

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)	
)	
Complainants,)	
)	
v.)	PCB No-2013-015
)	(Enforcement – Water)
MIDWEST GENERATION, LLC,)	
)	
Respondents)	

CITIZENS GROUPS' RESPONSE TO MIDWEST GENERATION, LLC'S THIRD REQUEST TO PRODUCE DOCUMENTS TO SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK and CITIZENS AGAINST RUINING THE ENVIRONMENT

Sierra Club, Environmental Law & Policy Center (“ELPC”), Prairie Rivers Network, and Citizens Against Ruining the Environment (“CARE”) (collectively “Citizens Groups”), by and through their counsel, hereby provide Citizens Groups’ responses to Midwest Generation, LLC’s (“MWG”) Third Request to Produce Documents (“MWG’s Document Requests” or “the Document Requests”) as follows:

GENERAL OBJECTIONS

Citizens Groups, by their counsel, make the following General Objections to each of MWG’s Document Requests. These objections and responses are based upon information now known. Citizens Groups reserve the right to amend, modify, or supplement the responses and objections stated herein.

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1. Citizens Groups object to MWG's Document Requests to the extent, if any, that they attempt to impose obligations on Citizens Groups beyond those authorized by the Illinois Supreme Court Rules or Illinois Pollution Control Board rules. This objection is not limited by the more specific General Objections that follow.

2. Citizens Groups object to MWG's Document Requests to the extent, if any, that they call for production of information protected by the attorney-client privilege, the work product doctrine, or any other legal exemption from discovery. Where privilege is the sole basis on which documents are not produced, Citizens Groups will identify the documents withheld, generally by class, and will provide a brief description of the document or class of documents withheld, and will identify or describe their author(s) and their recipient(s). Citizens Groups specifically object to any request to list or enumerate documents in their or their counsel's litigation files that are privileged or work product.

Without limiting the generality of the foregoing, Citizens Groups will not produce documents that constitute or memorialize: (1) communications between ELPC attorneys and Sierra Club or Prairie Rivers Network or ELPC members, employees and/or personnel, the subject of which is legal advice or facts communicated in connection with the rendering of legal advice, which documents have not been disclosed to any third party, and which communications did not constitute the basis of any witness' testimony; (2) communications between Chicago Legal Clinic ("CLC") attorneys, employees and/or personnel and CARE members, the subject of which is legal advice or facts communicated in connection with the rendering of legal advice, which documents have not been disclosed to any third party, and which communications did not constitute the basis of any witness' testimony; (3) communications between Environmental Integrity Project ("EIP") attorneys, employees and/or personnel and Sierra Club members,

employees and/or personnel, the subject of which is legal advice or facts communicated in connection with the rendering of legal advice, which documents have not been disclosed to any third party, and which communications did not constitute the basis of any witness' testimony; (4) communications between attorneys for Sierra Club, employees and/or personnel and Sierra Club members, employees and/or personnel, the subject of which is legal advice or facts communicated in connection with the rendering of legal advice, which documents have not been disclosed to any third party, and which communications did not constitute the basis of any witness' testimony; (5) communications among ELPC attorneys, employees and/or personnel, EIP attorneys, employees and/or personnel, CLC attorneys, employees and/or personnel, attorneys for Sierra Club, members, employees and/or personnel, Prairie Rivers Network members, employees and/or personnel, and/or CARE members, employees and/or personnel, the subject of which is legal strategy or analysis or information communicated in connection with legal strategy or analysis; and (5) work product of ELPC attorneys, EIP attorneys, attorneys for Sierra Club, and/or CLC attorneys, which documents have not been disclosed to any third party.

3. Citizens Groups may provide requested information in response to one or more objectionable Document Requests, or portions thereof, notwithstanding these General Objections. Such production is without prejudice to, and without waiver of, these objections with respect to any other data request or information.

4. Citizens Groups object to the Document Requests to the extent that they require Citizens Groups to produce information that is not in Citizens Groups' custody or control. Citizens Groups further object to the Document Requests to the extent that they require Citizens Groups to explain why requested information is not in Citizens Groups' custody and control, in the absence of some evidence that such information was ever in Citizens Groups' custody and

control. Citizens Groups additionally object to the Document Requests to the extent, if any, that they require Citizens Groups to identify the current location and/or custodian of any document that is not in Citizens Groups' custody and control.

5. Citizens Groups object to the Document Requests to the extent that they seek information that is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient and/or less burdensome.

6. Citizens Groups object to the Document Requests to the extent that they: (1) are overbroad, vague and ambiguous, and/or pose an undue burden as to scope, geographic area, or time period of request; (2) call for information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; or (3) seek information protected by agreements precluding disclosure in that they seek information from a third party under a non-disclosure agreement. Citizens Groups reserve the right to object to future discovery on the same or related matters and do not waive any such objections by providing the information provided in these responses. Further, Citizens Groups reserve the right to object to admissibility of any of these responses or related matters in full or in part at trial or other hearings in this action, on any grounds including but not limited to materiality and relevance and reserve the right to supplement if and when additional documents or information is identified.

RESPONSES TO MWG'S THIRD REQUEST TO PRODUCE DOCUMENTS

REQUEST NO. 1:

The document or citation to documents cited to by Mr. Kunkel on p. 4 of his Contamination Report as the definition of "Hydraulic Conductivity" and requested in his deposition taken on March 17, 2016 on p. 37, lines 14-19.

RESPONSE:

Citizens' Groups answer that, in his deposition, Dr. Kunkel identified the document he cited to for the definition of "hydraulic conductivity" used in his Contamination Report and explained the discrepancies between the definition contained in that document and the definition used in his report.

In his report, Dr. Kunkel defined "Hydraulic Conductivity" as

the rate at which water can move through a permeable medium. It is the product of intrinsic permeability of the medium and the properties of the fluid moving through the medium (USEPA, 2014).

James R. Kunkel Ph.D., P.E., *Expert Report on Ground-Water Contamination 5* (July 1, 2015).

As was noted by MWG's counsel during the deposition and is shown in the document cited, the first sentence of Dr. Kunkel's definition of "hydraulic conductivity" came from the United States Environmental Protection Agency rule on coal combustion residuals ("USEPA 2014" or "EPA 2014"). Comp. 018342, n. 61, and Comp. 018721. MWG counsel acknowledged this by stating, "To be fair to you, the only one we could find was hydraulic conductivity, but not the definition you provide, only the first part of the sentence. You added more to it." Kunkel Dep. 37:21-24, Mar. 17, 2016.

Later in his deposition, Dr. Kunkel elaborated on the contents of his definition of "hydraulic connectivity." He explained that his definitions in the report were not exact quotes from USEPA 2014 and reiterated that only the first sentence of the definition of "hydraulic connectivity" stemmed from USEPA 2014:

Q. ...In your report, at the beginning of your contamination report, you included a number of definitions?

A. Yes.

Q. And you cited a reference for those definitions, right?

A. Yes.

Q. Can you explain were -- are your definitions exact quotes from that reference?

A. No.

Q. Okay. How are they not exact quotes? Can you explain?

A. Yes, for hydraulic connectivity, which was somebody took the trouble to look up, that probably the EPA 2014 reference should have been right after the first sentence, or right after that first sentence, and then "It is the product of intrinsic permeability of a medium and the properties of fluid," the reason I put that in there is because "Intrinsic permeability is typically understood by nontechnical

people, including geotechnical engineers, by the way, to mean hydraulic conductivity." That's not true. It is absolutely false. Permeability is a function of the properties of solids only, and that's why it is in there. So I can move that EPA reference up to the end of "permeable medium."

Kunkel Dep. 230:22-232:1. Thus, the citations for the definition of "hydraulic conductivity" used in Dr. Kunkel's report were identified during the deposition of Dr. Kunkel.

REQUEST NO. 2:

The specific Bates Numbered Excel Spreadsheet that shows the Landfill Leachate Concentrations for Wyoming Coal Ash in Table 2 of the Contamination Report identified as from the Kosson and others, 2009 Report and requested in the deposition taken on March 17, 2016 on p. 49, lines 16-24.

RESPONSE:

The document requested did not appear in Kossen and others, 2009. It is from the United States Environmental Protection Agency rulemaking Docket ID EPA-HQ-RCRA-2009-0640 and was pulled from a larger subset of data which can be found at <https://www.regulations.gov/#!documentDetail;D=EPA-HQ-RCRA-2009-0640-0028>. This document is being produced along with the Response at Bates Comp 053660-053739.

REQUEST NO. 3:

The Documents or citation to documents that Mr. Kunkel relied upon to support his statement on p. 21 of the Contamination Report that the "surrounding land use [of the Waukegan Station] consists of undeveloped land to the north..." and requested in the deposition taken on March 17, 2016 on p. 144, lines 16-20.

RESPONSE:

To the best of Dr. Kunkel's recollection, the document he relied upon to support the statement identified in this Request is Patrick Engineering Inc., *Hydrogeologic Assessment Report: Waukegan Generating Station, Waukegan, Illinois* Bates MWG_14757 (Feb. 2011) (stating "The surrounding land use consists of undeveloped land to the north...").

REQUEST NO. 4:

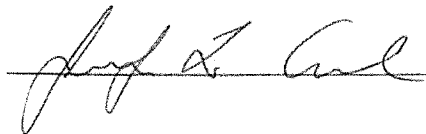
The correct citation to the Seymour Expert Report identified on p. 4 of the Rebuttal Report that Mr. Seymour's report states that "ground-water contamination is from up-gradient, off-site sources entering each site," and requested in the deposition taken on March 17, 2016 on p. 201, lines 16-18.

RESPONSE:

The correct citations for the identified statement on p. 4 of Dr. Kunkel's Rebuttal Report are the following statements from Mr. Seymour's report:

- "Thus, it is my opinion that the recent groundwater impacts are not a result of the ash currently stored in ponds at the sites, but instead are more likely than not a result of historical uses at the sites and the surrounding industrial companies and conditions." John Seymour, P.E., *Expert Report of John Seymour, P.E.* 43 (Nov. 2, 2015).
- "Groundwater conditions at Joliet #29 are impacted by upgradient off-site sources; for example, chloride was found upgradient away from the Joliet ash pond area." John Seymour, P.E., *Expert Report of John Seymour, P.E.* 15 (Nov. 2, 2015).
- "Groundwater conditions at Powerton are impacted by upgradient off-site sources; for example, nitrate is found upgradient, which is not related to COIs found on the Powerton site." John Seymour, P.E., *Expert Report of John Seymour, P.E.* 18 (Nov. 2, 2015).
- "Groundwater conditions at Waukegan are impacted by upgradient and off-site sources; for example, boron was detected exceeding IEPA Class I groundwater standards in upgradient wells from the former Greiss-Pfleger Tannery Site." John Seymour, P.E., *Expert Report of John Seymour, P.E.* 21 (Nov. 2, 2015).

Respectfully submitted,



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