

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ RENEWED ALTERNATIVE MOTION FOR LEAVE TO RESPOND INSTANTER TO AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC’S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER and COMPLAINANTS’ RESPONSE TO AMICUS CURIAE BRIEF**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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*Attorney for ELPC, Sierra Club and
Prairie Rivers Network*

Dated: December 13, 2019

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COMPLAINANTS’ RENEWED ALTERNATIVE MOTION FOR LEAVE TO RESPOND INSTANTER TO AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC’S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER

In the event that the Board grants the Motion for Leave to File the Amicus Curiae Brief in Support of Midwest Generation, LLC’s Motion to Reconsider and Clarify the Interim Order (“Amicus Motion” and “Amicus Curiae Brief”), pursuant to 35 Ill. Admin. Code. 101.110(c), Complainants move the Illinois Pollution Control Board (“Board”) for leave to respond, *instanter*, to the Amicus Curiae Brief in Support of Midwest Generation, LLC’s Motion to Reconsider and Clarify the Interim Order. In support of this Motion, Complainants state as follows:

1. On October 14, 2019, Illinois Environmental Regulatory Group, the Illinois Coal Association, the Chemical Industry Council of Illinois, and the Illinois Chapter of the National Waste & Recycling Association (collectively, “the Amicus Groups”) filed the Amicus Motion and Amicus Curiae Brief.

2. On October 28, 2019, Complainants filed three alternative motions in response to the Amicus Motion: Complainants' Opposition to Motion for Leave to File Amicus Curiae Brief in Support of Midwest Generation, LLC's Motion to Reconsider and Clarify the Interim Order, Complainants' Alternative Motion to Strike Portions of Amicus Curiae Brief in Support of Midwest Generation, LLC's Motion to Reconsider and Clarify the Interim Order, and Complainants' Alternative Motion for Leave to Respond to Amicus Curiae Brief in Support of Midwest Generation, LLC's Motion to Reconsider and Clarify the Interim Order.

3. Complainants thus timely filed a motion for leave to respond to the Amicus Curiae Brief. Complainants renew and amend that motion to respectfully request that the Board grant Complainants' leave to file, *instanter*, the attached brief in response to the Amicus Curiae Brief.

4. 35 Ill. Admin. Code. 101.110(c) provides

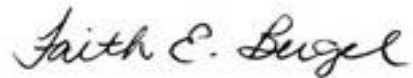
Amicus curiae briefs may be filed in any adjudicatory proceeding by any interested person, if the Board grants permission. Response briefs will be allowed only with Board permission. The briefs must consist of argument only and must not raise facts that are not in evidence in the relevant proceeding. Amicus curiae briefs, and any responses, will be considered by the Board only as time allows. The briefs will not delay the Board's decision-making. (See also Section 101.302(k).)

5. In order for the Board to benefit from a full and fair picture of the issues raised by the Amicus Curiae Brief, Complainants should be granted an opportunity to respond.

WHEREFORE, if the Board grants the Amicus Motion, Complainants respectfully request that the Board grant Complainants Renewed Alternative Motion for Leave to Respond, *Instanter*, to the Amicus Curiae Brief.

Dated: December 13, 2019

Respectfully submitted,



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COMPLAINANTS’ RESPONSE TO AMICUS CURIAE BRIEF

On October 14, 2019, the Illinois Coal Association, the Chemical Industry Council of Illinois, and the Illinois Chapter of the National Waste & Recycling Association (collectively, “the Associations”), brought a motion, pursuant to 35 Ill. Adm. Code 101.110(c), to submit a brief as amicus curiae (“Amicus Curiae Brief”), and concurrently submitted their Amicus Curiae Brief in support of Midwest Generation, LLC’s (“MWG”) Motion to Reconsider and Clarify the Interim Order. The Amicus Curiae Brief argued that Illinois Pollution Control Board (the “Board”) should reconsider its interpretation of the rules regarding groundwater management zones (“GMZs”) as discussed in its June 20, 2019 Interim Order in this proceeding. For the reasons stated in Complainants’ October 14, 2019 brief in opposition to MWG’s Motion to Reconsider and Clarify the Interim Order and for the additional reasons stated below, the Board correctly applied its regulations concerning GMZs.

At the outset, Complainants reiterate that questions about the GMZs are more appropriate for the remedy phase of these proceedings. *See* Comp. Opp. to MWG’s Mot. for Reconsideration

at 16. The Board found MWG liable for, among other things, groundwater contamination that existed before the GMZs were established in 2013. *Sierra Club v. Midwest Generation*, PCB 13-15, Order at 80-81 (June 20, 2019). Regardless of how long the GMZs lasted, the existence or duration of the GMZs would not affect MWG's liability for that pre-existing contamination. Instead, the open question for the Board is whether the GMZs and the accompanying corrective action were sufficient to remedy the contamination. They were not because they failed to account for and address all the sources of contamination at the sites, but that is a question for the Board to consider during the remedy phase.

I. The Board Applied Illinois Law and Regulations Correctly.

A. The Board's Applied 35 Ill. Adm. Code 620.250(a)(2) Correctly to MWG's GMZs

The Associations argue that the Board erred in its rulings regarding the expiration of MWG's GMZs. Amicus Br. at 5-7. Similar to MWG, the Associations argue that the GMZs were established pursuant to Section 620.250(a)(1) instead of (a)(2). *Id.* at 5 (citing 35 Ill. Adm. Code 620.250(a)). Under Section 620.250 of the Board's rules, a GMZ may be established at a site "(1) [t]hat is subject to a corrective action process approved by the Agency; or (2) [f]or which the owner or operator undertakes an adequate corrective action in a timely and appropriate manner and provides a written confirmation to the Agency. . . ." 35 Ill. Adm. Code 620.250(a)(1)-(2).

Complainants believe that the Board does not need us to repeat all of the arguments we made in our response to MWG's Memorandum in Support of its Motion for Reconsideration. However, we do note that MWG's GMZ application showed that it was submitted pursuant to 35 Ill. Adm. Code 620.250(a)(2). Comp. Opp. to MWG's Mot. for Reconsideration at 6.

In support of its argument that the GMZ was established pursuant to Section

620.250(a)(1), the Associations' brief cited to the Board's Final Order in *In the Matter of: Groundwater Quality Standards (35 Ill. Adm. Code 620)*, PCB R89-14(B) (Nov. 11, 1989), which approved the now-current GMZ regulations. In that order, the Board pointed out that:

JCAR recommended that the form required for the confirmation of an adequate corrective action *pursuant to 35 Ill. Adm. Code 620.250(a)(2)* be made an appendix to the rule. The Board has agreed to do so, and the form is placed at Appendix D in today's order.

PCB R89-14(B), Final Order at 15 (Nov. 11, 1989) (emphasis added). This excerpt makes clear that the form MWG used to file for its GMZ—the same form in Appendix D—is the form used for GMZs under 35 Ill. Adm. Code 620.250(a)(2). This further underscores that MWG's GMZ was pursuant to Section 620.250(a)(2).

B. The Board Correctly Applied 35 Ill. Adm. Code 620.250(c).

The Associations next argue that the “Board ignored the second requirement of Section 620.250(c) (attainment of applicable groundwater standards).” Amicus Br. at 7. In response to the same argument made by MWG in its Memorandum in Support of its Motion for Reconsideration, Complainants pointed out that the GMZs failed to set applicable groundwater standards and that, therefore, the Board correctly applied Section 620.250(c) to determine when MWG's GMZs expired. Comp. Opp. to MWG's Mot. for Reconsideration at 7. In Response to the Associations' identical argument, Complainants will not repeat our prior arguments but merely refer the Board back to our brief in response to MWG's Motion for Reconsideration. Comp. Opp. to MWG's Mot. for Reconsideration at 7-10.

II. The Board's Ruling Will Not Detrimentially Impact Industry in Illinois.

The Associations also argue that the Board's ruling creates a precedent that “all GMZs are limited to the time period that active corrective action work is being performed.” Amicus Br. at 11. This is incorrect for two reasons. First, where natural attenuation is explicitly included as

part of a remedy in conjunction with all necessary and adequate control of the source or sources of contamination, a GMZ may remain in effect for the period of time it takes for the source control to eventually attain groundwater standards. Second, GMZs can remain in effect until applicable standards are achieved when the Illinois EPA (the “Agency”) adopts applicable standards pursuant to Section 620.450(a)(4)(B).

The Associations then argue that the Board’s ruling could preclude the use of natural attenuation as part of a remedy. Amicus Br. at 11. Again, Complainants addressed this in part when responding to MWG’s argument that natural attenuation was part of the remedy in the present case. To reiterate our previous argument: natural attenuation can be part of a remedy along with proper source control when time is needed to allow source control to take effect. There is Board precedent agreeing that natural attenuation has an important role to play in ensuring that remedies work. *Central Illinois Light Co. (Duck Creek Station) v. IEPA*, PCB 99-21 (Dec. 17, 1998). MWG Memorandum at 19. Nothing in the Board’s ruling would prevent the proper use of natural attenuation, in combination with remedies such as source removal or source control, to achieve compliance with groundwater standards.

In the present case, however, MWG neither fully controlled the sources of the contamination nor identified natural attenuation as part of the remedy under the CCAs or in response to the first questions in Part III of the GMZ applications. Thus, the Board decision on natural attenuation in the present case is not precedent-setting. Instead, the Board’s decision makes clear that whether natural attenuation is part of the remedy is a case-by-case analysis. The simple way for industry to avoid a Board finding that natural attenuation is not part of the remedy is for a GMZ applicant to identify natural attenuation in a proposed CCA and GMZ application when natural attenuation is appropriately combined with source control or other

corrective action that fully addresses the source of the contamination.

The Associations also argue that the Board's ruling will create uncertainty regarding the duration of GMZs. Amicus Br. at 11. But again, there need not be any uncertainty as to the duration of GMZ. As discussed in MWG's Memorandum in Support of its Motion for Reconsideration and in our opposition response to MWG's Motion for Reconsideration, GMZs expire when applicable standards have been achieved. Comp. Opp. to MWG's Mot. for Reconsideration at 7.

A groundwater management zone expires upon the Agency's receipt of appropriate documentation which confirms the completion of the action taken pursuant to subsection (a) and which confirms the attainment of applicable standards as set forth in Subpart D.

35 Ill. Admin. Code 620.250(c). When there is a GMZ in place, the "applicable standards" for purposes of Section 620.250(c) are typically found at Section 620.450(a). And as discussed in Complainants' response to MWG's Motion for Reconsideration, the Board could not determine whether applicable standards were achieved in this case because the Agency did not set "applicable standards." Comp. Opp. to MWG's Mot. for Reconsideration at 7-8. As such, the Board could only make a determination as to the completion of corrective action and not whether the applicable standards had been attained. Under Section 620.450(a)(5), the Agency was required to develop and maintain a list of concentrations pursuant to 620.450(a)(4)(B), but it never actually adopted these standards at any of the three GMZs. The simple way for industry to avoid a Board finding that GMZs have expired at the completion of corrective action is for the GMZ applicant to ensure there are "applicable standards" put in place. A GMZ applicant should urge the Agency to adopt applicable standards if the Agency fails to do so at its own initiative. When applicable standards are in place, there need be no uncertainty as to the duration of a GMZ.

III. The Board Failed to Provide Parties and Interested Persons an Opportunity to Address the Issue of Expiration of GMZs Prior to the Board's Ruling.

The Amicus Brief argues that “[t]he Board’s sua sponte ruling deprived the parties and other interested persons an opportunity to present evidence or arguments on the issue.” Amicus Br. at 12. Once again, this is an argument that MWG raised and Complainants responded to, so Complainants will not unduly repeat our prior arguments here. (*See* Mot. for Reconsideration Resp. Brief at 3-5.) The Associations raise a new argument, however, arguing that MWG was not the only party deprived of the opportunity to present arguments and evidence on this issue, because the Associations were as well. In making this argument, the Associations ignore the distinction between Amici and parties to a proceeding: Amici never have an affirmative right to participate in a proceeding. This is reflected even in the case law the Associations cite, which is limited to parties and does not examine the due process rights of Amici. *Niles Twp. High Sch. Dist. 219 v. Ill. Educ. Labor Rels. Bd.*, 369 Ill. App. 3d 128, 136 (1st Dist. 2006) (addressing petitioner’s due process rights); *Oak Grove Jubilee Center, Inc. v. City of Genoa*, 347 Ill. App. 3d 973, 978-79 (2d Dist. 2004) (addressing plaintiff’s due process rights). Thus, there is no reason for the Board to entertain this additional argument by the Associations.

Nonetheless, even if the Board believes there may be an issue here it is easily remedied. As Complainants have already pointed out in the context of our opposition to the Motion for Consideration, if an adjudicatory body gives a party an opportunity to be heard on a decision, even if it is after a decision, that is sufficient to meet due process requirements. *Schwarzbach v. City of Highland Park*, 403 N.E.2d 102, 105 (Ill. App. 2d Dist. 1980); *see also Reyes v. Court of Claims of State of Ill.*, 702 N.E.2d 224, 231 (Ill. App. 1st Dist. 1998). In the present case, consideration of the issues on a motion for reconsideration and amicus curiae motion are more

than sufficient to meet a party's due process right to notice and an opportunity to be heard. Mot. for Reconsideration Resp. Brief at 3 (citing *Smith v. City of Champaign*, PCB 92-55, 1992 WL 315763, at *3 (Oct. 16, 1992)).

VI. The Board's Ruling Is Consistent with Its Authority to Interpret Environmental Standards and Adjudicate Enforcement Proceedings.

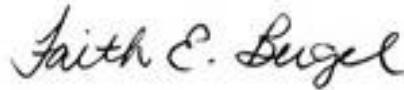
Finally, the Associations argue that "the Board's interpretation of GMZ expiration runs contrary to the role expressly assigned to Illinois EPA in this area." Amicus Br. at 13. The Associations cite no authority to support their claim that the Agency has exclusive authority to "make the determination as to whether monitored natural attenuation, or other corrective actions, are bringing the site into compliance with the applicable standards." Amicus Br. at 13.

In reality, the Board, not the Agency, is empowered to interpret environmental regulations and to adjudicate disputes involving application of those regulations. 415 ILCS 5/4, 5/5(b), (d). The Associations concede this point when they acknowledge that the Board has the authority to interpret regulations and to evaluate the Agency's implementation of those regulations. Amicus Br. at 13. The Board's authority goes beyond just interpreting its own regulations, however: it extends to all applicable environmental control standards. "The Board shall determine, define and implement the environmental control standards applicable in the State of Illinois and may adopt rules and regulations in accordance with Title VII of this Act." 415 ILCS 5/5(b). Further, the Board "has the power to interpret the Statutes and the Rules and their application to a particular facility." *Modine Manufacturing Company v. Illinois Environmental Protection Agency*, PCB 83-18, 1983 WL 25727, at *1 (March 24, 1983) (emphasis added). As a result, because the Board's ruling on when the GMZ expired was based on its application of its interpretation of environmental regulations to the facts in this proceeding, the Board did not exceed its authority.

Once more, Complainants reiterate that the questions raised about the existence or duration of the GMZs are a distraction from more pressing concerns. The Board has determined that MWG is liable for groundwater contamination that existed prior to the establishment of GMZs. Neither MWG's Motion for Reconsideration nor any of the briefing regarding the duration of GMZs will affect that liability. MWG will eventually have to find a way to remedy the contamination. In the meantime, large sources of coal ash are continuously leaching pollutants into Illinois groundwater.

Dated: December 13, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, Jeffrey Hammons, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RENEWED ALTERNATIVE MOTION FOR LEAVE TO RESPOND INSTANTER TO AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER and COMPLAINANTS' RESPONSE TO AMICUS CURIAE BRIEF** before 5 p.m. Central Time on December 13, 2019 to the email addresses of the parties on the attached Service List.

Respectfully submitted,

/s/ Jeffrey Hammons

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