

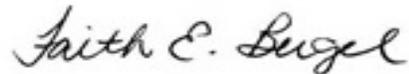
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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 **APPLICATION FOR NON-DISCLOSURE** and **AFFIDAVIT OF FAITH E. BUGEL IN SUPPORT OF APPLICATION FOR NON-DISCLOSURE** on paper, via overnight delivery, with the Illinois Pollution Control Board pursuant to 35 Ill. Adm. Code 130.112 and 35 Ill. Adm. Code 130.302(b).

Respectfully submitted,



Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: May 29, 2020

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
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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,)	
)	
Respondent.)	

APPLICATION FOR NON-DISCLOSURE

Pursuant to 35 Ill. Adm. Code 130.404, Complainants, Sierra Club, Environmental Law & Policy Center (“ELPC”), Prairie Rivers Network, and Citizens Against Ruining the Environment (“CARE”) (collectively “Complainants”), submit this Application for Non-Disclosure (“Application”) of an Article that will be filed in the above captioned matter. To satisfy the requirements as set forth in 35 Ill. Adm. Code § 130.404(e), Complainants state as follows:

- 1) The Article consists of a single affidavit, titled “Affidavit ... Regarding Expert Witness,” signed by Faith E. Bugel, attorney for Sierra Club, and dated May 29, 2020. The Article will be filed in support of Complainants’ Memorandum in Response to Hearing Officer’s May 22, 2020 Order, which will be filed on the same day as this Application. The Article will be filed per the requirements of 35 Ill. Adm. Code 130.112 (paper filing).
- 2) The Article constitutes non-disclosable information pursuant to 35 Ill. Adm. Code §101.202 because it contains “information privileged against introduction in judicial

proceedings.” The Article contains the mental impressions of Faith E. Bugel and those mental impressions are protected from introduction in judicial proceedings by the work product privilege.

3) On April 1, 2020, Complainants filed a motion seeking leave to name a new expert in the remedy-phase of this proceeding to replace Dr. James Kunkel, the expert Complainants used in the liability-phase of this proceeding.

4) On May 22, 2020, the Hearing Officer ordered Complainants to answer why Dr. James Kunkel “needs to be replaced” and “why a substitute expert would be better placed” than Kunkel. *Sierra Club et al., v. Midwest Generation, LLC*, PCB No. 13-15, Hearing Officer Order at 2 (May 22, 2020).

5) In order to provide an answer to the Hearing Officer’s question, Complainants must divulge one of their attorney’s mental impressions of Dr. James Kunkel. The Article contains the mental impressions of Faith E. Bugel that concern Dr. James Kunkel and why another expert would be better placed than Dr. Kunkel. The mental impressions of one of Complainants’ attorneys is considered attorney work-product privileged against introduction and disclosure in judicial proceedings in Illinois. *See, e.g., Ill. Sup. Ct. R. 201(b)(2)* (forbids disclosure when material contains “the theories, mental impressions, or litigation plans of the party's attorney.”); *King Koil Licensing Co. v. Harris*, Case No. 84 N.E.3d 457, at ¶ 79-80 (Ill. App. Ct. 1st. Dist. 2017) (attorney’s emails to other counsel within law firm and handwritten notes about case are privileged and the documents’ privilege “speak for themselves” after *in camera* review); *McCombs v. Paulsen*, No. 3-12-0366, 2013 WL 2153956, at *11 (Ill. App. Ct. 3d Dist. 2013) (attorney’s notes and written summaries of depositions are privileged because they disclose the attorney’s mental impressions); *Huebner v. Family Video Movie Club, Inc.*, No.

5-18-0215, 2019 WL 2409005, at *7 (Ill. App. Ct. 5th. Dist. 2019) (attorney's notes listing questions for interviewing potential witnesses are privileged because they disclose the attorney's mental impressions).

6) An attorney's mental impressions consisting of observations of witnesses are privileged against introduction in judicial proceedings because they "necessarily reveal the attorney's mental processes" in evaluating the witness and inform legal strategy. *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d 250, 253 (Ill. Sup. Ct. 1982).

7) Complainants are requesting non-disclosure because Complainants would be highly prejudiced by the disclosure of their attorney's privileged mental impressions of Dr. James Kunkel in this proceeding. "The work-product doctrine in Illinois, which protects against disclosure of the theories, mental impressions, or litigation plans of [a] party's attorney... is believed necessary to prevent complete invasion of counsel's files." *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 432 N.E.2d at 252 (internal quotations removed) (citing *Monier v. Chamberlain*, 221 N.E.2d 410, 416 (Ill. Sup. Ct. 1966), *Stimpert v. Abdnour*, 179 N.E.2d 602, 605 (Ill. Sup. Ct. 1962)). The attorney work product doctrine provides a broader protection than the attorney-client privilege and protects the right of an attorney to thoroughly prepare a case and precludes an adversary attorney from taking unfair advantage. *Fischel & Kahn, Ltd. v. van Straaten Gallery, Inc.*, 727 N.E.2d 240, 246 (Ill. Sup. Ct. 2000) (citing *Hickman v. Taylor*, 329 U.S. 495 (1947)). "The purpose behind the work product doctrine is to facilitate the flow of information leading to theories and strategies to be employed by the attorney at trial, thus allowing the attorney to prepare for litigation." *People v. Spiezer*, 735 N.E.2d 1017, 1026 (Ill. App. Ct. 2d Dist. Aug. 22, 2000). Although not controlling, federal courts provide further

guidance on the purpose of protecting attorney work product from disclosure.¹

8) In the event the Hearing Officer denies Complainants' motion to name a new expert to replace Kunkel and the Article is not protected from disclosure as confidential attorney work product, Respondent Midwest Generation, LLC, could use the attorney's mental impressions contained therein to impeach Kunkel giving Respondent an unfair advantage. That harmful outcome is the reason the work product privilege protects an attorney's mental impressions in the first place. Complainants are faced with the predicament of either providing a full answer to Hearing Officer's questions in his May 22, 2020 Order, which necessarily requires divulging the mental impressions of an attorney, or providing no answer in order to protect the privileged mental impressions. Because Complainants want to provide the Hearing Officer a complete answer to his question, which requires divulging attorney work product in the form of mental impressions, Complainants seek to keep that work product protected as allowed by Illinois law.

9) Complainants are also requesting non-disclosure because Kunkel could be injured by the public disclosure of this information.

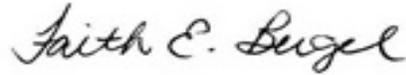
10) Persons familiar with the Article are limited to the attorneys for Complainants in this matter. Complainants attorneys have protected the Article and the information contained therein from disclosure.

11) Complainants have attached an affidavit, titled the "Affidavit ... in Support of Application for Non-Disclosure," verifying the facts set forth in this Application.

¹ "The attorney work-product privilege protects materials not normally discoverable and enables a lawyer to develop his mental impressions and legal theories without fear of having his adversaries rummage through them at leisure." *Abuhouran v. U.S. State Dept.*, 843 F. Supp.2d 73, 79 (D.D.C. Feb. 14, 2012) (internal quotations removed). The work product privilege, including protection of an attorney's mental impressions, "aims to protect the adversary trial process by providing attorneys a zone of privacy within which to think, plan, weigh facts and evidence, candidly evaluate a client's case, and prepare legal theories." *Judicial Watch, Inc. v. U.S. Dept. of Homeland Sec.*, 736 F. Supp.2d 202, 209 (D.D.C. Sept. 9, 2010).

Dated: May 29, 2020

Respectfully submitted,



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Attorney for CARE

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, certify that I have served on the date of May 29, 2020 the attached **APPLICATION FOR NON-DISCLOSURE** and **AFFIDAVIT OF FAITH E. BUGEL IN SUPPORT OF APPLICATION FOR NON-DISCLOSURE** upon the following persons by delivering the document to a third-party commercial carrier before of 5:00 p.m. Central Time, with proper postage or delivery charges prepaid:

Pollution Control Board, Attn: Clerk
100 West Randolph Street
James R. Thompson Center, Suite 11-500
Chicago, Illinois 60601-3218

I, the undersigned, an attorney, certify that I will serve electronically by email upon the individuals named on the below Service List a true and correct copy of **APPLICATION FOR NON-DISCLOSURE** and **AFFIDAVIT OF FAITH E. BUGEL IN SUPPORT OF APPLICATION FOR NON-DISCLOSURE** before 5 p.m. Central Time on June 1, 2020 to the email addresses of the parties on the below Service List. The entire filing package is 8 pages.

Respectfully submitted,

/s/ Faith E Bugel
Faith E Bugel

PCB 2013-015 SERVICE LIST:

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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)	
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AFFIDAVIT OF FAITH E. BUGEL
IN SUPPORT OF APPLICATION FOR NON-DISCLOSURE

1. Complainants seek to identify a single Article that will be filed with the Illinois Pollution Control Board as “non-disclosable information” as that term is defined in 35 Ill. Adm. Code §101.202 (the “Article”).
2. The Article consists of a single affidavit, titled “Expert Witness Affidavit,” that I, Faith E. Bugel, signed; and which is dated May 29, 2020.
3. The Article constitutes non-disclosable information pursuant to 35 Ill. Adm. Code §101.202 because it contains "information privileged against introduction in judicial proceedings." More specifically, the Article contains attorney work-product in the form of my mental impressions as an attorney.
4. Complainants are requesting non-disclosure of this Article because Complainants would be highly prejudiced by disclosure in this proceeding of my mental impressions.
5. Persons familiar with this my mental impressions as stated in the “Expert Witness Affidavit,” are limited to the attorneys for Complainants in this matter. The other attorneys for

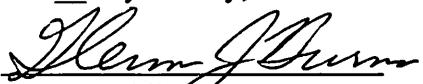
Complainants in this matter and I have protected the "Expert Witness Affidavit" and, more specifically, the information contained therein from disclosure.

I have personal knowledge of the facts stated herein. I declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge.

FURTHER AFFIANT SAYETH NOT.


Faith E. Bugel

Sworn and subscribed before me
this 29 day of May, 2020.


Notary Public

