BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS

SIERRA CLUB, PRAIRIE RIVERS NETWORK, and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	)	
Complainants,	)	
v.	)	**PCB 18-11 (Citizens Enforcement – Water)**
CITY OF SPRINGFIELD, OFFICE OF PUBLIC UTILTIES d/b/a CITY WATER, LIGHT AND POWER,	)	
Respondent.	)	

NOTICE OF FILING

To: Don Brown, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, IL 60601

And Attached Service List

Please take notice that on February 13, 2020, I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the attached **Response to Complainants' Motion for Partial Summary Judgment,** of the City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power, a copy of which is attached and served upon you.

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By _____
One of its Attorneys

Dated: February 13, 2020

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RESPONSE TO COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

NOW COMES Respondent, the City of Springfield, Office of Public Utilities ("City") d/b/a City Water, Light and Power ("CWLP"), by and through its counsel, **ADD NAMES** and pursuant to 35 Ill. Adm. Code 101.500 and 101.516 and respectfully requests that the Pollution Control Board ("Board") deny Complainants' Motion for Partial Summary Judgment on liability and proceed to schedule hearings on the disputed issues of material fact. In support of thereof, the City states as follows:

I. Summary of Argument

Summary judgment is not appropriate in this matter as disputed issues of material fact remain and Complainants' have not met their burden to demonstrate they are entitled to judgment as a matter of law. The key disputed issues of material fact summarized in this Response and supported by the Exhibits are: (1) Complainants have not demonstrated that the City's surface impoundments have caused contamination of groundwater at levels above background; (2) Complainants have not demonstrated the designation of groundwater standards

applicable to the relevant waters; (3) Complainants have not demonstrated that the City has not taken extensive precautions to prevent its surface impoundments from contaminating groundwater; and (4) Complainants have not demonstrated that any groundwater has been rendered harmful, detrimental or injurious to public health as a result of the City's operations. Therefore, Complainants Motion for Partial Summary Judgment should be denied.

II. Procedural Background

On September 27, 2017, Complainants Sierra Club, Prairie Rivers Network ("Prairie Rivers") and National Association for the Advancement of Colored People ("NAACP") filed a single Count Complaint with the Pollution Control Board ("Board") alleging violations of Sections 12(a) and 12(d) the Environment Protection Act ("Act") [415 ILCS 5/12(a) and(d)] and Sections 620.115, 620.301(a) and 620.405 of the Board's regulations. 35 Ill. Adm. Code 620.115, 620.301(a) and 620.405. Complainants' filed an Amended Complaint on April 19, 2019 and an Errata to the Amended Complaint on June 24, 2019. The City's Amended Answer and Affirmative Defenses were filed on July 5, 2019. Complainants' Reply to Respondents Affirmative Defenses to the Amended Complaint were filed on September 16, 2019.

In the Amended Complaint, Sierra Club, Prairie Rivers and NAACP narrowed the issues covered in the single count complaint to remove allegations that monitoring data from background wells upgradient from the City's surface impoundments were violating the Act and regulations and to remove allegations that the on-site permitted landfill was causing violations of the Act and regulations. Amended Complaint at pp. 2-3, ¶2 - 6. While the Complainants did not remove the alleged violation of 12(d) of the Act, they have made no attempt to argue that the Board should make a liability finding on 12(d) and have alleged no undisputed facts in support of a violation of that provision. 415 ILCS 5/12(d).

In the Amended Complaint, the Complainants' plead in the alternative that "Since 2010, the groundwater at the CWLP Site has exceeded the Class I GQSs for arsenic, boron, chromium, iron, lead, manganese, sulfate, and TDS, or the Class II GQSs for arsenic, boron, iron, lead, manganese, sulfate, and TDS. 35 Ill. Admin. Code §§ 620.410, 620.420." Amended Complaint at ¶29.

Complainants filed a Motion for Partial Summary Judgment on January 29, 2020, requesting that the Board "(a) [r]ule that CWLP has violated the Act on the single count in the First Amended Complaint; and (b) [e]stablish a limited hearing process to determine the appropriate amount of civil penalties that CWLP must pay and the mechanisms by which CWLP must cease and desist its violations of the Act and implementing regulations." Motion at p. 4. In the Memorandum of Law in Support of its Motion for Summary Judgment ("Mem."), Sierra Club, Prairie Rivers and NAACP provide an extensive "Statement of Undisputed Facts" that encompasses 28 numbered paragraphs over nine pages. The City will not reply to each fact individually to identify it as disputed or undisputed, but rather will use this Response to focus on facts that are in dispute which are material to the outcome of this Motion including clarifying, in some cases, that facts identified in Complainants' Statement of Undisputed Facts are actually in dispute.

III. Standard of Review

Under the Board's procedural rules, summary judgment is proper when "the record, including pleadings, depositions and admissions on file, together with any affidavits, shows that there is no genuine issue of material fact." 35 Ill. Admin. Code 101.516(b). Summary judgment must be granted when the Board finds that "there is no genuine issue of material fact and that the undisputed facts show that complainant's right to the relief requested is 'clear and free from

doubt'." *People v. Skokie Valley Asphalt, Inc.*, PCB 96-98, Slip. Op. at 2 (May 3, 2001) (quoting *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 483, 693 N.E.2d 358, 370 (1998)).

As the Board found in Complainants Sierra Club and Prairie Rivers Network's citizens' enforcement suit against Midwest Generation: "As this standard mirrors the standard that applies in Illinois trial courts, cases interpreting Illinois summary judgment standard can inform how the Board interprets its own standard. Illinois courts have held that when "ruling on a motion for summary judgment, pleadings, depositions, and affidavits must be considered strictly against the movant and in favor of the opposing party . . . . The purpose of summary judgment is not to try a question of fact, but rather to determine whether a genuine question of material fact exists." *Illinois Envt'l Prot. Agency v. Illinois Pollution Control Bd.*, 386 Ill. App. 3d 375, 391, 896 N.E.2d 479, 493 (3d Dist. 2008) (citations omitted). Summary judgment "is a drastic means of disposing of litigation, and therefore, should be granted only when the right of the moving party is clear and free from doubt. *Adames v. Sheahan*, 233 Ill. 2d 276, 296, 909 N.E.2d 742, 754 (2009). *Sierra Club, et al v. Midwest Generation LLC*, Slip Op. at 3 (January 19, 2017).

In an enforcement proceeding before the Board, the Complainant must prove by a preponderance of evidence that the Respondent violated the Act, Board rules, or permits. *People v. Packaging Personified, Inc.*, PCB 04-16, Slip Op. at 11 (September 8, 2011); *People v. General Waste Services, Inc.*, PCB 07-45, Slip Op. at 12 (April 7, 2011); *Nelson v. Kane County Forest Preserve*, PCB 94-244, Slip Op. at 5 (July 18, 1996); *Lefton Iron & Metal Company, Inc. v. City of East St. Louis*, PCB 89-53 Slip Op. at 3 (April 12, 1990); *Industrial Salvage Inc. v. County of Marion*, PCB 83-173 Slip Op. at 3-4, (August 2, 1984) citing *Arlington v. Water E. Heller International Corp.*, 30 Ill. App. 3d 631, 640, 333 N.E.2d 50, 58 (1st Dist. 1975).

Section 12(a) of the Illinois Environmental Protection Act ("Act") provides that "[n]o person shall … [c]ause 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." 415 ILCS 5/12(a). The Act defines, "water pollution" as "such alteration of the physical, thermal, chemical, biological or radioactive properties of any waters of the State, or such discharge of any contaminant into any waters of the State, as will or is likely to create a nuisance or render such waters harmful or detrimental or injurious to public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate uses, or to livestock, wild animals, birds, fish, or other aquatic life." 415 ILCS 5/3.545.

To find a violation of Section 12(a) of the Act, the Board must find that a contaminant was discharged, or threatened to be discharged that is likely to render waters harmful, detrimental, or injurious to public health. *People v. CSX*, PCB 7-16, Slip Op. at 16 (July 12, 2007). *Sierra Club et al v. Midwest Generation*, Slip Op. at 77 (June 20, 2019). As explained in detail below, the Sierra Club, Prairie Rivers and NAACP have not pointed to undisputed facts that demonstrate the City "caused, threatened or allowed" a discharge of contaminants to groundwater and they have not demonstrated waters have been rendered harmful or injurious to public health.

IV. ARGUMENT

A. Sierra Club, Prairie Rivers and NAACP Have Not Met Their Burden to Demonstrate with Undisputed Facts that the City Caused or Allowed the Discharge of Contaminants

Sierra Club presents the Board with the following standard of review in its Motion for Partial Summary Judgment on the issue of liability under Section 12(a) [415 ILCS 5/12(a)]:

> To determine whether a party has "cause[d] or threaten[ed] or allow[ed] the discharge of any contaminants" into waters of the State, Illinois courts and the Board focus on two factors: first and primarily, whether the party has the "capability of control" over the water pollutants or the premises where the water pollution occurred, and second, whether the party has taken "extensive precautions" to prevent pollution from occurring. *See, e.g., Gonzalez v. Pollution Control Bd.*, 2011 IL App (1st) 093021, ¶ 33 ("Property owners are responsible for the pollution on their land unless the facts establish the owners either lacked the capability to control the source or had undertaken extensive precautions to prevent vandalism or other intervening causes") (internal quotations and citations omitted); *People v. A.J. Davinroy Contractors*, 249 Ill. App. 3d 788, 794, 618 N.E.2d 1282, 1287 (1993) (defendant liable when it "neither lacked the capability to control the source of the pollution nor undertook any precautions to prevent the pollution"); *Perkinson v. Ill. Pollution Control Bd.*, 187 Ill. App. 3d 689, 694-95, 543 N.E.2d 901, 904 (1989) (Illinois has a "long line of precedent . . . which holds that the owner of the source of the pollution causes or allows the pollution . . . and is responsible for that pollution unless . . . the owner either lacked the capability to control the source ... or had undertaken extensive precautions to prevent vandalism or other intervening causes")."

Mem. at pp. 14-15.

The City concedes that it has ownership and control of the surface impoundments which are part of its treatment system permitted by the Illinois Environmental Protection Agency ("Illinois EPA") under National Pollutant Discharge Elimination System ("NPDES") permit #IL0024767. The surface impoundments are operated to provide treatment for two separate and equally essential operating functions: 1) managing the by-products of combustion of coal to produce electricity including those by-products of the flue gas desulfurization process, and 2) providing wastewater treatment for the by-products of the drinking water treatment process for

the citizens of the City of Springfield and surrounding communities at the lime softening/sludge ponds that are located at the Lakeside Ash Pond. In their Motion, Sierra Club, Prairie Rivers and NAACP do their most selective cherry picking from the Record when they claim that the facts are undisputed that the City has not taken extensive precautions to prevent water pollution. Sierra Club, Prairie Rivers and NAACP summarize this conclusion by saying: "In short, CWLP did not just fail to take extensive precautions to prevent the coal ash ponds from contaminating the groundwater; it failed to take any precautions (even the most minimal) to protect the groundwater from being contaminated by coal ash in Dallman and Lakeside Ash Ponds." Mem. at p. 18. To rebut this misleading picture presented in Complainants' Motion, the City will have to refute this Statement of Undisputed Facts by presenting the voluminous facts provided in discovery which demonstrate extensive precautions to prevent pollution. But stated more simply, it appears that Sierra Club, Prairie Rivers Network and NAACP are expecting the Board to conclude on the Record without a hearing, that any actions short of ceasing electricity and drinking water production are proof of not taking "even the most minimal" precautions.[1] Therefore, Complainants' Motion for Partial Summary Judgment should be denied.

B. Complainants' Conclusion that the City's Surface Impoundments are "Leaking and Leaching" is Not Supported by the Record

In paragraphs 12-14 of its Statement of Undisputed Facts, Sierra Club, Prairie Rivers and NAACP claim in the Section heading that the "Ash Ponds at CWLP are Leaking and

[1] Complainants took deposition testimony from Patrick J. ("PJ") Becker and William Antonacci out of context to suggest the City does not have plans to close its Ash Ponds under the current federal CCR rule and the upcoming State rules. This is refuted by the same witness depositions. *See* Becker deposition at 69:17-70:8, 88-89 and 97:10-98:6 regarding plans and studies undertaken by CWLP and 45:19-23 (CWLP will assess nature and extent and then move to corrective action if necessary); Antonacci deposition at p. 61 regarding discussions of ash pond closure and Susan Corcoran deposition at 114:10-24 regarding the City's Integrated Resource Plan. Relevant Excerpts of Antonacci, Becker and Corcoran Deposition Transcripts are provided at Exhibits A, B and C, respectively.

Leaching." Yet the facts cited in the Record, even if they were taken as true, do not demonstrate any such thing. First, the only underlying fact referenced in these sections is surface seepage from the Lakeside Ash Pond. There are no facts cited as to "leaking" from the Dallman Ash Pond or any facts cited of "leaching" from either pond. The City does not dispute that there are certain areas of the Lakeside Ash Pond where water can occasionally seep out of the pond and must be captured and returned to the ash ponds or the clarification pond for additional treatment. The Complainants' direct the Board to the transcripts of William Antonacci (pages 27 – 37) and Susan Corcoran (pages 35 – 43) to demonstrate their conclusion, but fail to reference the testimony on these same pages that provides undisputed evidence that no ash pond seepage has left the CWLP site by any means other than following treatment at the permitted outfall 004 in CWLP's NPDES permit.[2] Exhibits A and C. Statements from the portions of Susan Corcoran's deposition referenced by Complainants and continuing on to page 44 demonstrate that no leakage is occurring from the ponds that is not captured and treated when she testifies that seepage was "not leaving our facility" (35:24); EPA investigated whether anything was leaving the site and "there was not" (36:1-3); the Dallman ashpond has no seepage (43:4); a ditch is maintained to drain any water to the clarification pond (43:10-12); and no seepage is present other than what was already described (44:12-20). Exhibit C. Similarly, the pages referenced of William Antonacci's deposition do not demonstrate "leaking" or "leaching" that is not captured and treated on-site when he testified that "I make sure there are no

[2] Complainants' discussion in footnote 5 is particularly misleading in its attempt to imply that relief granted by the Board in AS96-4, prior to adoption of the current boron water quality standards (40.1 mg/l acute and 7.6 mg/l chronic) in R11-18, is somehow evidence of a violation of Section 12(a) of the Act by the City's surface impoundments. There are no allegations or evidence that the City is not in compliance with its NPDES permit limits for its discharge to Sugar Creek or that Sugar Creek and the Sangamon River are not meeting the applicable water quality standards for boron.

discharges other than permitted outfalls" (32:17-19); roadways are sloped to make sure all water drains back into the ash ponds (32:23-33:4), past seepage was corrected with drain tile repairs and drains to clarification pond (33:13-16); and ditch is maintained to catch seepage but even if ditch is not maintained, road slopes back into the ponds (41:1-20). Exhibit A. Because of these disputed issues of fact, Complainants' Motion for Partial Summary Judgment should be denied.

C. The City has Taken Extensive Precautions to Prevent Water Pollution in Operation of its Surface Impoundments

In order to refute Complainants' unsupported statements that the City has taken no actions to prevent water pollution, this Section will as briefly as possible identify the long list of documents and evidence that demonstrate CWLP has taken exhaustive efforts to properly operate and maintain its facility, to follow existing laws and regulations designed to identify structural and environmental problems at surface impoundments and to take appropriate actions to ascertain any groundwater impacts. Sierra Club, Prairie Rivers and NAACP seem to suggest that in following the procedures laid out in the federal Coal Combustion Residuals ("CCR") rule, the City has somehow neglected to "follow" State law. In fact, until the Board adopts a state CCR program pursuant to P.A. 101-171, there is no means or method of "complying" with 35 Ill. Adm. Code Part 620 as Complainants seem to suggest. 35 Ill. Adm. Code Part 620 establishes ambient groundwater quality standards for different classes of waters but does not designate the class of the City's groundwater or provide a methodology of determining whether these standards have been exceeded and how to respond to them. Becker Dep. at pp. 127-128 (Exhibit B).

The following is a list in timeline form of some of the many actions CWLP has taken over the decade prior to the close of discovery in this matter demonstrating the extensive precautions the City has taken to prevent water pollution and the documents provided in

discovery that verify each activity:[3]

Date	Activity	Document #[4]

7/14/2009 – CWLP initially proposes to add ash pond wells and begin sampling (Exhibit G)

7/28/2010 - USEPA request to access property for inspection (Doc. #5.3)

8/13/2010 – USEPA ash pond inspection

9/22/2010 – CWLP submits hydrological assessment and well sampling data to Illinois EPA (Doc. #6.1)

5/10/2011 – USEPA ash pond inspection final report with recommendations (Doc. #5.12)

8/3/2011 – Illinois EPA reviews June 2010 groundwater data and requests a meeting (Doc. #4.28)

8/8/2011 – CWLP responds to USEPA inspection report and provides an action plan (Doc. #5.5)

10/6/2011 – Illinois Department of Natural Resources ("IDNR") inspects ash ponds

10/19/2011 – Illinois EPA requests backgrounds to be developed (Doc. #4.15)

10/26/2011 – IDNR inspection letter finding ash ponds low hazard and well maintained (Exhibit H)

11/18/2011 – CWLP submits groundwater monitoring program to Illinois EPA (Doc. #4.17)

12/29/2011 – Illinois EPA approves the groundwater monitoring program (Exhibit I)

5/30/2012 – Andrews Engineering submits logs, well reports and data for AP1, AP2 and AP3 (Doc. #4.12)

May 2010 to August 2013 CWLP submits 14 quarters of groundwater data to Illinois EPA

6/21/13 –Andrews submits statistical backgrounds for ash pond network to Illinois EPA (Doc. #4.4)

2/20/2014 – CWLP receives Violation Notion ("VN") from Illinois EPA (Document #4.6)

4/2/14 – CWLP proposes Compliance Commitment Agreement ("CCA") to Illinois EPA (Doc. #4.7)

4/11/14 – Illinois EPA acknowledges receipt of CCA and proposes a 4/22/14 meeting (Doc. #4.8)

4/22/2014 – CWLP meets with Illinois EPA on VN

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[3] *See also*, Corcoran Dep. at 118:5-121:12 (Actions under taken following recommendations from USEPA inspection) and 15:17-16:9, 46:20-47:6 and 54:17-55:1 (actions taken including weekly inspections, monitoring plan, etc.) (Exhibit C) and Brad Hunsberger Fact Dep. at 130:8-138 (Andrews Engineering extensive Scope of Work conducted for CWLP) (Exhibit E).

[4] Referenced documents are provided in Document number order in Group Exhibit F. Document numbers are based on discovery numbering system agreed to by the Parties.

5/12/2014 – CWLP proposes a revised CCA (Doc. #4.10)

5/29/2014 – CCA is rejected (Document #4.11)

4/17/2015 – CCR rule final and effective

5/28/2015 – CWLP uploads fugitive dust program on CCR website[5]

10/17/2016 – CWLP uploads the following documents on the CCR website: "Run-on and Run-off Control System Plan for CCR Unit 2 Landfill" and "Closure, Post-Closure Plans for CCR Unit 2 Landfill" [6]

10/17/2016 - Liner Status Report for Coal Combustion Residuals Surface Impoundments (Doc. #11.1-03)

10/17/2016 - History of Construction Report for CCR Surface Impoundments (Doc. #11.2)

10/17/2016 - Initial Hazard Potential Classification Assessment Report for CCR Surface Impoundments (Doc. #31.8)

10/17/16 - Structural Stability Assessment for CCR Surface Impoundments (Exhibit J)

10/17/2016 - Initial Safety Factor Assessment for CCR Surface Impoundments (Doc. #31.9)

10/17/2016 - Inflow Design Flood Control Report for CCR Surface Impoundments (Exhibit K)

10/1 7/2016 - Closure Plan for Coal Combustion Residuals Surface Impoundments[7]

10/17/2016 - Post-Closure Plan for Coal Combustion Residuals Surface Impoundments[8]

1/15/2016 – CWLP uploaded Annual Inspection report for CCR Landfill and CCR Surface Impoundments[9]

12/15/2017 – CWLP uploaded Annual Fugitive Dust Control Report[10]

10/17/2017 - CCR Surface Impoundment Groundwater Monitoring Program (Doc. #10.15)

10/17/2017 - CCR Landfill Groundwater Monitoring System Certification (Doc. #10.18)

10/17/2017 - CCR Landfill Groundwater Statistical Method Certification[11]

10/17/2017 - CCR Surface Impoundments Groundwater Monitoring System Certification (Doc. #24.9)

10/17/2017 - CCR Surface Impoundments Groundwater Statistical Method Certification (Doc. #16.15)

1/11/18 – CWLP notification to Illinois EPA of ceasing Part 620 sampling to follow Part 257 (Doc. #4.3)

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[5] Pursuant to the federal CCR rules, CWLP must maintain a publically available website with documentation developed about its surface impoundments and landfills. That website and the documents referenced may be accessed at https://www.cwlp.com/CCRCompliance.aspx.

[6] https://www.cwlp.com/CCRCompliance.aspx.

[7] https://www.cwlp.com/CCRCompliance.aspx

[8] https://www.cwlp.com/CCRCompliance.aspx

[9] https://www.cwlp.com/CCRCompliance.aspx

[10] https://www.cwlp.com/CCRCompliance.aspx

[11] https://www.cwlp.com/CCRCompliance.aspx

1/31/2018 – CWLP uploaded Annual Groundwater Monitoring and Corrective Action Reports for Dallman and Lakeside CCR Surface Impoundments and Landfill (Doc. #6.5)

2/28/2018 – CWLP uploaded Assessment Monitoring Program notification (Doc. # 10.20)

7/11/2018 – CWLP established Groundwater Protection Standards (Doc. # 10.19)

7/11/18 - CCR Surface Impoundments Notification of Statistically Significant Increase (Doc. # 10.21)

11/16/2018 - CCR Surface Impoundment Location Restrictions Demonstration (Doc. # 10.22)

11/16/2018 - Annual inspection for the Dallman and Lakeside CCR Surface Impoundments and Landfill[12]

12/17/2018 – CWLP uploaded the Annual Fugitive Dust Control Report[13]

1/31/2019 – CWLP uploaded the following: Annual inspection for Dallman and Lakeside CCR Surface Impoundments; Annual inspection for CCR Landfill; Annual Groundwater Monitoring and Corrective Action Report for Dallman and Lakeside CCR Surface Impoundments and Annual Groundwater Monitoring and Corrective Action Report for our CCR Landfill[14]

4/5/2019 – CWLP uploaded Initiation of Assessment of Corrective Measures (Doc. #10.30)

5/6/2019 - Notification of Intent to Comply with Alternative Closure Requirements (Doc. #10.31)

5/6/2019 - Assessment of Corrective Measures Extension (Doc. #10.28)

May 2019 to July 2019 CWLP performed Assessment Investigation for well RW-3 (Doc. #6.13)

8/5/2019 – CWLP uploaded Completion of Corrective Measures (Doc. #10.29)

As this voluminous list should make clear, Sierra Club, Prairie Rivers and NAACP's statement that CWLP has "failed to take any precautions (even the most minimal) to protect groundwater from being contaminated" is clearly an issue of material fact in dispute that requires the Board to deny their Motion for Summary Judgment.

To sustain their burden of proving that there are no genuine issues of material fact which support the position that CWLP has "failed to take any precautions (even the most minimal) to protect the groundwater from being contaminated" the Complainants face the logically daunting task of proving a negative. By contrast, to demonstrate the Complainants' failure to sustain their

[12] https://www.cwlp.com/CCRCompliance.aspx
[13] https://www.cwlp.com/CCRCompliance.aspx
[14] https://www.cwlp.com/CCRCompliance.aspx

burden, the City need only prove one precaution taken; we've listed over 50. Complainants might argue at hearing that those 50 precautions do not arise to the level of "extensive," but they may not do so in the context of a summary judgment motion that argues no factual issues support the City's position.

D. Complainants Have Not Met their Burden to Demonstrate with Undisputed Facts that Waters Have Been Rendered Harmful or Injurious to Public Health

Sierra Club, Prairie Rivers and NAACP make no effort to prove with undisputed facts or otherwise that any waters have been "rendered harmful or detrimental or injurious to public health." The City understands that the Board has found that a violation of the Board's groundwater quality standards constitutes a violation of Section 12(a) of the Act. *International Union, et al v. Caterpillar*, PCB 94-420 slip op. at 33-34 (Aug. 1, 1996). However, since there are material facts in dispute in this matter as to whether and which groundwater quality standards have been violated, the Complainants must present facts on this element to prevail as a matter of law.

There is undisputed evidence in the Record that there are no potable groundwater wells within the vicinity of the City's facility. *See* Exhibit L (Doc. # 28), Becker Dep. at pp. 117-122 (Exhibit B) and Mahlon Hewitt Deposition Transcript at 70:18-22 (Exhibit D). The Potable Well survey conducted by Mr. Hewitt of Andrews Engineering used a benchmark of 2,500 feet pursuant to Section 14.3(c) of the Act [415 ILCS 5/14.3(c)]. The closest potable well that could potentially be still in existence downgradient of the CWLP Ash Ponds in the Sugar Creek Basin was located 3,421.6 feet downgradient of the CWLP Ash Ponds. A second well located just over the benchmark at 2,504.7 feet from the CWLP Ash Ponds was not located within the Sugar Creek Basin. (Exhibit L). There is no evidence that either well is still in use but even using this conservative measure there is no potential impact on potable wells from the CWLP Ash Ponds.

Sierra Club, Prairie Rivers and NAACP point to no evidence to dispute the City's position that no elevated groundwater levels have been found off-site and no actual or potential uses of groundwater have been impacted or precluded. Such harm is an essential element of proving a violation of Section 620.301(a) of the Board's rules which states:

> a) No person shall cause, threaten or allow the release of any contaminant to a resource groundwater such that:
>
> 1) Treatment or additional treatment is necessary to continue an existing use or to assure a potential use of such groundwater; or
> 2) An existing or potential use of such groundwater is precluded.

35 Ill. Adm. Code 620.301(a).

The Complainants have presented no evidence that any particular uses are precluded or that any particular treatment is necessary to allow such use. While after a hearing Complainants may be able to sustain violations of 35 Ill. Adm. Code 620.115 (prohibits violating the Act and Part 620) and 35 Ill. Adm. Code 620.405 (prohibits violating groundwater quality standards) if they are able to demonstrate that applicable groundwater quality standards have been violated, but it is still necessary to prove evidence of specific harm to prove a violation of 35 Ill. Adm. Code 620.301(a). Therefore, Complainants' Motion for Partial Summary Judgment should be denied.

E. Complainants Continue to Plead Violations in the Alternative and Have Failed to Present Undisputed Facts as to Which Groundwater Standards Apply

Sierra Club, Prairie Rivers and NAACP do not try and allege that any waters of the State have been rendered harmful, detrimental, or injurious to public health. As discussed above, Complainants have simply relied on prior Board caselaw to argue they need only prove violations of groundwater quality standards in 35 Ill. Adm. Code 620 to sustain a violation of 12(a) of the Act. 415 ILCS 5/12(a). While the City concedes the Board has focused on

violation of the groundwater quality standards in Part 620 in sustaining violations of Section 12(a) of the Act, it has done so only in circumstances where evidence was presented (either undisputed by the parties or at hearing)[15] as to which class of groundwater quality standards under 620 are applicable. In this case, Sierra Club, Prairie Rivers and NAACP continue to plead in the alternative between Class I and Class II through the summary judgment stage without making any more than the most cursory attempt to hint at which standard they are attempting to prove.

The City has argued from the outset that Sierra Club, Prairie Rivers and NAACP's Complaint was insufficiently pled because the pleadings had alleged violations of both Class I and Class II groundwater quality standards when, in fact, these standards are mutually exclusive. In denying the City's Motion to Dismiss the Board found:

> "The Board notes that a technical omission such as complaint's failure to identify pleading of violation of Class I and Class II standards as pleading in the alternative does not render complaint insufficiently pled as to those violations... The Board has both legal and technical expertise to address these allegations based on the evidence in the record as the case progresses. The Board, thus, denies the CWLP's motion to strike the alleged violation of Section 620.301(a) from the complaint." Slip Op. at 8 (December 21, 2017).

The City understands the Board's unwillingness to dismiss the Complaint for a technicality of not pleading a claim in the alternative and did not object when this technicality was corrected in the Amended Complaint with a proper pleading in the alternative. But that is a different matter than interpreting the Board's approval of alternative pleading as meaning that the Complainants

[15] In addressing Motions for Summary Judgment in *Sierra Club et al v. Midwest Generation* the Board found that "The parties...agree that during the period relevant to the amended complaint, Class I GQSs applied at the Waukegan station and applied at the other three stations until the Agency approved groundwater management zones there. But nearly every other fact is disputed, and many of these disputes concern material facts." *Sierra Club et al v. Midwest Generation,* Slip Op. at 4 (January 19, 2017). Unlike the *Midwest Generation* case, there is no stipulation or agreement between the parties as to the class or classes of groundwater applicable in this case.

need not present evidence of which groundwater classification is applicable at the Summary Judgment stage.

In responding to the City's Motion to Dismiss, Complainants argued: "In this case, Complainants' decision to plead in the alternative is justified because Complainants do not yet have access to the factual information that would indicate whether the Class I or Class II groundwater standards apply." Complainants' Response to Respondent's Motion to Dismiss, at p. 7 (November 17, 2017). Sierra Club, Prairie Rivers and NAACP went on to argue:

> "Complainants do not have access to the property or to hydrogeological analyses of the site sufficiently specific to allow them to determine whether the groundwater is "10 feet or more below the land surface," within "[u]nconsolidated sand, gravel or sand," within "[s]andstone," or qualifying Class I groundwater under any of the other criteria. "The Illinois Code of Civil Procedure (735 ILCS 5/2–613(b) (West 1996)) clearly authorizes alternative pleading, regardless of the consistency of the allegations, as long as the alternative factual statements are made in good faith and with genuine doubt as to which contradictory allegation is true." *Bureau Serv. Co. v. King*, 308 Ill. App. 3d 835, 841, 721 N.E.2d 159, 163 (1999) (citing *Wegman,* 219 Ill.App.3d at 895, 162 Ill. Dec. 221, 579 N.E.2d 1035 (1991)). Since Complainants do not have access to the property to obtain the necessary information about the groundwater, Complainants made good faith claims that the groundwater at Dallman exceeded both Class I and Class II groundwater quality standards. (Compl. Par 29.)"

Id. at pp. 7-8. So now, after the close of extensive discovery which even included a site visit to the CWLP surface impoundments, Complainants still argue in the alternative and have made no attempt to present undisputed facts to support one alternative over the other.

It has been said that summary judgment is the "put up or shut up" moment in litigation, when a party must show what evidence it has that would convince a factfinder to accept its version of events. *Johnson v. Cambridge Indus., Inc.*, 325 F.3d 892, 901 (7th Cir. 2003). At this stage, the Complainants must argue, in effect, that the undisputed facts are "a" and "b" and taken together, a + b = 5. Logically they cannot also argue in the alternative that the undisputed facts

a + b = 48. If the facts are known, and they are undisputed, they cannot point to mutually exclusive alternatives.

The Board regulations provide the following definitions of Class I Potable Resource and Class II General Resource Groundwater:

Section 620.210 Class I: Potable Resource Groundwater

Except as provided in Sections 620.230, 620.240, or 620.250, Potable Resource Groundwater is:

a) Groundwater located 10 feet or more below the land surface and within:
   1) The minimum setback zone of a well which serves as a potable water supply and to the bottom of such well;
   2) Unconsolidated sand, gravel or sand and gravel which is 5 feet or more in thickness and that contains 12 percent or less of fines (i.e., fines which pass through a No. 200 sieve tested according to ASTM Standard Practice D2487-06, incorporated by reference at Section 620.125);
   3) Sandstone which is 10 feet or more in thickness, or fractured carbonate which is 15 feet or more in thickness; or
   4) Any geologic material which is capable of a:
      A) Sustained groundwater yield, from up to a 12 inch borehole, of 150 gallons per day or more from a thickness of 15 feet or less; or
      B) Hydraulic conductivity of 1 x 10-4 cm/sec or greater using one of the following test methods or its equivalent:
         i) Permeameter;
         ii) Slug test; or
         iii) Pump test.

b) Any groundwater which is determined by the Board pursuant to petition procedures set forth in Section 620.260, to be capable of potable use.

Section 620.220 Class II: General Resource Groundwater

Except as provided in Section 620.250, General Resource Groundwater is:

a) Groundwater which does not meet the provisions of Section 620.210 (Class I), Section 620.230 (Class III), or Section 620.240 (Class IV).
b) Groundwater which is found by the Board, pursuant to the petition procedures set forth in Section 620.260, to be capable of agricultural, industrial, recreational or other beneficial uses.

Sierra Club, Prairie Rivers and NAACP list the "undisputed facts" relevant to this issue of law in Paragraph 8. Even reading these undisputed facts, it is clear there is much yet to be

resolved at hearing on this issue. No facts have been presented as to whether the groundwater at issue meets the technical definition of Class I groundwater. The only evidence Complainants present are discussions in the transcripts regarding groundwater classifications at the permitted landfill site, not the ash ponds. Mem. at p. 5, ¶8. *See also*, Hunsberger Fact Dep. at pp. 148-154 (Exhibit E). Complainants do not reference the testimony from the same transcripts that demonstrate no regulatory agency has made a groundwater classification designation at the ash ponds (Hunsberger Fact Dep. 147:23-148:8) (Exhibit E) and that while some consultants made assumptions about groundwater classifications at the landfill for convenience, no one has made a classification of the groundwater under the ash ponds. (Hunsberger Fact Dep. 150:3-7)(Exhibit E). Complainants allege violations of both Class I or Class II standards but make no reference to whether it could be neither as being identified as Class III or IV in the Board's regulations. In particular, where groundwater at the CWLP site is designated as Class IV groundwater (such as within a zone of attenuation at the landfill), Class I and II groundwater quality standards would not generally be applicable. There is clearly a dispute between the parties as to what groundwater quality standard designations are to be applied at the CWLP site and these disputed facts are material to whether the Complainants' have proven a violation of the Board's groundwater quality standards -- and, therefore, a dispute over whether there is a violation of 415 ILCS 5/12(a) and 35 Ill. Adm. Code 620.115 and 620.405.[16] Because of this disputed issue of material fact, Complainants' Motion for Partial Summary Judgment should be denied.

F. Facts Remain in Dispute as to the Cause of Impacts Identified at Well AW-3/RW-3

Complainants have removed allegations related to the City's on-site landfill from the Complaint. They recognize different standards apply to determining compliance at the landfill

[16]On pages 21 and 22 of the Memorandum of Law, Complainants provide charts of the groundwater quality standards they claim to be violated. These charts are misleading to the Board as they present parameters under the Class II standards that are not even alleged to have been violated.

and different procedural requirements apply to bringing suit over a permitted facility under the Resource Conservation and Recovery Act ("RCRA") and the Board's regulations adopted thereunder. However, without the benefit of a hearing on the merits, the Complainants will be unable to resolve the factual dispute over the source of elevated levels of arsenic at well RW-3/AW-3.

As pointed out in Complainants' Statement of Undisputed Facts at ¶10, well AW-3 is designed to monitor both the permitted landfill and the ash ponds. Sierra Club has presented no undisputed facts that the ash ponds have caused an exceedance at this well and that any exceedance could not be traced to another source (including background levels) or to simply being an outlier in the data. *See*, Corcoran Dep. at pp. 94-95 (Exhibit C) and Hunsberger Fact Dep. at 31:4-13 (AW-3 is a dual purpose well) and 46:1-51:6 (description of differences between constituents detected in AW-3 and AP-1, AP-2 and AP-3) (Exhibit E). Though there are facts in the Record regarding a limited number of past exceedances of background levels of arsenic at well AW-3/RW-3, there are disputed issues of material fact that can only be resolved at hearing as to what the background levels of arsenic applicable to AW-3/RW-3 are; the cause of arsenic exceedances only at AW-3/RW-3 which monitors both the surface impoundments and the landfill; and the absence of exceedances of arsenic background levels at the AP-1, AP-2 and AP-3 wells that monitor only the surface impoundments. The only conclusion for the Board to draw when viewing facts the undisputed facts in the light most favorable to the City is that there remain facts in dispute that are material to the issue of violations of the Act and regulations with regard to well AW-3/RW-3. Therefore, Complainants' Motion for Partial Summary Judgment should be denied.

G. Facts Remain in Dispute Regarding Whether Groundwater Constituent Levels in AP-1, AP-2 and AP-3 are at Levels above Background Concentrations in AP-4 and AP-5

Complainants have narrowed the issues for the Board somewhat by eliminating reference to wells AP-4 and AP-5 in their Amended Complaint.[17] By acknowledging the validity of these background wells, they have made the Board's job easier and eliminated the need to prove up that issue at a hearing. However, Complainants have simply used this conclusion to delete alleged violations from their tables of alleged groundwater quality standard violations. They have not attempted to establish that data in CWLP's monitoring wells AP-1, AP-2, and AP-3 were compared to background levels established by the City's consultants at Andrews Engineering. There remains a fact dispute as to whether data at wells AP-1, AP-2 and AP-3 are exceeding background values.

The fact that Sierra Club, Prairie Rivers and NAACP made allegations in their original Complaint of violations of the Act at wells that are designed to monitor background levels demonstrates that there is a disputed issue of material fact as to whether there are levels of constituents in the City's monitoring wells that register in excess of standards found in Part 620 as a result of background levels of those constituents. If levels of constituents are a result of natural causes there is no violation of the Part 620 regulations. The same is true of any constituents otherwise not caused by the City's surface impoundments. The City simply cannot be found to have caused a violation of the Act or a particular groundwater quality standard in Part 620 when its monitoring wells have not exceeded an established background value for that constituent. Complainants cannot sustain their allegations without evidence that CWLP's surface impoundments have impacted monitoring wells at levels above background. There are clearly

[17] In the original Complaint, Complainants alleged violations of the Act based simply on values of data relative to certain groundwater quality standards at wells AP-4 and AP-5 even though these wells are upgradient of the ash ponds.

issues of disputed fact as to the facts presented in Complainants' Statement of Undisputed Facts at ¶9 regarding whether specific data at specific monitoring wells represent an increase above background levels. For the Board to make a ruling that Complainants have met their burden to prove this essential element of a violation will require a hearing. Therefore, Complainants' Motion for Partial Summary Judgment should be denied.

H. Facts Remain in Dispute Regarding Whether Groundwater Constituent Levels for Certain Parameters in Wells AP-1, AP-2 and AP-3 are in Levels that Represent Increases Above Background Concentrations or are Outliers

Tables on pages 21 and 22 of Sierra Club, Prairie Rivers and NAACP's Memorandum of Law in Support of its Motion for Partial Summary Judgment purport to list parameters with violations of Class I and Class II groundwater quality standards. As explained in footnote 16, some of these parameters are not contained in the allegations attached to the amended complaint. But additionally, there are clearly facts in dispute about certain parameters on the list in these tables that are listed as violations of the Act even if there was only 1 or 2 data points that exceeded that level when the monitoring wells were first installed (data points prior to 2014) that have not been found at those levels for several years before this matter was even filed with the Board. For example, Sierra Club, Prairie Rivers and NAACP allege violations of the Class I chromium groundwater quality standards; however, the City will point the Board's attention to the fact the allegation that chromium water quality standards have been violated was based solely on two data points from well AP-2 in 2012.

Surely, the Board would want to hear from experts as to the statistical significance and trends of such information before finding a violation of groundwater quality standards. As described above, establishing a proper groundwater monitoring network and upgradient wells and calculations of background concentrations are important steps the City has taken to ensure

compliance with the Act. In evaluating groundwater data, the Illinois EPA and groundwater experts base their evaluation on accepted methodology to determine whether a piece of data represents a statistically significant increase above background levels. The Board must hear testimony to determine whether such a data point exceeds background levels or whether it might be an outlier before it can conclude that a standard has been violated or whether this was simply a function of the initial monitoring wells "settling down". *See* Hunsberger Fact Dep. at p. 61 and 77:1-13 (variability in new wells) (Exhibit E).

In fact, both Complainants' Expert and the City's Expert agree that using analytical data alone to draw a conclusion about liability would be inappropriate. The City presents as evidence of this Agreement the following excerpt from the Fact Deposition of the City's expert Brad Hunsberger regarding his opinions on Complainants' Expert's initial report.

"Q: Let's take a look at page 12. One page 12 there is a section just 4.3 Groundwater Quality Criteria. Could you just read that first sentence for me?
A: Analytical data from monitoring wells tell us nothing without a standard or benchmark against which to judge whether a result shows significant degradation of water quality from site operations.
Q: Can you just tell me whether you generally agree with that statement?
A: I agree with that statement."

Hunsberger Fact Dep. at 147:5-15 (Exhibit E). For this reason and for the other reasons highlighted in this Response, the Board must find that there are genuine issues of disputed material fact as to whether the City has violated the Act and Board regulations and that Complainants' Motion for Partial Summary Judgment should be denied.

V. Conclusion

Respondent has demonstrated that there are still substantial facts in dispute in this matter on the issues of liability and hereby requests oral argument on Complainants Motion for Partial Summary Judgment pursuant to 35 Ill. Adm. Code 101.700. Complainants have not met their

burden to demonstrate with undisputed facts: (1) that the City's surface impoundments have caused contamination of groundwater at levels above background; (2) the designation of groundwater and accompanying standards applicable to the waters at the City's surface impoundments; (3) that the City has not taken extensive precautions to prevent its surface impoundments from contaminating groundwater; and (4) that any groundwater has been rendered harmful, detrimental or injurious to public health as a result of the City's operations.

For the reasons stated herein, Respondent, City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power respectfully requests that the Board deny Complainants' Motion for Partial Summary Judgment on liability and grant Respondent's motion for Partial Summary Judgment striking the relief sought in subparagraphs C.ii. and C.iii. of the Complaint.

Respectfully submitted,

THE CITY OF SPRINGFIELD,
a municipal corporation

By _____
One of its Attorneys

Dated: February 13, 2020

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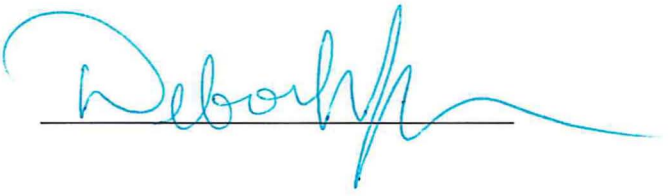
CERTIFICATE OF E-MAIL SERVICE

The undersigned, Deborah J. Williams, an attorney, certifies that I have served by email upon the individuals named on the attached Service List a true and correct copy of the **NOTICE OF FILING** and Respondent's **RESPONSE TO COMPLAINANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** of the CITY OF SPRINGFIELD, OFFICE OF PUBLIC UTILITIES d/b/a CITY WATER, LIGHT AND POWER from the email address (deborah.williams@cwlp.com) of this 1,178 page document before 5:00 p.m. on February 13, 2020 at the address provided on the attached Service List.



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