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, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent, Midwest Generation, LLC's Motion For Leave to File, *Instanter*, Its Reply in Support of Its Motion for Reconsideration and its Reply in Support, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: October 28, 2019

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service and Respondent, Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion for Reconsideration and its Reply in Support was filed on October 28, 2019 with the following:

Don Brown, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were emailed on October 28, 2019 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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RESPONDENT'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

Respondent, Midwest Generation, LLC ("MWG"), by its undersigned counsel, submits to the Illinois Pollution Control Board ("Board") this Motion for Leave to File, *Instanter*, its Reply in Support of its Motion for Reconsideration ("Reply"). 35 Ill. Adm. Code 101.500(e). In support of this motion, MWG attaches its Reply and states:

1. On September 9, 2019, MWG timely filed its Motion for Reconsideration relating to certain portions of the Board's Interim Order and Opinion. MWG's Motion requested that the Board reconsider its Interim Order and Opinion due to the Board's mistakes in the application of law.

2. On October 14, 2019, Complainants filed their Response to MWG's Motion. In their Response, Complainants raise new issues that MWG did not address in its Motion. Specifically, Complainants now claim that:

   a. because Illinois EPA did not create a list of concentrations for GMZs in Illinois under Section 620.450(a)(5), there is no "applicable standard" and the GMZs must have expired;

b. MWG's use of standard form language for its GMZ applications somehow impacts the Illinois EPA's approval of MGW's corrective action process;

c. after a claim is made alleging contamination, a respondent must conduct sampling of the area without request in order to provide the complainant with evidence that the complainant needs to meet its burden of proof; and,

d. the Board should "clarify" and reverse the Board's finding concerning application of GMZs to Section 12(a) of the Illinois Environmental Protection Act, which is actually an untimely motion for reconsideration.

3. Each of these arguments is outside the scope of MWG's Motion for Reconsideration and warrant a response. MWG's Reply details how Complainants engage in an illogical reading of the regulations to reach their conclusions because it is evident that Illinois EPA's GMZ "list" has no relation to the groundwater standards that apply in a GMZ. MWG points out that mere use of standard language found in the only GMZ application form provided in the Board's regulations does not negate that the MWG engaged in an agency-approved corrective action process. MWG explains that the burden of proof in a case rests with Complainants and when Complainants have no evidence to meet that burden, MWG is not required to voluntarily and without request sample yet another area of groundwater at its station to create new evidence. Finally, MWG points out that Complainants are making an untimely motion to reconsider when they ask the Board to "clarify" and reverse the Board's 12(a) finding – it should be disregarded and, in any case, the Board's finding was correct.

4. Complainants also make a new request that the Board further divide this case to separate out one station, and part of another station. The request is also untimely and is an inappropriate use of resources.

5. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice because MWG should have the opportunity to address new and untimely arguments.

6. The Board has previously granted replies to avoid material prejudice when a response presents new issues not addressed in the motion. In *Mather Investment Properties, L.L.C. v. Illinois State Trapshooters, Assoc., Inc.*, the Board granted the respondent's motion for leave to file reply *instanter* over the objection of the complainant. *Mather Investment Properties, L.L.C. v. Illinois State Trapshooters, Assoc., Inc.*, PCB 05-29, *27-28 (July 21, 2005), 2005 Ill. ENV LEXIS 451. The Board found that because the complainant had raised new issues for the Board to analyze, the respondent would suffer material prejudice if the Board were to deny the motion. *Id* at *28. *See also People v. NACME Steel Processing, LLC*, PCB 13-12, *4-5 (June 6, 2013), 2013 Ill. ENV LEXIS 157 (Board allowed a reply over an objection, even though the movant filed the reply before the Board granted leave and the movant offered no support for its statement that it would be prejudiced if not allowed to reply) .

7. This motion is timely filed within fourteen (14) days after service of Complainants' Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, MWG respectfully requests that the Board grant Respondent's Motion for Leave to File, *Instanter*, its Reply in Support of its Motion for Reconsideration, and accept the attached Reply as filed on this date.

Respectfully submitted,
MIDWEST GENERATION, LLC
By: /s/ Jennifer T. Nijman
One of Its Attorneys

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MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION

Complainants raise new issues in their Response that are unsupported by any applicable law or regulation, ignore the evidence presented, or lack any evidence to support Complainants' position. Complainants also improperly include in their Response requests to the Board that should have been the subject of a separate motion by Complainants and not properly considered as part of the Board's ruling on Midwest Generation, LLC's ("MWG's") Motion for Reconsideration.

Complainants contend that the reference in 35 IAC §620.450(a)(5) to a *listing* of groundwater management zones ("GMZs") that may be maintained by the Illinois Environmental Protection Agency ("Illinois EPA" or "Agency") somehow makes such a "list" equivalent to groundwater standards. The plain language of the GMZ regulations does not support Complainants' contention. In addition, neither the Illinois Environmental Protection Act ("Act"), 415 ILCS 5/5(b), nor the GMZ regulations grant the Illinois EPA the authority to unilaterally adopt groundwater standards.

The undisputed evidence in this case shows that the Illinois EPA approved the corrective action MWG implemented. That evidence means that the Board mistakenly applied Section 620.250(a)(2) to these agency-approved MWG corrective actions. 35 IAC § 620.250(a)(2). In response, Complainants contend that the generic, form GMZ application document somehow supports the application of Section 620.250(a)(2). Not only does Complainants' argument make no sense, it is totally unsupported by the GMZ regulations or any case precedent.

In the instance of the Joliet 29 historic ash areas, Complainants lack any evidence of contamination, so they instead argue that it was MWG's affirmative responsibility to voluntarily sample those areas to determine if any contamination was present after Complainants alleged (without evidence) that such contamination existed. Complainant's attempt to evade their burden to prove that such contamination actually exists should not be countenanced by the Board.

Similarly, Complainants should not be allowed to use the vehicle of a response brief to pursue relief that should be the subject of Complainants' own motions. Although couched in the guise of a request for "clarification" from the Board, Complainants' Response moves the Board to reverse its opinion that Section 12(a) of the Act does not apply while a GMZ is established. Like MWG, Complainants were free to move the Board for reconsideration of this portion of its Opinion. They did not do so. Complainants' belated attempt to seek such reconsideration should be disregarded. Besides its procedural deficiency, Complainants' Section 12(a) argument is incorrect. The Board properly found that no violation of Section 12(a) of the Act existed after the establishment of the GMZs.

In addition to including an untimely motion for reconsideration in its Response, Complainants also include what is essentially a motion for further bifurcation of this case. Complainants seek to have the MWG Waukegan Station claims and a portion of their Will County

Station bifurcated from the rest of their case while this Motion to Reconsider is pending. Not only is this request beyond the scope of a response to a motion for reconsideration, it also should be denied because any additional separation of the issues in this case would cause unnecessary confusion and waste judicial resources.

Clearly Complainants' Response has many substantive and procedural flows. But the Board should look beyond those errors and note that Complainants' Response fails to offer any rebuttal to most of MWG's Motion to Reconsider. They did not do so because the record and the applicable law support a decision by the Board to grant MWG's Motion and issue an order remedying those issues.

I. AN ILLINOIS EPA "LISTING" OF A GMZ IS NOT ITSELF A GMZ GROUNDWATER STANDARD

Complainants' argument regarding Section 620.450(a)(5) of the Board regulations is simply nonsensical. Under Complainants' reading of that section, Illinois EPA is required to develop an applicable groundwater "standard," in the case of each GMZ it approves. Complainants then submit that because the Illinois EPA "never actually adopted these standards at any of the three [MWG] GMZs," there are no applicable groundwater or other standards at the MWG's stations and thus the GMZs expired. *See* Complainants' Response, pp.7-10. Complainants' premise is false. Section 620.450(a)(5), does not establish a "standard." It states:

> The Agency shall develop and maintain a *listing of concentrations derived pursuant to subsection (a)(4)(B).* This list shall be made available to the public and be updated periodically, but no less frequently than semi-annually. This listing shall be published in the Environmental Register.
> 35 Ill. Adm. Code 620.450(a)(5) (emphasis added).

Section 620.450(a)(5) is simply a requirement that the Agency develop and maintain a "listing" of concentrations that were established pursuant to the standards in Section 620.450(a)(4)(B). It is Section 620.450(a)(4)(B) that sets out the applicable standards for a released chemical after

completion of a corrective action. A "listing of concentrations" does not equal a groundwater "standard," particularly when the plain language refers to standards that are to be established pursuant to an entirely separate section of the GMZ regulations.

The Illinois EPA, whether it creates a list or not, does not have the power to establish a standard. That power rests with the Board. Section 5(b) of the Act states that the Board "shall determine, define and implement the environmental control standards applicable in the State of Illinois…" 415 ILCS 5/5(b). Section 620.450(a)(5) in no way grants the Illinois EPA the authority to establish new applicable standards under a GMZ, certainly not by keeping a "list," which is neither subject to public notice or comment. The Board should reject Complainants' tortured interpretation.[1]

Based upon Complainants' erroneous interpretation of Section 620.450(a)(5), they fabricate the premise that there are no applicable standards for the Board to apply to the three GMZs at the MWG stations. According to the Complainants, because there are no applicable groundwater standards and because (they claim) the corrective action is complete, then pursuant to Section 620.250(c) the GMZs must have expired. Complainants' argument leads to a totally illogical result. In the simplest terms, if it is true that there are no applicable Subpart D groundwater standards for the Board to apply, then after MWG completed the corrective action at the MWG stations, it could not be in violation of any standards because no standards apply.

Section 620.401 states that "[g]roundwaters must meet the standards appropriate to the groundwater's class as specified in this Subpart [D]…" 35 Ill. Adm. Code 620.401. There are four

[1] It is MWG's understanding Illinois EPA has never created such a list. MWG searched the Environmental Register published in the Board's website for a listing of concentrations in GMZs and found none since at least 2012. Certainly, if this were at issue during the Hearing, as MWG stated in its Motion for Reconsideration, MWG would have presented a witness from Illinois EPA to describe how GMZs function, to state whether the listing of concentrations was created, and how it relates to the groundwater standards. *See also,* MWG's Memorandum in Support of its Motion for Reconsideration, p. 6.

classes of groundwater specified in Subpart D, Class I through Class IV, and there are also the Alternative Groundwater Quality Standards, which apply to GMZs. 35. Ill. Adm. Code 620.410-450. The Board regulations make it clear that the *only* time that the standards set forth in Subpart D do not apply are "prior to completion of a corrective action." 35 Ill. Adm. Code 620.450(a)(3). Otherwise, "[a]fter completion of a corrective action…" the applicable standard depends upon the concentration of the chemicals in the groundwater. 35 Ill. Adm. Code 620.450(a)(4). In an attempt to negate the plain language of Section 620.250(c), Complainants want it both ways. 35 Ill. Adm. Code 620.250(c). Complainants argue that the corrective actions are complete at the MWG's stations, but also argue that there are no applicable standards to apply. The regulations do not allow such an interpretation. Section 620.250(c) plainly states that a GMZ only expires when corrective action is complete, and the applicable standards have been attained. 35 Ill. Adm. Code 620.250(c). This is another reason supporting MWG's request for reconsideration of the mistaken finding that GMZs expire immediately following active work.

That GMZs do not expire immediately following active work is consistent with how the Illinois EPA has applied Section 620.250(c). For example, in a letter to Dynegy Midwest regarding the Hennepin East Ash Pond System, Illinois EPA addressed whether the GMZ established at Hennepin had expired. *See* Oct. 8, 2009 Letter from Illinois EPA to Mr. Rick Dieriex attached here as Exhibit A. At Hennepin, a question arose as to whether a GMZ that had been in place for over thirteen years had expired when the only continuing work was groundwater monitoring and annual reporting. *Id.* The Illinois EPA stated that because the groundwater in the GMZs had not achieved the applicable groundwater standards of Subpart D, the GMZ was still in effect. Ex. A, p. 2. Illinois EPA further stated that if the trends of the groundwater concentrations changed, then Dynegy would also have to conduct additional investigation or response action as needed. *Id.* Here, MWG's

GMZs have been established for less than half the time of the Hennepin GMZ. Like Hennepin, here, the applicable standards are set out in Subpart D, the MWG GMZs have not expired because the groundwater has not attained the applicable standards, and MWG is continuing the monitoring of the groundwater pursuant to the GMZs. Further, should over time the trends in groundwater concentrations change, then MWG would conduct additional investigation or response action as needed to address the situation. The Board should not be misled by the Complainants' twisting of the Board's regulations. It should instead reconsider and remedy its mistake of law and hold that pursuant to Section 620.250(c) of the Board regulations, the MWG GMZs have not expired.

II. LANGUAGE FROM A FORM APPLICATION DOES NOT ALTER AN AGENCY-APPROVED CORRECTIVE ACTION

In its Memorandum in Support of its Motion for Reconsideration ("Memorandum"), MWG pointed out that the Board had applied the wrong section of the Board's regulations to an agency-approved corrective action. Memorandum, p. 8. There has never been any doubt or question that the work MWG performed in response to Agency notices of violation was required and approved by the Illinois EPA. Yet, in response to MWG's argument that the Board mistakenly applied 620.250(a)(2) to an Agency-approved corrective action process, Complainants attempt to justify the Board's error by suggesting, for the first time, that perhaps MWG's work was not approved by the Illinois EPA. Complainants' Response, p. 6. The Board made no such finding. Complainants rely solely on a form document used to apply for a GMZ. This application form has absolutely no bearing on whether the Illinois EPA approved MWG's corrective action.

MWG's GMZ applications were submitted on the form document for obtaining GMZs that is provided Appendix D of the Board's Groundwater Quality regulations. Appendix D provides the language and information that a GMZ applicant must submit to the Illinois EPA. 35 Ill. Adm. Code App. D. There is no other form a GMZ application in the Board regulations and all GMZ

applicants use this form language.[2] This is supported by Exhibits 1 and 2 attached to MWG's Memorandum, which are the GMZ applications for the Hennepin Station and Wood River Station respectively. In both GMZ applications, the applicants copy the Appendix D language in their submissions to the Illinois EPA for their approval of the GMZ. As demonstrated by these other GMZ applications, using the form language provided in Appendix D to apply for a GMZ does not mean that the corrective action process was not approved by the Illinois EPA.

Indeed, it is indisputable that Illinois EPA approved the corrective action process described in the GMZ applications, which included relining the ash ponds and monitoring for natural attenuation. As clearly proven at hearing, the Illinois EPA provided written approval of these GMZs to MWG. Hearing Exs. 627, 638, 658, 660 (Illinois EPA GMZ approval letters). Based on that approval, MWG continues to sample the groundwater and submits the groundwater monitoring results to the Illinois EPA. Hearing Exs. 244M-246M, 257O-260O, 279Q-281Q (Groundwater Monitoring Reports). When MWG submitted the GMZ applications to the Illinois EPA in 2013, the Illinois EPA conducted a thorough review of the GMZ applications, and where it made comments it thought were necessary, it required MWG to make amendments to the GMZs. For instance, at the Powerton Station, Illinois EPA approved the GMZ application originally submitted on January 18, 2013 following submission of an amendment on August 26, 2013. Hearing Ex. 638 (Illinois EPA approval of Powerton GMZ). Similarly, Illinois EPA approved the Will County Station's GMZ application but with three additions that MWG was required to insert. Hearing Ex. 658. (Illinois EPA approval of Will County GMZ). Illinois EPA approved the corrective action processes at the MWG Stations, and in two instances would not issue their approval until MWG amended the GMZ applications. Because Illinois EPA approved the

[2] Again, if this were at issue during the Hearing, MWG would have presented a witness from Illinois EPA to describe the forms it requires for a GMZ application. *See also*, MWG's Motion for Reconsideration, p. 6.

corrective action processes in the MWG GMZ applications, the MWG GMZs were established pursuant to 35 Ill. Adm. Code 620.250(a)(1).

III. IT IS ALWAYS COMPLAINANTS' BURDEN TO PROVE THEIR CASE

It is uncontroverted, black letter law that a plaintiff is required to make its case; a defendant is never obligated to create evidence in response to a complaint so that a plaintiff can meet its burden of proof. Yet, Complainants appear to be arguing the reverse. In response to MWG's argument that the Board lacked evidence on which to conclude that the Joliet 29 historic ash areas are contributing to groundwater contamination, Complainants assert that upon receiving the complaint in this case MWG should have sampled the Joliet historic ash area: "The rule MWG advocates for here would effectively provide respondents in similar enforcement cases an easy way to avoid liability in enforcement actions – simply refuse to gather the most relevant evidence of a given claim." Complainants' Response, p. 22. Complainants' statement is the antithesis of the tenants of the United States judicial system and well-established Illinois law. The Illinois Supreme Court clearly stated, "a plaintiff bears the burden of producing evidence sufficient to establish each element of the claim." *Nolan v. Weil-McLain*, 233 Ill. 2d 416, 430, 331 Ill. Dec. 140, 149, 910 N.E.2d 549, 558 (2009). In other words, it is Complainant's burden to pursue and establish each element of their claim. To do that, they must seek out such evidence to support the claims through proper discovery methods. Complainants present no authority – because there is none – that a respondent must affirmatively gather additional evidence, unbidden by a complainant, to determine whether a complainant's unsupported claim is or is not false. And if it fails to do so, it can be held liable due to the sheer absence of any evidence refuting that claim. Complainants attempt to re-write the rules of justice to shift the burden of proof, based on a mere allegation, to the respondent. That is simply not the law.

There is no dispute that MWG dutifully answered all of Complainants' *numerous* discovery requests without refusal. That Complainants had insufficient evidence to meet its burden does not mean that the burden shifts to MWG to assist them. To hold otherwise would negate the fundamental tenant that it is the Complainants' burden to prove the violations of the Act through their own investigation and discovery. *Rodney v. Kane County*, PCB 94-244, 1996 Ill. ENV LEXIS 509 (July 18, 1996).

In its Interim Order, the Board found that the numerous monitoring wells that MWG voluntarily installed at the Joliet 29 Station are unlikely to show conclusive results of any contaminants emanating from the historical areas. *See* MWG's Motion for Reconsideration, pp. 23-25. Complainants request that the Board find the untested areas are "likely" to contribute to groundwater contamination. *Id.* "Likely" without any actual evidence such as sampling is merely speculation and nothing more. Proof that relies on conjecture, speculation or guesswork is insufficient. *Nolan*, 233 Ill. 2d at 434. Because all parties agree, including the Board, that there is no evidence in the record that any of the historic ash areas are contributing to the alleged contamination at the Joliet 29 Station, the Board must reconsider and remedy its conclusion regarding the Joliet 29 Station historic areas.

IV. COMPLAINANTS' REQUEST FOR "CLARIFICATION" OF SECTION 12(a) SHOULD BE DISREGARDED

The Board held that while a GMZ is established, Section 12(a) of the Act does not apply. Opinion, p. 92. MWG did not challenge this finding in its Motion for Reconsideration. Nevertheless, in their Response, Complainants improperly request that the Board "clarify" and reverse the Board's 12(a) decision. Complainants' Response, p. 38. Complainants' cloaked motion for reconsideration should be denied as untimely. Under the Board's Procedural Rules, a party must file a motion to reconsider within 35 days of an order (unless extended by motion). 35 Ill.

Adm. Code 101.520. In this case, Complainants never filed a motion nor requested an extension to do so. It is now too late. Because Complainants' request is an untimely motion to reconsider, the Board should disregard it.

Even if the Board were to consider the Complainants' late motion for reconsideration, it should be denied because there is no violation of Section 12(a) of the Act after the establishment of the GMZs. Section 12(a) states that no person shall:

> Cause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, **or** so as to violate regulations or standards adopted by the Pollution Control Board under this Act. 415 ILCS 5/12(a) (**emphasis added**)

In this case, the Board found that MWG violated Section 12(a) because the groundwater standards had been exceeded at the Stations. Board Order, pp. 77-78. Putting aside the duration of the GMZs for the sake of this argument, the Board then accounted for the fact that the GMZs were in effect at the Stations. 35 Ill. Adm. Code 620.250(c). While the GMZs are in effect, the groundwater standards are not exceeded. 35 Ill. Adm. Code 620.450(a)(3). Thus, the Board is correct that while a GMZ is in effect, there is no violation of Section 12(a) of the Act. [3]

Complainants' position is not logical. Complainants argue that even if there is no violation of regulations or standards due to a GMZ being established, there is still a statutory violation of 12(a) despite that GMZ. If that is the case, then the whole regulatory construct of GMZs becomes meaningless. There would be no value to having a GMZ because there will always be a violation of 12(a) regardless of the GMZ's existence. The purpose of a GMZ is to give the Illinois EPA flexibility in responding to contaminated properties and allow a property owner to avoid daily fines

[3] *People v. Texaco*, PCB 02-03 (Nov. 6, 2003) is inapplicable. In that case, the Board was merely dismissing an affirmative defense and there was no evaluation of GMZs or how a GMZ will affect a future allegation of violation of the Act.

and penalties. *In the Matter of: Coal Combustion Waste (CCW) Ash Ponds and Surface Impoundments at Power Generating Facilities: Proposed New 35 Ill. Adm. Code 841*, R14-10; Illinois EPA's Response to Questions Posed by the Board (March 6, 2017), at p. 12. If, as the Complainants suggest, a GMZ provides no such protection, then no property owner would have any motivation to voluntarily respond and remediate a contaminated property because by doing so, that owner would invite being held in violation of the Act. As the Board has concluded, a GMZ provides such protection when a property owner has submitted a corrective action program to the Illinois EPA, and with the Illinois EPA's approval, is pursuing appropriate remediation.

V. COMPLAINANTS' REQUEST TO FURTHER SPLIT THIS CASE IS IMPROPER AND WILL NOT ASSIST THE BOARD

The Board should reject Complainants' improper request to further divide this case to proceed with one MWG station and a part of another while this Motion to Reconsider is pending. Complainants' Response, p. 1. Complainants' request to partition this case yet again does not respond to any of the issues in MWG's Motion to Reconsider and should be disregarded. Regardless, Complainants provide no reason – because there is none – that further partition of this matter would provide any benefit to the Board or further resolution of this case. Rather, any additional separation of the issues would only cause unnecessary confusion and create excessive repetition of information. As demonstrated during the liability phase of this matter, many witnesses and documents relate to all of the MWG Stations. If this matter were to be further separated, the record would likely repeat the same information for each of the separate hearings, which would unnecessarily increase the size of this voluminous record and waste the Board's and parties' time. Complainants' suggestion that Board hold a hearing on a *part* of a MWG station is even more outrageous and would provide no benefit in finalizing this matter. Complainants made the decision to file their complaint to address four individual stations in one action. To argue now to change

the course of action by proceeding with only one-and-a-half of those stations is untimely and wasteful.

VI. COMPLAINANTS' FAILURE TO RESPOND IS A CONCURRANCE

Because Complainants did not respond to many of the issues in MWG's Motion to Reconsider, the Board should grant MWG's Motion on those issues. Specifically, Complainants did not disagree that the Board made inconsistent conclusions regarding certain constituents at Joliet 29 and Powerton. Memorandum, pp. 33-34, 40-41. Additionally, Complainants did not object to MWG's requests for clarification as to (1) whether the Board concludes that the pond liners were leaking after the ponds were relined or if the ponds contained no ash; (2) that the only expert was John Seymour; (3) and whether the Board considers monitoring wells 8, 10, and 11 at Joliet 29 as background wells. *Id.* at 43-44. Complainants thus concur with MWG's position and the Board should grant MWG's requests.

VII. CONCLUSION

Complainants' Response is of little assistance to the Board because the Response primarily refers back to Complainants' Closing Brief, without actually responding to the issues MWG identified. Complainants fail to address the specific and numerous issues MWG identified in the Board's opinion – issues MWG supported with citations to the record of the ten-day hearing. In its evaluation of MWG's Motion to Reconsider the Interim Order and Opinion, the Board should not rely merely upon arguments and assertions by a party that lack any critical analysis or support but should look to the facts established by the witness testimony and the documents in the record.

As detailed above, the Board should reject Complainants' contrived interpretation of the Board regulations and find that the GMZs established at the MWG stations have not expired. 35 Ill. Adm. Code 620.250(c). The Board should also reject Complainants' attempt to suggest that MWG's actions were not Agency-approved corrective action, when there are Agency approval

letters in evidence that directly refute this assertion, merely because of standardized language in a Board application form. Complainants' claim that it is MWG's responsibility to create sampling data so that Complainants can meet their burden of proof cannot be sustained. Complainants' have the burden of establishing their claims and have failed to do so at the Joliet 29 Station. Finally, the Board should disregard Complainants' request for "clarification" of Section 12(a) as untimely. In any case, the Board is correct that there is no violation of Section 12(a) of the Act after the establishment of the GMZs. Respondent, Midwest Generation, LLC, respectfully requests that the Board reconsider and clarify the Interim Order and Opinion and issue an order as requested in its Motion.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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EXHIBIT A

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PAT QUINN, GOVERNOR DOUGLAS P. SCOTT, DIRECTOR

October 8, 2009

Mr. Rick Diericx
Senior Director, Operations Environmental Compliance
Dynegy Midwest Region Operations
604 Pierce Boulevard
O'Fallon, Illinois 62269

Dear Mr. Diericx:

This letter is in response to Dynegy's correspondence dated April 30, 2009, regarding the Closure Work Plan (CWP) for the Hennepin East Ash Pond System's (Ponds 2 and 4) groundwater management zone (GMZ) established in 1996, relative to a landfill for ash disposal proposed in the same geographic area as ash pond number 2.

Specifically, Dynegy requests clarification from the Illinois Environmental Protection Agency (Illinois EPA) about three issues:

1) Currently approved CWP;
2) Prohibition against the placement of new fly ash or bottom ash into Pond 2; and
3) Status of the GMZ around the east ash pond system.

1) Currently approved CWP

Response:
The CWP requires that Pond 2 and 4 be taken out of service, but may be left uncovered to facilitate ash mining, as a means of source removal. Dynegy is required by the letter establishing the GMZ, dated November 8, 1996, to notify the Illinois EPA if ash mining ceases. The Illinois EPA will accept the progressive covering of Pond 2 with the engineered liner that will be installed below the proposed landfill as an adequate means to close Pond 2. See Recommendations Section.

2) Prohibition against the placement of new fly ash or bottom ash into Pond 2

Response:
The Illinois EPA concurs with Dynegy's assessment that construction of a landfill on top of Pond 2 does not constitute disposal of ash in Pond 2. The liner below the landfill serves as a physical barrier between the landfill and Pond 2. Therefore, the landfill is not part of Pond 2.

3) Status of the GMZ around the east ash pond system

Response:
Pursuant to 35 IAC 620.250(c):
A GMZ expires upon the Illinois EPA's receipt of appropriate documentation which confirms the completion of the Illinois EPA approved corrective action taken pursuant to subsection (a) and which confirms the attainment of applicable standards as set forth in Subpart D.

Or

The Illinois EPA establishes alternative groundwater standards pursuant to 35 IAC 620.450(a)(4)(B).

Based on the most recent monitoring data dated August 17, 2009, some of the monitoring wells within the GMZ have not achieved compliance with the groundwater standards of Subpart D. Therefore, the Pond 2 and 4 GMZ is still in effect. As such, groundwater monitoring and annual reporting must continue. The Illinois EPA notes that the CWP Annual Reports contain data that indicates improving groundwater quality down gradient of Pond 2. Should a reversal of these improving trends outside those predicted by Dynegy be noted subsequent to the installation of the proposed landfill, a remedial investigation and/or response, as needed, will be required.

Recommendations:
Dynegy should submit a request for a CWP modification of the Pond 2 and 4 GMZ for Illinois EPA approval. The modification should discuss:

- The timeframe for cessation of ash mining;
- Any modifications that may be made to Pond 2 in preparation for liner placement (e.g. grading);
- Any anticipated impacts those modifications may have on groundwater quality;
- Approximate schedule for the progressive placement of the liner over Pond 2; and
- Revised groundwater quality predictions for GMZ monitoring wells, if impacts are anticipated due to hydrogeologic changes caused by landfill installation (e.g. reduced water levels, altered flow directions, etc.)

I trust this responds to your needs. If you have further questions or concerns please contact Lynn Dunaway of my staff or me at (217) 785-4787.

Sincerely,

William E. Buscher

William E. Buscher, P.G.
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Groundwater Section
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Bureau of Water

CC: Al Keller, BOW Permits
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