demonstrated that Standard Scrap emitted heavy black smoke, up to 100% in opacity, including blocking a driver's view on the neighboring highway. *Id*. 659-660. In its decision upholding the Board's finding of violation, the court gave significant weight to Standard Scrap Metal's "continuing lack of good faith" over ten years, including its admission that it never had the required permits, despite being fully aware of the requirements. *Id.* at 662. The court's consideration of the suitability of the area it was located was limited to two sentences, noting that it was suitable to its location, but that it could not operate without controls of its offsite emissions (*i.e.*, black smoke billowing over the highway). *Id*. At 664.

MWG's Stations are not remotely similar to *Standard Scrap* because MWG has demonstrated that its operations *have controls*. MWG complies with laws and regulations, and cooperated with IEPA when approached. Interim Order, p. 21; SOF 489-493, 682, 968, 972-975. MWG's experts proved, without dispute, that the constituents in the groundwater at the MWG Stations do not pose a risk to offsite receptors, demonstrating they are under control. MWG Br., §V.C. Moreover, unlike *Standard Scrap*, Complainants do not claim, because they cannot, that MWG has acted in bad faith.

The other cases Complainants rely upon to claim that waste at a property is de facto unsuitable for its location are more similar to the "box-checking" observed above and not supportive of their claim. *Johns Manville v. IDOT*, PCB14-03 (Aug. 3, 2023), p. 65 (A single sentence on suitability in a 68-page opinion); *IEPA v. Forest Elec. Co.*, PCB86-26 (Nov. 1987), *slip-op.*, p. 3 (Because no direct evidence on suitability to the area, a general statement that compliance is preferred).

iii. Environmental Justice Considerations are Inapplicable Here Because They Prospective in Nature

Section 33(c)(iii) inherently considers the history of the operations of a respondent in the area in which it is located, specifically noting that the Board must consider the "priority of location" - who was there first. In comparison, environmental justice ("EJ") considerations, raised for the first time in Complainants' post-hearing brief, are generally made when considering permit applications, and whether an industry may operate in an area. Illinois Environmental Justice Act, 415 ILCS 155/5 (General Assembly found that certain communities may suffer disproportionally from facilities with permits). Comp. Br. at 22.

In fact, that was the entire thrust of Chris Presnall's testimony in the *In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments:* 35 Ill. Adm. Code 845, R 2020-19 ("Illinois CCR Rulemaking").[15] In the Illinois CCR Rulemaking, Pressnall's testimony was presented to support the Agency's consideration of EJ as part of the sequence of submitting permit applications for closure of CCR surface impoundments. *See* Pre-filed Test. of Chris Pressnall (June 1, 2021) p. 3. Pressnall specifically stated that the proposed prioritization scheme for permit applications requires those located in the EJ areas "to submit a closure application first." *Id*. Pressnall's testimony stated nothing further on whether the presence of the CCR surface impoundments indicated their suitability or unsuitability for the area in which they are located. Indeed, that Part 845 allows for CCR surface impoundments to close in place, regardless of whether they are located in an EJ area, indicates that their presence in those communities is suitable. 35 Ill. Adm. Code 845.750; 415 ILCS 5/33(c)(iii).

iv. The Presence of Non-Industry Operations Does Not Make the Area Unsuitable

Complainants' last-ditch attempt to argue that the MWG Stations are unsuitable for the areas in which they are located - based on the location of certain neighboring natural features - falls flat. Indeed, the Board has already found that two of the Stations, Waukegan and Joliet 29, are located in "primarily industrial areas." 2019 Interim Order, p. 22, 63-64.

For example, in considering the Will County Station, Complainants' attempt to paint the Chicago Sanitary and Ship Canal as evidence of the Station's unsuitable location. This is absurd. The Chicago Sanitary and Ship Canal is an engineered canal built in 1900 to transport human waste and industrial pollutants away from Lake Michigan, which was accomplished through the flow reversal of the Chicago River.[16] It serves as the "primary passage for the transport of sand and

[15] MWG continues to object to the incorporation of Presnall's testimony because it is unrelated and irrelevant to this matter. *See* MWG's Objection to Comp's Motion to Incorporate (March 3, 2022).

[16] *In The Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System (CAWS) and the Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304*, PCB08-09; Attachment B to Illinois EPA Statement of Reasons, Chicago Area Waterway System Use Attainability Analysis Final Report. Camp, Dresser and McKee, prepared for Illinois EPA (August 2007), p. 3-2.

gravel, coal, cement, fuel oils, and other industrial materials." *Id.* In other words, the Chicago Sanitary and Ship Canal's use as an industrial thoroughfare further supports the conclusion that the Will County Station is located in an industrial area and is suitable for its location.

The same is true for their allegations related to Powerton's location. Powerton Lake was built by ComEd to provide cooling water for the power plant.[17] As Shealey testified, MWG spends a significant amount of money to support the recreational use of the lake. SOF 800, 801. The presence of the lake, and its popularity, demonstrates that the Powerton plant is suitable for the area because it can coincide with recreational uses.

Ultimately, the material weight of the evidence demonstrates that the four stations are suitable for the locations where they are located.

v. Public Comment on the Suitability of the Location is Not Evidence

Complainants improperly cite to public comments in this matter to support their claim of unsuitability. Yet the Board rule is clear that "factual statements made during public remarks are not evidence in the proceeding." 35 Ill. Adm. Code 101. As stated in MWG's Objection above, MWG objects to Complainants treatment of the public comments as "evidence."

The Board is also clear that it gives less weight to oral and written comments that are not subject to cross-examination. *ExxonMobile Oil Corp. v. IEPA*, PCB11-86 (Dec. 1, 2011) 2011 Ill. ENV LEXIS 512, *67-69. In *ExxonMobile Oil* the Board succinctly stated its principle on how it treats public comments:

> Members of the public are extended some latitude under the Act and Board's rules so that they can express their opinions and beliefs concerning environmental issues without being unduly hampered by procedural barriers. These opinions and beliefs are afforded lesser weight than evidence and statements that are subject to cross-examination. See 35 Ill. Adm. Code 101.628(b)
>
> Parties in adjudicatory proceedings, particularly in enforcement cases, cannot be afforded the same latitude as members of the public who participate at hearings. Parties and their agents are subject to the rules of discovery, evidence, and administrative procedure as set out in the Board's rules. *See* 35 Ill. Adm. Code 101. Subpart F. . . . post-hearing "comment"--even though accompanied by affidavit--is not subject to cross-examination, and is not an acceptable substitute for hearing testimony. The Board cannot give the full weight of sworn testimony to public comment concerning facts and opinion statements.

Illinois v. Community Landfill Co. and City of Morris, PCB No. 03-191, slip op. at 19 (June 18, 2009)(citations to record omitted), *citing Rochelle Waste Disposal, LLC v. City of Rochelle*, PCB No. 03-218 (Apr. 15, 2004) (stating that "public comments are entitled to less weight than is sworn testimony subject to cross-examination."); *Industrial Fuels & Resources/Illinois, Inc. v. City of Harvey*, PCB No. 90-53 (Sept. 27, 1990) (stating that unsworn comments provided at hearing

[17] https://www.ifishillinois.org/profiles/waterbody.php?waternum=00039.

"may be admitted as public comments, and not as testimony, and their probative weight thereby is reduced accordingly."). The Board continues to uphold that principle. *See James Fiser v. James Meador and Henry's Double K, LLC*, PCB 18-084 (Jan. 21, 2021), FN 2 ("The Board's rules indicate that such public comments are given less weight than evidence subject to cross-examination."). Here, because the public comments were not subject to cross-examination, the Board must give them less weight, and pursuant to its rules, not treat the public comments as evidence.

At the very least, the Board should give all the public comments the same weight. There were two public comments to the Board that stated closure-in-place was a scientifically acceptable method to address the issues at the MWG Stations. 6/15/23 Tr., p. 80:14 – 85:13. More specifically, a resident of Will County stated that he had concerns about closure by removal because of the unnecessary and excessive truck traffic, and that he was "almost fed up with the trucks," in his community. 6/15/23 Tr., p. 80:14-83:9. Representative Avelar had the same concern about the pollution impact of the trucking any removal action would require, noting that her district was already overburdened with dust and diesel emissions. 6/13/23 Tr., p. 9:18-21.

F. The Weaver Remedy Builds upon MWG's ongoing Compliance Efforts and is Therefore Consistent with Those Efforts.

Complainants' claim that MWG has not made reasonable efforts to comply ignores MWG's work since it began operations at the Stations. It is undisputed that MWG began a fleet-wide assessment and maintenance program to improve the ash ponds liners long before there was any specific regulatory requirement. SOF 408-409, 942-945. It is also undisputed that MWG voluntarily installed the groundwater monitoring wells at IEPA's request to collect the groundwater samples that Complainants rely upon to pursue this matter. SOF 489-493, 974-975. With the adoption of the federal and state CCR rules, MWG is conducting the significant work required to comply. SOF 664-670, 1039-1093, 1112-1161. Weaver's remedy builds upon MWG's work by confirming MNA is occurring at the Stations and demonstrating that there is no risk to offsite receptors while the MNA continues. *See* MWG's Br. §V.

Also, as described further below, Complainants' claim that their complaint required some action by MWG overlooks MWG's right to due process. *See infra* §VIII.F. Indeed, the entire purpose of the second hearing was to "determine the appropriate relief." Interim Order, p. 92. Without that determination, MWG was precluded from taking any permanent actions, other than continuing the monitoring and confirming the absence of risk. Moreover, even if MWG had taken actions that it knew would address Complainants' claims (such as installing a cap over the FS Area), because Complainants seek removal of effectively the entire stations, MWG's reasonable actions would not have satisfied Complainants and perhaps not the Board. In short, the fact that Complainants' intentionally avoided mentioning the extensive measures MWG has taken since it

began operations at the Stations demonstrates that MWG has taken significant compliance actions, supported by the manifest weight of the evidence. *See also* MWG Br. § VII.E.

VIII. THE MANIFEST WEIGHT OF EVIDENCE RELEVANT TO THE SECTION 42(H) FACTORS SUPPORTS A MINIMAL MONETARY PENALTY, IF ANY

Complainants incorrectly state that Illinois law provides the "benchmark" for a penalty amount of up to $50,000 for each violation and $10,000 for each day of violation. Comp. Br. 50. Not true. Section 42(a) of the Act states that a penalty shall "*not exceed* $50,000 for each violation and an additional civil penalty of *not to exceed* $10,000 for each day" of violation. 415 ILCS 5/42(a) (emphases added).[18] That is a maximum penalty, not a benchmark by which to start. Rather, the Act dictates that in considering a civil penalty, the Board must consider at least eight factors, but may consider other factors, such as good faith. 415 ILCS 5/42(h); *Modine Mfg. Co. v. IPCB.,* 193 Ill. App. 3d 643, 649 (2d Dist. 1990).

Because of Complainants' misinterpretation of the Act, they propose a penalty of at least $41.6 million and up to $425 million, which is unprecedented and unjustified. Recognizing that there is no Board enforcement matter that has ever issued a remotely comparable penalty, Complainants rely on three inapplicable federal cases, one regarding air violations and the two others from other states. Comp. Br., p. 51.

To demonstrate how off the mark Complainants penalty demand is, MWG analyzed the Board water/groundwater enforcement cases over the last 20 years to gauge the range of penalties the Board has issued.[19] Unsurprisingly, there are dozens of water enforcement cases where the penalty was less than $25,000. Thus, in order to not bias the analysis by a high number of low penalties, MWG focused its analysis on 25 enforcement matters found in which the Board issued a penalty over $25,000 for alleged water/groundwater violations.[20] Of the 25 cases, the average penalty amount was approximately $66,890, and the highest was $250,000. *Id*., *People et al, v. Freeman United Coal Mining Co., LLC*, PCB10-61, (Aug. 17, 2017). Moreover, like here, many of the cases alleged violations of both Section 12 (water pollution) and Section 21 (open dumping). *People v. Sterigenics*, PCB 23-48 (Dec. 1, 2022); *People v. Caterpillar, Inc.,* PCB 22-60 (May 26, 2022); *People v. Gateway Bobcat,* PCB 08-29 (Dec. 6, 2006).

Complainants also try to muddy the waters by arguing that MWG believes there would be no

[18] While the Board used the term "benchmark" in *IEPA v. Barry*, the Board did not engage in estimating the actual maximum penalty under the Act. PCB 88-171 (May 10, 1999) *slip-op*, p 74. Instead, it chose to not consider the number of days on which each violation occurred, which resulted in a maximum penalty of $65,000. *Id.*

[19] *See* https://pcb.illinois.gov/Resources/EnvironmentalRegister.

[20] See PCB 04-98 ($125,000); PCB 04-138 ($80;000); PCB 04-194 ($30,000); PCB 05-66 ($135,000); PCB 05-110 ($60,000); PCB 05-163 ($65,000); PCB 06-16 ($28,000); PCB 07-29 ($27,000); PCB 07-124 ($84,570); PCB 08-29 ($30,000); PCB 08-044 ($55,000); PCB 09-003 ($40,000); PCB 11-003 ($40,000); PCB 11-019 ($25,699.68); and PCB 12-001 ($28,500); PCB13-29 ($46,000); PCB16-65 ($47,000); PCB17-76 ($42,500); PCB10-86 ($175,000); PCB19-85 ($80,000); PCB19-4 ($50,000); PCB22-28 ($30,000); PCB22-60 ($33,000); PCB10-61($250,000); PCB23-48 ($65,000).

"economic impact" from a penalty. Comp. Br. at 52. Also, not true. Obviously, a penalty will always have an impact on a party. When Complainants wrongly attempted to add evidence about a non-party into this matter,[21] MWG responded by stating that it is not making an *inability to pay* argument. Indeed, that is one of the reasons the Board held no other party may be introduced. In fact, that is the exact quote Complainants insert in their FN 268: Bd. Order, PCB 13-15 at 8 (Sept. 9, 2021) ("Midwest has not put forth an *inability to pay argument* at this time...") (emphasis added).

Overall, Complainants' penalty demand is unduly punitive and excessive, and not "reasonably calculated to aid the purposes of the Act as discussed in Section 42(h)." *People v. Lincoln, Ltd.*, 2021 IL App (1st) 190317-U (Nov. 5, 2021) ¶ 36. A penalty at even the tenth of their lowest demand would be against the manifest weight of the evidence in consideration of the Section 42(h) factors. In its post-hearing brief, MWG identified the extensive and detailed evidence demonstrating that under Section 42(h), no penalty is merited. MWG further demonstrated that there is a real risk that a penalty would deter others from voluntarily agreeing to work with IEPA. *See* MWG 2024 Br., § VIII. If the Board determines that any penalty should assessed, MWG's economic expert demonstrated that MWG may have accrued only a nominal economic benefit.

A. Degree, Character, Gravity, and Duration of the Violations Support a Low Penalty

i. Complainants failed to provide evidence supporting their assertion that a "grave" injury occurred.

Implicit in the Board's authority to impose penalties is a requirement that the penalties "bear some relationship to the seriousness of the infraction or conduct." *Southern Illinois Asphalt Co. v. IPCB*, 60 Ill. 2d 204, 208 (1975). A penalty must also be "commensurate with the seriousness of the infraction for which it is imposed." *Lincoln, Ltd.*, 2021 IL App (1st) 190317-U, at ¶31, quoting *Trilla Steel Drum Corp. v. IPCB*, 180 Ill. App. 3d 1010, 1013 (1st Dist. 1989). As noted in MWG's discussion of the "degree" and "character" of the injury (*supra* §VII.A.), Complainants have failed to substantiate their accusation that the injuries identified by the Board are "grave." Comp. Br. at 16. On the contrary, because they have not made *any* attempt to quantify *any* facet of the prospective injuries described in the 2019 and 2020 Board Orders, they can only offer tautologies that would apply in *any* Board proceeding, regardless of how great or small the injury is (or was).

The Board determines the "gravity" of each violator's injury in connection with each case's admissible evidence. But the "per se" injury Complainants describe, by definition, exists in "isolation." *Black's Law Dictionary*, Rev. 4th ed. It is "unconnected with other matters" such as expert testimony or even a cursory attempt to quantify the "grave" harms asserted. *Id.* The Board has considered the appropriateness of monetary penalties in other cases where the evidence showed little or no actual or prospective harm. *See, e.g.*, *Poland*, 2003 Ill. ENV LEXIS 457, *33 ($25,000

[21] MWG objects to Complainants violation of the Board's repeated orders to exclude information about MWG's corporate relationship.

for one co-defendant, $5,000 for the other); *Ficklin*, PCB 79-271, at 4 ($250 penalty for "minimal" injury where "[t]here were some odors, but the area is such that few people were affected"); *CSX Trans., Inc.*, PCB 07-16 (July 12, 2007) (no penalty for spill whose "character and degree of injury is slight"). *See also Ill. Asphalt Co.*, 60 Ill. 2d at 210-12 (overturning $5,000 penalty for unpermitted air emissions, where agency submitted no evidence of injury). It should do the same here.

ii. Complainants Fail to Demonstrate that the Duration is Long, Ignores the Board's Interim Order, and Ignores their Own Contribution to the Length

Complainants' inflated duration ignores that the GMZs are in effect, and ignores their own delays to resolve this matter, including their extreme demand for corrective actions. As MWG explained in its post-hearing brief, the duration of groundwater violations is short for Joliet 29, Will County and Powerton because each has a GMZ in effect. MWG Br., p. 67. Indeed, Complainants' demand for an unprecedented penalty following implementation of the GMZs demonstrates the absurdity of finding that a GMZ does not resolve liability under Section 12 of the Act. MWG 2024 Br., § III.B.

Here, MWG conducted a corrective action at the three stations and was granted a GMZ by IEPA. The purpose of the GMZs was to allow the MNA mechanisms to take place following the corrective actions and to ensure the MNA is continuing. 6/13/23 Tr., p. 86:5-17, 119:8-16, 103:15-104:6; MWG Ex. 1701, MWG13-15_81467-81468. But, as the Board stated, "the process of monitored natural attenuation can be by its nature a long one. And can last for many years." 6/14/23 Tr., p. 103:9-104:3; Board 2020 Order, p. 13. Regulations cannot be read such that they produce absurd results. *People v. Hanna*, 207 Ill. 2d 486, 498 (2003) (ILSC reversed lower court decision because the literal meaning of the regulation produced an absurd result). It is nonsensical for the Board regulations to recognize and provide a regulatory mechanism that takes time for the effects of corrective actions to be realized in the groundwater, but then subject the person conducting the work to continued penalty assessments after implementation of the GMZ.

Similarly, Complainants' claim that the duration of alleged inaction following the Board's Interim Order should be considered puts the cart ahead of the horse. The first order was ***interim***, and whole point of this second phase was to "determine the appropriate relief." Interim Order, p. 92. It would be improper for MWG to do anything but what it has done (monitor to confirm absence of risk) until the Board makes a final determination.

Complainants' claim that the duration is long also ignores their contribution to it. As MWG described in its post-hearing brief, there were numerous delays in this matter, wholly unrelated to MWG. See also MWG 2024 Br., p. 68. In fact, while MWG filed motions for stay because of the federal and state CCR rules, none were granted and the motions did not stay the proceeding while they were pending. 35 Ill. Adm. Code 101.514. Similar to the parties in *Lincoln, Ltd.*, in

considering the duration, the Board cannot count the time it took for the parties to present to the Board the relief they think "appropriate. *Lincoln, Ltd.*, 2021 IL App (1st) 190317-U, ¶ 35.

The cases Complainants rely upon do not support Complainants' miscalculation of duration. Complainants' reliance on *ESG Watts* is inapposite. See Comp. Br., p. 53. Watts and his companies were notorious violators of the Act and Board's regulations, subject to at least five enforcement matters by the State of Illinois throughout the 1990s. PCB94-127, PCB96-107, PCB96-233, PCB96-237, PCB01-167. They operated multiple landfills throughout the State, and caused numerous violations, including failure to properly cover the landfill and allowing refuse to be exposed, litter scattered throughout the landfill, leachate seeping out of the landfill, gas emissions including methane, significant odor violations, providing sufficient financial assurance, and numerous reporting requirements, all of which lasted years. *Id.* MWG's alleged violations here are nowhere near the scope of the violations committed by Watts and his companies.

Standard Scrap is also inapplicable also. Comp. Br., p. 54. As explained above, that case is about an extreme malefactor, whose lack of good faith caused the duration of violations to be long.[22] The same is true for *People v. Freedom Oil, Co.*, 93-59 (May 5, 1999). In that case, the respondent entirely dismissed the Agency requirements to investigate releases from underground storage tanks, calling the required investigation "mere paper violations" *Id., slip-op* at 9. Similarly, as stated above, cases where only one side bothers to show up are not compelling precedents. That was the case in *People v. Ill. Fuel Co.*, PCB10-86 (July 25, 2019), in which the Board granted the People's unopposed motion for summary judgment. Even with the motion being unopposed, again unlike here, the People included factual evidence by an expert, the IEPA Permit Manager. *Id., slip-op.*, at 2.

B. Because of MWG's Due Diligence and Voluntary Efforts to Comply, No Additional Penalty is Warranted

Complainants' claims for lack of diligence and no voluntary effort to comply calls to mind the Aldeous Huxley's quote "Facts do not cease to exist because they are ignored." Aldous Huxley, Complete Essays, Vol. II: 1926-1929. Here, merely because Complainants ignore the significant work MWG performed at each of the Stations that began long before there was any regulatory requirement, does not mean the work did not happen. In fact, Complainants' counsel knows MWG conducted work at its Stations, stating in another matter in front of the Board that MWG "made efforts to remediate the contamination…" *Sierra Club v. IL Power Generating Co., et al*, PCB 19-78, Comp.'s Opp. to Mot. to Bifurcate (April 29, 2019), p. 7. In short, there is no evidence to support Complainants' general claims that MWG has "made no meaningful effort" and is belied by the extensive record of MWG's due diligence to voluntarily comply, which is summarized in

[22] Complainants' FN 275 has a Freudian slip – they insert a quote from *Standard Scrap*, but in the quote Complainants falsely insert "MWG."

MWG's brief, starting with its extensive site-wide assessment of the ponds long before there was any requirement, relining its ponds, all the way through to its substantial work to comply with the new, highly technical, federal and Illinois CCR Rules. MWG 2024 Br., § VIII.B, VIII.F.

In fact, the block quote Complainants insert in their brief from *People v. Watts* demonstrates that MWG *has* conducted the efforts the Board considers to demonstrate due diligence. Comp. Br., p. 55, *quoting People v. Watts*, PCB94-127 (May 4, 1995) *slip-op*, p. 10. As Complainants' quote shows, the Board's acceptable efforts to demonstrate good faith includes "hiring engineers to find a cure for pollution, attempting to secure permits, installing pollution control equipment at considerable expense, and abandoning offensive practices altogether." *Id*. MWG has taken every single one of those measures. The record includes numerous documents from multiple engineers that MWG has hired, including Natural Resource Technology, Patrick Engineering, Valdes Engineering Company, KPRG & Associates, Inc., Geosyntec, and Sargent & Lundy.[23] When MWG originally relined the ponds, it did even more than the Board considers as due diligent by actually securing permits from IEPA (*see* Ex. 502, 503, 609, 628, 657, 702, 705, 708, 709). Moreover, now that the Illinois CCR Rule has passed, the parties have stipulated that MWG has attempted to secure permits by timely submitting permit applications to the Agency. SOF 1112-1117, 1128, 1136, 1142, 1145. MWG has also installed pollution control equipment at considerable expense – it relined its ash ponds with state-of-the-art HDPE liners in 2012- 2013, which cost it approximately $10 million. SOF 1006-1017.[24] Finally, three of the four stations no longer generate CCR, thus no longer engaging in the practice that is the subject of Complainants' Amended Complaint. SOF 66, 685, 692, 695.[25]

Complainants also spend a significant amount of time speculating on the measures *they* think MWG's could have done. As stated above, what should be done is the entire point of the second phase of this matter, and MWG could not act until that was decided by the Board. Indeed, Complainants' litany of measures it thinks MWG should have done (which are not supported by any evidence in the record) demonstrates why MWG has been hamstrung throughout this process. On one hand, Complainants complain that MWG has not done enough, but on the other hand criticize the measures MWG did take, finding them not good enough. For example, Complainants criticize MWG's investigation around MW-9 at the Joliet 29 Station calling it "self-serving." Comp. Br., p. 56. MWG conducted the investigation because the results at MW-9 were unusual

[23] *See e.g.*, Exs. 24E-30.5E, 33, 34, 100, 201, 203, 204G-209G, 210H-215H, 216I-220I, 222J-228J, 229K-235.5K, 236L-241L, 242, 243M-246M, 248N-251N, 253, 254, 256O-260O, 261, 263, 267P-270P, 274, 276, 278Q-281Q, 284, 293, 501, 505-508, 608, 610, 613-616, 621, 629, 701, 703, 704, 706-708, 710, 1301-1332, 1402, 1503-1512, and 1514.
[24] These costs do not include the relinings before 2012 (Waukegan: East and West Ponds; J29: Ponds 1 and 2; Powerton: Bypass Basin and Metal Cleaning Basin; Will County: Pond 3S). SOF 95-96, 186, 205, 285-286, 449-450.
[25] The other cases Complainants rely upon are of no support. As stated above, comparisons to the *Watts* and *Freedom Oil* decisions are unreasonable. Moreover, in what is turning into a theme that the "best" cases Complainants can find to support their claims are the ones where only one side bothers to show. *People v. Ogoco, Inc.*, PCB 06-16 (Sept. 21, 2006), *slip-op.* at 1.

and the Board identified that well in its Interim Order. SOF 778-779; Interim Order, p. 30. The investigation demonstrated that the unusual results were naturally occurring and not a result of CCR. MWG Br., §V.A.ii. If MWG had not conducted the investigation, Complainants would have also stated that it was a missed opportunity. Complainants also consistently ignore that MWG conducted an additional investigation at the Northwest Area at the Joliet 29 Station, defeating their claim that the investigations around MW-9 and at the FS Area were the only two. MWG Br., p. 9; SOF 141-148, 771-775. Complainants also minimize the significant work to comply with the federal and state CCR rules, describing it as "largely on paper," and ignoring the installation of wells, certifications of safety, and submission of detailed permit applications. Comp. Br., p. 55. Similarly, Complainants' attempt to paint MWG's usage of regulatorily available mechanisms to properly classify areas at its Stations and accurately follow the compliance requirements under the federal CCR rules though an alternative source demonstration as some sort of delay is not based on any evidence in the record. As MWG stated in its brief, "when regulations specifically allow for a company like MWG to have some flexibility when faced with new rules, MWG cannot be punished for relying upon them." MWG 2024 Br., p. 66. Ultimately, Complainants' criticisms of the work MWG has done demonstrates that nothing MWG has done or would have done other than a complete removal would have satisfied them – and even a removal would have been subject to complaint.

The key feature Complainants are missing in considering due diligence to comply is that it is about whether a party is "honestly trying." *Employees of Holmes Bros v. Merlan, Inc.*, PCB71-39 (Sept. 16, 1971), slip-op p. 5. Even if the due diligence to comply does not fully achieve compliance, the Board has found that a penalty should be mitigated. *IEPA v. Allen Barry*, PCB 88-71 (May 10, 1990), *slip-op*, pp. 35. In *Gott et al v. M'Orr Pork, Inc.*, like here, the Board noted that the respondent voluntarily undertook numerous recommended efforts to abate the emissions, even though the measures had not completely resolved the problem. PCB 96-68 (April 16, 1998) *slip-op*, p. 14. Because of the "voluntary efforts to comply" and despite the fact that they were not fully effective, the Board found that "a large penalty is not warranted." *Id*, at 15.[26] The Board was clearly following the policy outlined by its first Chair, Mr. Currie, that "all that can be expected is a good faith effort." Enforcement Under the Illinois Pollution Law, 70 Nw. U. L. Rev. 389, 431 (1976). Here, the unrebutted testimony of Weaver and Koch demonstrates MWG's extensive due diligence to comply, which demonstrates a consistent "good faith effort." *See* MWG 2024 Br., §VIII.B.

C. Complainants' Claim that the Board Can Conduct Shefftz's Economic Analysis On

[26] Notably, one of the Board Members dissented from assessing a penalty stating there was "no justification for further penalizing" the respondent, because of the voluntary measures taken by the respondent at substantial sums. *Id*, Dissent by R.C. Flemal (April 16, 1998).

Its Own Shatters Their Claim That His Expertise is Required

Shefftz testified that if someone asked him to calculate economic benefit based on a new set of inputs, that's no problem. They just need to sit tight for a few hours (or maybe longer) while he, the world's leading expert in how *his* proprietary model functions, recalculates the sums. Despite Shefftz's own testimony, Complainants still insist that the Board can operate Shefftz's model as little more than an afterthought; as if it's no more complicated than converting gallons to ounces.

To see why that's not credible, the Board should set aside what Complainants have written and recognize what they have left out—*instructions*. Once the Board has selected a remedy, what is Step Two? How does it get a cost estimate? The Hearing Officer never admitted one into evidence. Where can it get a copy of Shefftz's proprietary economic-benefits model? If it thinks that the remedy could have been initiated in 2011, and completed in 5 years, how are those inputs entered into the model?

And, as Koch noted, the economic-benefits model requires the technician to take account of mitigation efforts. 6/15/23 NDI Tr., 39:6-7. If the Board rejects Complainants' assertion that *not one single dollar* of MWG's compliance costs meet this criterion, what then? Complainants did not ask Shefftz to demonstrate to the Board how to account for those offsets.

Complainants' gripe that Koch failed to provide the Board with "general tools to adjust her estimates in the event that the Board finds the Weaver experts less credible than she does" misses the key difference. Comp. Br. at 66. Koch's estimates are based on financial inputs that have been admitted into evidence. By contrast, Complainants demand that the Board act as their consultant and develop a remedy and a cost estimate that they should have developed themselves in the years following 2019.

Indeed, Complainants seem to be saying that providing Shefftz was an act of charity: It was the Board's "ultimate responsibility" to meet Complainants' burden for them. Comp. Br. at 65. But while the Board has a duty to "ensure" that the monetary penalty exceeds the economic benefits of noncompliance, it is also granted the power to find that there were no economic benefits---including in situations where the complainants fail to provide an expert opinion based on record evidence. 415 ILCS 5/42(h) ("…the economic benefits, *if any*…") (emphasis added). Section 42(h) does not require that the Board conduct independent investigations to answer complex questions that those who lodge complaints with it cannot be bothered to answer themselves. *See Landfill, Inc. v. IPCB*, 74 Ill. 2d 541, 557 (1978) ("The need for a technical staff capable of performing independent investigations dictates that the job of administering the permit system be entrusted to the Agency rather than the Board."). Complainants fail to produce a single case supporting their mistaken understanding of what the Board *does*.

Or maybe Complainants might be saying that their expert is no expert at all and that the Board does not need Shefftz, but merely a calculator. They state that the Board could run the calculation with "ease." Comp. Br. at 66. Indeed, they mock Koch's statement that an expert's role is to assist

the Board in areas of an expert's expertise. *Id*. Complainants' notion that they can sit back and let the Board help *them* make their case and lift their evidentiary burdens is shocking. And their dismissal of Koch's thorough effort to provide the Board with an economic benefit that is based on an accepted expert remedy and cost opinion, that is in the record, is astounding.

i. The Act Looks to "Lowest Cost Alternative," and Complainants' Claims of a "Best Available" for a "Presumptive Remedy" is Not Based in Law or Fact

Complainants' claim that Shefftz relied on the "best available cost estimate" is a complete fabrication and not the statutory definition. Section 42(h)(3) states that the economic benefit must be based on the "lowest cost alternative for achieving compliance." 415 ILCS 5/42(h)(3). Here, MWG's expert Koch testified that the lowest cost alternative for achieving compliance is the remedy proposed by Weaver. 6/15/23 NDI Tr., p. 31:4, 68:21-69:1-3, MWG Ex. 1901, MWG13-15_82215. She also testified, without any of her testimony disputed, that a removal remedy is the *highest* cost alternative. 6/15/23 NDI Tr., p. 31:1-4; MWG Ex. 1901, MWG13-15_82214-82215. Because the cost alternative used by Shefftz is not based on any evidence in the record, not only is it not the lowest cost, it is not remotely the "best available."

Complainants claim that a complete removal is the "presumptive remedy" of open dumping to support their tenuous claim that Shefftz's costs were somehow reasonable is not based in law or fact. Comp. Br., p. 64. The Act does not have "presumed" remedies—it instead presumes that the Board will apply the Section 33(c) factors and its technical expertise and select the most practical and reasonable method for furthering the Act's goals. In fact, Section 45(d) explicitly acknowledges that, in a Section 42(e) suit, open dumping can be resolved if the defendant *either* "remove[s]" the openly dump waste *or* "otherwise clean[s] up the site." 415 ILCS 5/45(d). There is not one presumed remedy that can be adopted without admissible evidence regarding its cost and adequacy.

And, despite the fact that the adequacy of a remedy is a complex factual question that requires expert insight to answer, Complainants incorrectly claim that *J&F Hauling, Inc.* eliminates the need for expertise by creating a removal "presumption." Comp. Br. at 64, citing PCB 02-21 (Feb. 6, 2003). That decision has no precedential or persuasive force: The respondent failed to appear or attend the hearing. Of course, the Board granted the State's request – no one objected to it.[27]

In any event, if Complainants thought that *J&F Hauling, Inc*. provides a model, they have failed to follow it. The State obtained the removal order only after providing expert testimony

[27] By contrast, in closely contested cases like *Zarlenga* and *Village of Matteson*, the complainants did not try to convince the Board that there was a "presumed" remedy to address the respondents' noise pollution. Instead, in each case, the parties submitted expert testimony. *Vil. of Matteson*, PCB 90-146, at 30 (Feb. 25, 1993); *Zarlenga*, PCB 89-169, 1991 Ill. ENV LEXIS 361, at *38.

(from an Agency inspector) and evidence justifying their demand. *See* PCB 02-21, at 4-6.[28] Here, Complainants did not even present an expert to state that removal was required, much the less feasible and likely to end all violations at the Stations. Their "presumptive remedy" argument is baseless.

MWG has established that the presumptive remedy for waste areas like the FS area at Waukegan is installing a cap. This "presumption" comes not from a misreading of *one* Board decision, but from the descriptions of the only experts that carry weight in this case. And the Board accepted a similar expert in in *Poland*, where it rejected the state's request for a removal, and agreed with the Respondent's expert that a cap was the proper remedy. *Poland*, PCB 98-148, 2003 Ill. ENV LEXIS 457, at *23-25.

ii. The Weaver Remedy is the Lowest-Cost Remedy, and Koch's Reliance on it to Calculate Economic Benefits was Appropriate

Complainants fail to describe Koch's testimony accurately, making a passing accusation that Koch's testimony "relies exclusively on the expert opinions offered by MWG's Weaver experts." *Id*. at 66. In fact, Koch relied on much more than just Weaver's cost estimate. To run her calculations, Koch personally collected data about MWG's operations, reviewed depositions of the operators, observed all of the hearing testimony, and reviewed both the Board's orders and primary documentation from the Stations, among other actions. MWG Ex. 1901. She took a completely different approach to her work in this case than Complainants' witness, who relied exclusively on data provided by the attorneys on "the side that is retaining me." 5/17/23 NDI Tr., 38:20-22. Based upon her expertise, Koch determined that the Weaver Remedy was the "lowest cost alternative," as required under Section 42(h)(3) of the Act. A Board finding in the alternative would be against the manifest weight of the evidence.

D. Any Penalty Here Would Deter Future Compliance

There is no support for Complainants' claim that the Board's consideration of deterrence is bound with economic benefit. The single case identified by Complainants, *People v. J.T. Einoder, Inc.*, 2 N.E.3d 1097 (1st Dist. 2013) states nothing about deterrence. Moreover, its persuasive value is suspect, as it was reversed in part by the Illinois Supreme Court. *People v. J.T. Einoder, Inc.*, 2015 IL 117193, 2015 Ill. LEXIS 324 (2015).

Rather, the Board balances consideration of deterrence with a party's voluntary efforts to comply. *Gott v. M'Orr Pork*, PCB96-68, April 16, 1998, *slip-op*. p. 14 (Board found large penalty unwarranted because of respondents' voluntary efforts to comply). Here, the evidence shows that

[28] A comparison to *J&H Hauling* is also baseless because in that case the total volume of waste was about 800 cubic yards of waste. *Id*, at 7. There is little doubt that it is technically feasible and economically reasonable to remove 800 cubic yards of waste. By comparison, as stated above, one of MWG's smallest ponds holds approximately 17,000 cubic yards. Comp. Ex. 1332, MWG13-15_126013.

because of MWG's extensive voluntary efforts to comply, there is no value in deterring a future violation nor would a penalty enhance voluntary compliance. *See* MWG 2024 Br., §§VII.E, VIII.B, VIII.D., & VIII.F.

Instead, a large penalty here would have a different deterrent effect – deterring others from voluntarily working with IEPA. The Board has consistently been concerned with penalizing companies that exercise good faith in trying to control their problems. *Employees of Holmes Bros v. Merlan, Inc.,* PCB71-39 (Sept. 16, 1971), slip-op p. 5. The Board has held that it is not "sound public policy to attach a substantial monetary penalty to a voluntary cleanup, especially when the evidence shows that the contamination was historical in nature." *Int. Union, et al. v. Caterpillar, Inc.*, PCB94-240 (Aug. 1, 1996), *slip-op*., p. 35. In *International Union*, the complainants were seeking a penalty of $200 million, but because of the respondent's efforts to comply, the Board found no penalty was warranted. *Id.*

Here, it is undisputed that MWG voluntarily agreed to begin monitoring the groundwater at its stations at IEPA's request. It is also undisputed that MWG voluntarily entered into the CCAs and relined its ash ponds, despite its valid (and ultimately correct) concerns that the relining projects would be supplanted by the pending federal CCR rule. Just like the Board's concerns in *International Union*, a large penalty here "would serve only to discourage the cleanup of contaminated property." *Int. Union*, at 35. The Board should uphold its policy to not discourage "a site owner or operator from reporting environmental contamination and then taking steps, in concert with government, to respond by removing and remediating the contamination." *Id.* If the Board were to reverse its long-standing policy here, it would likely have a chilling effect on IEPA's efforts to engage the regulated community in cooperation to collect information. Moreover, an excessive penalty here could go even further and promote the abandonment of businesses from Illinois and dissuade businesses that could provide hundreds of millions of dollars in socio-economic value from moving here.

E. <u>There is no "Long History of Violations"</u>

Complainants correctly state there are no previously adjudicated violations of the groundwater standards. But their claim that the notices of violations ("NOVs") have any meaning is false. An NOV "has no legal effect in and of itself." *National Marine v. IEPA*, 159 Ill. 2d 381, 389 (1994). As the First District stated: "A determination of an actual violation 'if it is ever even made, rests in the Board or the circuit court, not in the agency, and certainly not in the agency's mere notification that it is investigating a possible violation. *People v. Lincoln, Ltd.,* 2016 IL App (1st) 143487, P37, *quoting National Marine*, 159 Ill. 2d at 390, 639 N.E.2d at 575." Because the NOVs had no legal effect, the First District rejected the State's contention that the defendant should have done something upon receiving IEPA's violation notice. *Id.* The same is true here and the Board should reject Complainants' suggestion that the NOVs have any meaning under Section42(h)(5)

of the Act.[29]

F. MWG Voluntarily Agreed to IEPA's Request to Investigate and Voluntarily Disclosed the Results

The best that Complainants can claim in response to MWG's wide-ranging voluntary efforts to comply is to suggest, without any basis in the record, that IEPA "prodded" MWG into conducting groundwater monitoring. That is a stretch at best. When MWG agreed to install the groundwater monitoring wells and share the quarterly data with IEPA, there was no order to conduct the monitoring, and indeed there was not even an NOV (not that an NOV is evidence of an obligation to do anything, *see* §VIII.E, above). The evidence in the record demonstrates that IEPA asked and MWG said "yes."

Instead, Complainants maintain that, because MWG did not fully prevail during the liabilities phase, its "continuous[] and strenuous[]" arguments that it had not violated the Act require a "more aggravated . . . penalty determination." Comp. Br. at 69. But Complainant's brief makes no attempt to identify any provision of Section 42(h) that would support imposing greater fines on a respondent for arguing its case before the Board. MWG's participation in Board proceedings is constitutionally protected under due process and cannot provide a basis for enhanced penalties.

Indeed, Section 42(h) *cannot* work that way. "[T]he primary purpose of a penalty is to aid in the enforcement of the Act and not to punish." *Trilla Steel Drum Corp.*, PCB 86-56, 1987 Ill. ENV LEXIS 375, *11. The Act allows respondents to appear before the Board and advise the Board on what the Act *says* and what the facts *are*. Punishing parties for taking that opportunity frustrates the Act's purposes and does not aid the Board. *Lincoln, Ltd.*, 2016 IL App (1st) 143487, at ¶35 ("We do not find that the Operator defendants should be penalized for the delay that resulted from their unsuccessful interlocutory appeal."). Nor, for that matter, do Complainants explain how the Board could punish MWG for defending itself and making legal arguments without violating MWG's constitutional rights. MWG cannot be punished for disagreeing with Complainants' views on the facts, law, or ultimate remedy. Nor would a proceeding that hands out extra punishment to the losing side, merely for being the losing side, comport with basic notions of due process.

Complainants insist that *Toyal America, Inc. v. IPCB* shows why it is "imperative" that MWG receive an excessive monetary penalty. Comp. Br. at 50, citing 966 N.E.2d 73, 83 (Ill. App. 3d Dist. 2012) & Ex. 1201. All this for a series of violations that the Complainants do not dispute are not causing any offsite risks. *See supra* §IV.E. But *Toyal* involved the opposite situation: A polluter in a nonattainment zone who did not install the regulatorily required control equipment, released air pollutants in excess of applicable standards that contributed to dangerous levels of ground-level ozone, and caused a direct, negative, effect on the health of many Will County

[29] In any event, MWG *did* do something in response to the NOVs – it entered into the CCAs to reline its ponds at great expense. *See* MWG 2018 Br., § II.F.; SOF 559-661, 1007-1010; 6/12/23 Tr., p. 207:12-15.

residents. 2010 Ill. ENV LEXIS 327 at *140 (July 15, 2010). Despite being on notice of new Board regulations that could have required the installation of new control technologies, Toyal did not take advantage of a 14-month grace period leading up to the regulation's March 1995 effective date. *Id.* at *150. And even *after* the effective date, Toyal continued moving at a snail's pace. Despite promising in a March 1996 CAAPP application that it would install the equipment by 1998, the equipment ultimately did not come online until *December 2008*. *Id.* at *151.

That is not the case here. In this case, the Stations had voluntarily installed and replaced control equipment in the form of liners *long before* there was any requirement. Indeed, unlike other CCR surface impoundments, MWG's were originally lined in the 1970s. Interim Order, p. 22, 36, 52, 64; SOF 23, 88-89, 168-170, 181-182, 188, 195, 201, 284, 287, 373, 379. When MWG began operating the Stations, it initiated a fleet-wide analysis and upgrade of the liners in the ash ponds. 408. No federal or state regulatory agency asked MWG to evaluate the ash ponds, there was no legal requirement for MWG to conduct the pond liner evaluation, and there were no Illinois or Federal regulations related to the storage or use of the coal ash at the time. SOF 409. Instead, the evaluation was a part of MWG's preventative maintenance operations and review of the Stations. SOF 408. When the Agency asked MWG to install the groundwater monitoring wells and share the data with them, MWG voluntarily complied and voluntarily disclosed the information. See MWG 2024 Br., § V.A., VII.E., VIII.B.; SOF 489-493, 968, 972-975.

G. <u>Complainants Confuse the CCA Statements and the GMZ Certifications</u>

Complainants' claim – that MWG has not presented evidence of a certification of completion of the CCAs – is false. Comp. Br., p. 70. The Board found in its Interim Opinion that MWG submitted a certification of completion of the CCAs to the Agency. Interim Order, p. 24, 38, 53, 65; MWG Ex. 630, 637, 661, 651. Complainants make the same mistake about the CCA certifications as the Board initially did in its 2019 Interim Opinion. Complainants claim that CCA certifications must include data that demonstrates completion of the corrective process. That is wrong. Just like the Board in its 2019 Interim Order, Complainants are mistakenly referring to the certification required to end a GMZ under Section 620.250 of the Board rules. 35 Ill. Adm. Code 620.520. But as the Board explained in its 2020 Order when it corrected its mistake:

> MWG's 2013 Compliance Statements – each a page in length – merely certified the completion of those CCA steps that had been taken as of that date. <u>*They are distinct from documentation confirming that the corrective action taken under Section 620.250(a)(1) is complete*</u>.

2020 Order, p. 12 (emphasis added). The GMZs remain in effect because MWG has not submitted documentation confirming that the corrective action is complete. *Id.* at 13. But because the steps in the CCAs were completed, MWG submitted the Compliance Statements. *Id.* Complainants are correct that MWG has maintained that it must continue to the groundwater monitoring pursuant to the CCAs, but that is because the *GMZs are in effect*. MWG cannot cease groundwater monitoring

until the corrective actions initiated by the GMZs through the CCAs are complete, which the Board recognizes could "last for many years." 2020 Order, p. 13. At Waukegan, MWG's sampling is conducted pursuant to a 2017 construction permit, unrelated to the CCAs. SOF 519, 985-986.

Also, Complainants' claim that the CCAs control all future decisions about the CCR surface impoundments and somehow trump the 2015 federal CCR rule or 2020 Illinois CCR rule has no basis. Complainants do not identify any authority to support that claim because there is none. Section 31 of the Act, which created and controls the CCAs, does not give the CCA such power, and no other Section of the Act applies. When MWG entered into the CCAs in 2013, all four Stations used coal to generate electricity. The purpose of the CCAs was to resolve the alleged violations in the NOVs when the Stations *operated* as coal-powered generating stations and the impoundments *were used* as part of the operations. There was no intent, because there could not be, for the agreements to overrule all future decisions related to the ponds when the Stations ceased using coal. Moreover, there is no basis, because there cannot be, that the agreements overrule the federal CCR rule and the Illinois CCR rule that were adopted *after* the CCAs. Indeed, that conclusion would be at odds with the express requirements of the Illinois CCR rule. Under the Illinois CCR rule, an owner/operator must conduct an alternative closure analysis of the closure options. 35 Ill. Adm. Code 845.710. In Section 845.710, an owner/operator must conduct an extensive evaluation of the alternatives for permanent closure to evaluate and decide on most appropriate final closure of the CCR impoundments, based upon engineering comparisons, transportation comparisons, and costs comparisons. 35 Ill. Adm. Code 845.710. It is illogical to suggest that a single sentence in a CCA about not using the operating sites for permanent disposal could overrule the extensive analysis required by a legal requirement for the final closure decision of the CCR surface impoundments.

IX. CONCLUSION

For the reasons explained herein, and in its 2024 post-hearing brief, the Board's final order should adopt the remedial measures identified in MWG's post-hearing brief and conclude that no penalty is warranted, or at most $52,958. *See* MWG 2024 Br., §IX.

Respectfully submitted,
Midwest Generation, LLC
By: /s/ *Jennifer T. Nijman*
One of Its Attorneys

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3400
Chicago, IL 60603
312-251-5255