

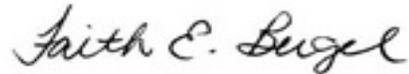
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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,)	
)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed **COMPLAINANTS' MEMORANDUM IN RESPONSE TO HEARING OFFICER'S MAY 22, 2020 ORDER** and **CONFIDENTIAL EXHIBIT OF FAITH E. BUGEL REGARDING EXPERT WITNESS** 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,



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Attorney for Sierra Club

Dated: May 29, 2020

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
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)	(Enforcement – Water)
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

**COMPLAINANTS’ MEMORANDUM IN RESPONSE TO HEARING OFFICER’S
MAY 22, 2020 ORDER**

Pursuant to the Hearing Officer’s May 22, 2020 Order, Complainants respectfully submit this supplemental memorandum.

I. Why Replace Complainants’ Expert.

The Hearing Officer’s Order directs Complainants to “elaborate on why Dr. Kunkel needs to be replaced and why a substitute expert would be better placed than Dr. Kunkel.” *Sierra Club et al., v. Midwest Generation, LLC*, PCB No. 13-15, Hearing Officer Order at 2 (May 22, 2020). The answer to the Hearing Officer Halloran’s question requires divulging privileged attorney work product consisting of attorney mental impressions. Attorney mental impressions are protected by the attorney work product privilege. In an effort to provide an answer to the Hearing Officer’s question, Complainants have attached Exhibit A – Confidential Affidavit of Faith E. Budget Regarding Expert Witness, which is a confidential affidavit by attorney Faith E. Bugel that contains her mental impression on why new expert would be better

placed in the remedy phase of this proceeding. Concurrent with this memorandum, Complainants are filing an Application pursuant to 35 Ill. Admin. Code 130.400 *et seq* to designate the affidavit as “non-disclosable information” because it contains this attorney work product-protected information, as discussed above. Pursuant to 35 Ill. Admin. Code 130.404(d), Complainants are only serving the confidential affidavit on the Board, which take measures to provide it to the Hearing Officer for *in camera* inspection to protect the attorney work-product privileged information.

II. Consistency with Prior Testimony.

The second part of the Hearing Officer’s Order directs Complainants to “state whether the substituted expert testimony would be inconsistent and/or contradict Dr. Kunkel’s previous testimony.” *Sierra Club et al., v. Midwest Generation, LLC*, PCB No. 13-15, Hearing Officer Order at 2 (May 22, 2020). Complainants’ expectation is that the new expert’s testimony will not be inconsistent or contradict Dr. Kunkel’s previous testimony. At the liability-phase hearings in this matter, Dr. Kunkel provided testimony on the record on October 26 and 27, 2017 and January 29, 2018. Complainants re-reviewed the transcripts from the liability-phase hearing to confirm Dr. Kunkel’s hearing testimony did not opined on remedy issues. Because Dr. Kunkel provided no testimony on the record on remedy issues at the liability-phase hearing and Complainants’ new expert will be focused on remedy issues, Complainants do not expect there will be no inconsistency or contradiction with Dr. Kunkel’s previous testimony.

Hearing Officer Halloran clarified by email that his reference to “testimony” included not only hearing testimony but also Dr. Kunkel’s deposition testimony and expert reports. Email from B. Halloran to F. Bugel, PCB 13-15 *Sierra Club v. Midwest Generation, LLC* (May 26, 2020). Complainants state that, to the best of their knowledge, there will be no inconsistency or contradiction with Dr. Kunkel’s previous deposition testimony or reports. Complainants expect

that a new expert will provide more detail, focus on different elements of a remedy, and elaborate on different points in comparison to Dr. Kunkel's opinions on for a number of reasons. These differences are not an inconsistency or a contradiction for a number of reasons. First, nearly five years have passed since Kunkel's expert report on remedy was served on July 1, 2015¹ and four years since Kunkel's deposition on March 17, 2016. Facts have developed and changed in that time and new information is available. More and different details, a focus on different elements, and elaboration of different points by a new expert are not inconsistent or in contradiction with Kunkel's previous statements if they are based on new information not available or in existence at the time of Kunkel's report or deposition.

Much has changed since the liability-phase discovery in this matter. Any expert's opinion on remedy (either Complainants' or MWG's experts) will need to be based on the Board's extensive orders from June 2019 and February 2020 that define the scope of violations and thus the scope of remedies. Since those Board orders did not exist at the time of the liability-phase hearings or liability-phase depositions, these Board orders may lead to differences in remedy-phase expert opinions from those expressed in the liability-phase discovery of this proceeding.

In addition, Complainants' new expert will review remedy-phase discovery responses that were not available or did not exist at the time of the past hearings. The last document production in this matter before the liability-phase hearing was in April 2017. Since then, beginning on May 29, 2020, the parties began updating past discovery responses, responding to new remedy-phase discovery requests, and producing new documents in response to discovery requests. More than three years of new information and documents will need to be considered that will affect available and appropriate remedies for the violations the Board found..

¹ While some of Kunkel's expert reports were introduced on the record at the liability-phase hearings, his remedy report was not and no testimony was taken on the record concerning remedy.

Complainants' new expert will be required to review all of this new information and base their opinions on this new information. Reliance on this new information will likely lead to somewhat different remedy-phase expert opinions compared to liability-phase. Again, such differences would not be in contradiction or inconsistent with Dr. Kunkel's liability phase reports.

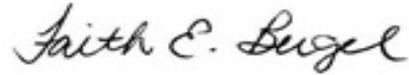
Another development since the liability-phase depositions and hearings is MWG's implementation of the federal Coal Combustion Residuals Rule ("CCR Rule") that regulates MWG's handling of coal ash at the four coal plants at issue. MWG's practices and changes made in response to the CCR Rule may impact remedy issues in this matter, and those practices and changes did not exist or were in their early stages at the time the last round of expert depositions in March 2016 or the liability-phase hearings in this matter. In addition, corrective action and remediation of coal ash around the country in response to the federal CCR rule means more information on corrective action and remediation options is now available that did not exist three years ago. Reliance on this new information would certainly lead to an evolution in expert opinions on remedy in general.

For these reasons, Complainants' substituted expert witness will not be inconsistent or contradict Dr. Kunkel's previous testimony taken on the record or Dr. Kunkel's deposition in early 2016. More and different details, a focus on different elements, and elaboration of different points by a new expert based on the new information discussed above is not inconsistency or contradiction. Lastly, Complainants note that, before remedy-phase hearings are held in this matter, the new expert identified will be required to submit a remedy expert report disclosing their opinion and the basis for that opinion and will be subjected to depositions by MWG's counsel. New and different details, a different focus, and elaboration of expert opinions will not be prejudicial or surprise to Respondent—which is the true test of whether an expert may be

substituted.

Dated: May 29, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, an attorney, certify that I have served on the date of May 29, 2020 the attached **COMPLAINANTS' MEMORANDUM IN RESPONSE TO HEARING OFFICER'S MAY 22, 2020 ORDER** and **CONFIDENTIAL EXHIBIT OF FAITH E. BUGEL REGARDING EXPERT WITNESS** 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 **COMPLAINANTS' MEMORANDUM IN RESPONSE TO HEARING OFFICER'S MAY 22, 2020 ORDER** 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

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Exhibit A

**Confidential Affidavit of Faith E. Bugel Regarding
Expert Witness**