

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 2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Don Brown, Clerk	Attached Service List
Illinois Pollution Control Board	
James R. Thompson Center	
100 West Randolph Street, Suite 11-500	
Chicago, IL 60601	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Response in Opposition to Complainants' Motion *in Limine* to Exclude New or Revised Expert Opinions, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 4, 2022

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**MIDWEST GENERATION, LLC’S RESPONSE IN OPPOSITION TO
COMPLAINANTS’ MOTION *IN LIMINE* TO EXCLUDE NEW OR
REVISED EXPERT OPINIONS**

Complainants’ claim – that MWG is providing new expert opinions based on supplemental documents disclosed – is simply wrong. As required by the Hearing Officer’s discovery order, MWG timely produced its “notice of any *additional items* experts will rely on based on supplemental production.” (Hearing Officer Order, Dec. 10, 2021). The items identified were exactly as the Order required – additional materials. MWG did not offer new opinions. The additional items MWG identified were public documents that support the opinions previously made in the Weaver Expert Report dated April 22, 2021 (“Weaver Report”). To the extent Complainants seek to preclude some future, unknown statement that MWG’s experts *might* make during their testimony, the Hearing Officer, on July 18, 2017, previously ruled that experts may use supplemental documents to elaborate on previously disclosed opinions.¹ Rather than deal in

¹ See July 18, 2017 Order, attached as Exhibit 1. As discussed in section II (p.8) below, Complainants cite to this 2017 Order in support of their motion to exclude, suggesting the Hearing Officer did not allow an expert to testify as to later-produced documents. In fact, the Hearing Officer came to the opposite conclusion and specifically allowed expert

hypotheticals and unknowns, if, during the hearing, Complainants believe some “new opinion” is being offered that goes beyond elaboration, it can be addressed by the Hearing Officer at that time. In any case, the additional items MWG was required to identify pursuant to the Hearing Officer’s Order directly support Weaver’s existing opinions. Thus, the Motion should be denied.

I. MWG’s Notice of Additional Materials Properly Supports Weaver’s Expert Opinions

Complainants first seem to argue that MWG is issuing a new opinion based on the additional items properly identified pursuant to the Hearing Officer’s discovery Order. Complainants’ entire premise is incorrect. MWG timely identified “additional items experts will rely on”, which included Board Orders and documents evidencing MWG’s compliance with the Coal Combustion Residual (“CCR”) rules – documents that Complainants concede were unavailable at the time of the Weaver Report. The Weaver Report states the following:

MWG is actively complying with the detection and assessment groundwater monitoring requirements of the Federal CCR Rules at these Stations and has created a long-term plan for closure of the regulated active and inactive CCR surface impoundments, as appropriate. The plans comply with the existing Federal CCR Rules and MWG is aware of, and further intends to comply with the IL CCR Rules, once promulgated.

Weaver Report, p. 49, excerpt attached as Ex. 2.

The documents Complainants take issue with are additional items that show MWG’s ongoing work to comply with the Illinois CCR Rules. For example, the September 9, 2021 Board Orders (listed in MWG’s notice of additional items) granted MWG a variance from the Illinois CCR Rule deadlines for three of its impoundments. Without relying on these documents, it would appear that the CCR Rule deadlines were not met – but they were met, as revised by the Board, and consistent with Weaver’s opinion that MWG continues to comply with the CCR Rules.

testimony that would elaborate on existing opinions. Complainants’ explicit failure to explain the prior ruling is misleading and arguably sanctionable.

Similarly, MWG's petitions for adjusted standards are evidence of MWG's continued efforts to comply with the Illinois CCR Rule with regard to its existing pond liners. As fully established in the liability phase of this case, MWG recently installed liners in many of its CCR impoundments as part of a voluntary assessment and later as part of Illinois EPA Compliance Commitment Agreements. *Sierra Club v. Midwest Generation, LLC*, PCB13-15, June 19, 2019 Order, pp. 22, 36, 52, 64; 1/29/18 Hearing Tr. pp. 214:4-10, 216:1-3; 218:3-16; MWG Exs. 626, 636, 656. MWG seeks to retain some of the recently installed, Illinois-EPA approved liners in its surface impoundments following the closure of the impoundments and after removing any CCR materials. MWG also seeks to confirm that certain ponds are not CCR surface impoundments and do not fall within the CCR Rule – which is again supportive of Weaver's opinion that MWG is complying with the CCR Rules. Indeed, the Board recently granted MWG's Powerton petition, finding that the Service Water Basin is not a CCR surface impoundment. *In the matter of: Midwest Generation LLC's Petition for Adjusted Standard and Finding of Inapplicability for the Powerton Station*, PCB21-02 (Feb. 17, 2022). These additional, factual, and public documents clearly support Weaver's original opinions on compliance. Weaver bases its opinion of an appropriate remedy for the MWG Stations on the fact that MWG is complying with the Federal and Illinois CCR Rules. MWG properly identified these documents, pursuant to the Hearing Officer's Order, as additional materials that support Weaver's opinions.

In fact, Complainants directly questioned Weaver about compliance with the Illinois CCR Rules, as a basis of Weaver's remedy opinion, numerous times during Weaver's deposition.

Complainants specifically asked the question:

Q: And if my understanding is correct, the remedy is continue complying with the CCA measures, ***comply with the Illinois Coal Ash Rule, comply with the Federal CCR Rules***, that that's sufficient for a remedy going forward; is that fair?

Weaver dep, p 116, lines 3-8 (emphasis added), excerpt attached as Ex. 3. Weaver answered, many times, that continued compliance with the CCR rules and requirements was a basis of its opinions on a remedy. Even before Complainants asked the question, on page 74 of Weaver's deposition expert Mike Maxwell states,

your question prior to that, the question about further source control. We did recommend that the -- to the extent that there are ponds, CCR ponds, ***there that are applicable to the Federal and State CCR rules that the Federal and State CCR rules be followed as it relates to closure*** – appropriate closure of the appropriate ponds.

Ex. 3, p. 74, lines 9-14 (emphasis added). Similarly, on page 132 of Weaver's deposition, expert Douglas Dorgan states,

MR. DORGAN: Yeah. I mean, earlier in the report, we discussed the fact that there are regulated units there ***and that Midwest Gen is complying with the regulatory framework that applies to those regulatory units, both the --both the federal and the state rules.***

Ex. 3, p. 132, lines 19-24 (emphasis added). On the next page, Mr. Dorgan states,

MR. DORGAN: I believe our report says that at Will County, what already has been implemented, ***we continue to comply with the federal and state CCR rules***, we continue to apply the groundwater monitoring program, that the conditions at the site are adequately protective of human health and the environment, and that [no] further work beyond that which is already being implemented or would have to be implemented pursuant to the regulations would be needed at this time.

Ex. 3, p. 133, lines 12-22 (emphasis added), and 10/28/2021 Errata Sheet. And on page 216, Mr. Dorgan says yet again,

MR. DORGAN: We certainly have not made any recommendations with regard to anything ***other than the continued compliance with the CCR requirements at each of the four sites*** that would prevent ash from coming in contact with groundwater.

Ex. 3, p. 216, lines 19-24 (emphasis added). For Complainants to suggest that there is any surprise about Weaver's opinion on this point is pure sophistry. The public documents MWG properly disclosed as part of its "notice of additional items" support the existing opinion and thus the Motion is unsound.

II. Because There is no Basis for a Supplemental Report Where No Opinions Have Changed, Complainants' Claims of New Opinions are Hypothetical and Premature

Complainants then make the baseless assertion that MWG was required to or should have supplemented its expert report – apparently to identify the additional documents showing compliance with the CCR Rules. Even if Complainants' Motion was not mischaracterizing MWG's notice of additional documents as a new opinion, a supplemental report that merely cites to additional public documents as further evidence of an already existing opinion is not warranted under any rule, or otherwise. In this case, the Hearing Officer accounted for supplemental documents that support an opinion by ordering that the parties simply notify each other of any additional items the experts would rely on. MWG did just that. The Order does not require anything more – no reference to opinions or experts, and no reference to new reports. To require supplement reports any time a more recent, supplemental document arises would violate the Hearing Officer's Discovery Schedule, and is a waste of the parties' time and money as well as the Board's resources.

Pursuant to the Hearing Officer's first discovery schedule for the remedy hearing, entered on October 19, 2020 (and extended as requested by Complainants), MWG's expert opinions were due on April 22, 2021, and the schedule does not give MWG another opportunity to submit an expert report. Certainly, if Weaver's *opinions* had changed, MWG would have submitted a revised report – but the opinions did not change, so nothing further was required until the January 10, 2021 “notice of additional items.”

Complainants' next make the claim that they are somehow harmed by not having a supplemental report and the inability to take a deposition on how these documents support the Weaver opinion. This claim rings hollow. As detailed above, Complainants were fully aware that Weaver based its remedy opinions on compliance with the CCR Rules, and Complainants deposed Weaver at length on the issue. Weaver's expert report was very clear that the experts were relying

on select publicly-available information obtained from the administrative record on the IPCB website (available at <https://pcb.illinois.gov/>) and select publicly-available information available concerning MWG on the CCR Rule Compliance Data and Information website (available at <http://www.nrg.com/legal/coal-combustion-residuals.html>). Ex. 2, at pp. 3-4. In fact, all but two of the documents Complainants object to were publicly available *before* the Weaver deposition occurred on October 6, 2021. Of those remaining two, Complainants were fully aware of one because *it is their own - Complainants filed it with the Board*. The “Illinois EPA Bureau of Water – Waukegan Power Station: Part 845 – CCR Surface Impoundments” presentation by Darin LeCrone was filed by Kiana Courtney on behalf of the Environmental Law and Policy Center and Faith Bugel on behalf of the of Sierra Club. Complainants’ filing is attached as Exhibit 4.² There is no basis to suggest some surprise or unfairness in citing, as an additional item relied on, public materials *and a document filed by Complainants*.³

Any supplemental report and deposition would only state that the Weaver experts are relying on these newer publicly available documents to support their previous opinion that MWG is complying with the Illinois CCR Rule. The Hearing Officer’s scheduling Order, as proposed by the parties and agreed by Complainants, did not include any reference to additional depositions following disclosure of the “additional items” relied on by experts. There is simply no basis for

² The last document is MWG’s Amended Petition for Adjusted Standard filed on Nov. 12, 2021, which withdrew MWG’s request to reuse the liners in the ash ponds at Powerton, but maintained its request that the Board find the Service Water Basin is not a CCR surface impoundment. The Board granted MWG’s Petition for an Adjusted Standard at Powerton and held that the Service Water Basin was not a CCR surface impoundment. *In the Matter of: Midwest Generation, LLC’s Petition for an Adjusted Standard and Finding of Inapplicability for the Powerton Station*, PCB21-02, Order, (Feb. 17, 2022). Again, evidencing compliance with the Illinois CCR Rules, as modified by the Board.

³ In fact, the Board could simply take administrative notice of the three orders it issued in PCB21-02, PCB21-107, and 21-108, if necessary. *See People v. Community Landfill Company, Inc. and City of Morris*, PCB03-191, 2009 Ill. ENV LEXIS 228, (June 18, 2009) *70-71 (Board took administrative notice of the facts and its decisions in a different proceeding).

Complainants' claims of harm and no need to waste time and resources on a supplemental report and deposition that does not alter any opinions.

Finally, Complainants express a misplaced concern that MWG's experts could "change or modify their previously written opinions and/or deposition testimonies..." based on information in the "notice of additional items." Complainants' Motion p. 4, ¶ 12. Weaver's expert report, as detailed in Complainants' deposition of the Weaver experts, makes the Weaver opinion very clear. The additional materials that MWG identified properly and timely supplemented the documents that form the basis of the Weaver opinion.

MWG did exactly as the Hearing Officer's order required – it notified Complainants of additional materials and described those materials in some detail. See MWG's Notice and Supplemental Email attached as Attachments 1 and 2 to Complainants' Motion. For Complainants to claim some unknown fear of a new opinion is disingenuous, at best, in light of their own response to the Hearing Officer's Order. Complainants' "notice of additional items" relied on by Complainants' experts lacked any detail and only identified additional documents by bates numbers. It stated, in full:

**COMPLAINANTS' NOTICE OF ADDITIONAL
ITEMS EXPERTS WILL RELY ON**

PLEASE TAKE NOTICE that in addition to any items previously identified, Complainants' Experts will rely on the documents found at the following ranges of Bates numbers:

MWG_13-15 79493-79771
MWG_13-15 108251-108252
MWG_13-15 108447-108718
MWG_13-15 109155-109637
MWG_13-15 110276-110621
MWG_13-15 111265-111570

Complainants' notice of additional items, attached as Ex. 5, does not identify documents by name, or by expert, or by opinion. It is strange that Complainants suggest that MWG had some additional obligation to identify "which expert and which opinion" in MWG's notice, given the very cursory information in Complainants' own disclosure (Comp. Mot. ¶ 5).

To the extent Complainants seek to preclude a future, unknown statement that MWG's experts *might* make that *might be* beyond Weaver's existing opinions, the Hearing Officer already decided that issue in 2017. See July 18, 2017 Order, Ex. 1. Complainants, in what can only be interpreted as directly misleading, cite to the Hearing Officer's 2017 Order in support of their current motion to exclude documents identified after Weaver's deposition, clearly suggesting that the 2017 Order finds in their favor. Comp. Mot., ¶9. The Order is not in their favor. The 2017 Order was issued in response to MWG's motion *in limine* to preclude Complainants from issuing new opinions based on documents disclosed after their expert's deposition – essentially the same situation before the Hearing Officer now. Complainants argue that their current motion to exclude additional expert opinions "is consistent with the Hearing Officer's Order of July 18, 2017." Comp. Mot., ¶9. For obvious reasons, however, Complainants do not attach the Hearing Officer's 2017 Order, nor even state the Hearing Officer's decision. That is because the Hearing officer *denied* MWG's motion and specifically allowed Complainants' experts to testify about documents produced after the deposition "in order to elaborate previously disclosed opinions." July 18, 2017 Order, Ex. 1. The Hearing Officer held, "although the experts have not stated exactly how post-deposition discovery informs their opinions, it would be unduly restrictive to completely bar experts from testifying about these documents." *Id.* Complainants' reference to this holding in their current motion means that not only were they aware of this Order, but they purposefully misled the Hearing Officer by failing to state the actual 2017 holding, or even attempting to explain

or distinguish it. Complainants' conduct is highly questionable and arguably sanctionable.⁴ Because Complainants clearly knew how the Hearing Officer would decide their current motion in light of the 2017 holding, Complainants' motion has no purpose other than to harass and cause MWG, and the Hearing Officer, to waste judicial resources. MWG's Notice of Additional Documents is doing exactly what the Hearing Officer's 2017 Order provides – using properly identified “additional items” to support an existing opinion.

MWG requests that the Court deny Complainants' Motion *in Limine* to Exclude New or Revised Expert Opinions because MWG complied with the Hearing Officer discovery Order to identify supplemental materials that support its existing opinions, and because MWG's use of timely identified “additional items” that support its experts' opinions complies with the Hearing Officer's 2017 Order specifically allowing such testimony.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By /s/ Jennifer T. Nijman
One of Its Attorneys

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⁴ This is the second time Complainants blatantly misrepresented the holding of an order in a Board case. In their unwarranted Motion for Sanctions, Complainants falsely represent a Board holding, stating that the Board issued sanctions in a case when the Board held exactly the opposite – no sanctions were warranted. See discussion of *Freedom Oil v IEPA*, MWG Response to Comp.'s Motion for Sanctions, Sec. V. Even more distressing is that Complainants, once again, knew of the issue because they had previously cited to this same case, for its opposite holding of no sanctions, in their own brief in 2018. *Id.*

EXHIBIT 1

ILLINOIS POLLUTION CONTROL BOARD

July 18, 2017

SIERRA CLUB, ENVIRONMENTAL LAW)
AND POLICY CENTER, PRAIRIE RIVERS)
NETWORK, and CITIZENS AGAINST)
RUINING THE ENVIRONMENT,)
)
Complainants,)
)
v.) PCB 13-15
) (Citizen's Enforcement - Water)
MIDWEST GENERATION, LLC,)
)
Respondent.)

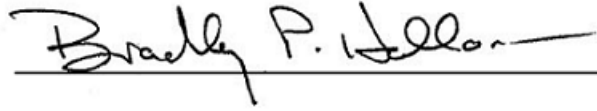
HEARING OFFICER ORDER

On May 22, 2017, Midwest Generation, LLC (Midwest Gen) filed a motion *in limine* seeking to limit expert testimony at hearing (Mot.). Midwest Gen requested that the Hearing Officer limit expert testimony to only the information in the expert reports submitted and the expert depositions taken during discovery. That is, Midwest Gen asks the Hearing Officer to prohibit experts' testimony concerning discovery documents developed after an expert's deposition. On June 8, 2017, Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, Environmental Groups) submitted a response opposing the motion (Resp.).

The Board's procedural rules are silent on this issue, so Illinois Supreme Court Rules 213(f) and 213(g) guide the Hearing Officer's ruling. *See* 35 Ill. Adm. Code 101.100(b). Rule 213(f) requires a party, upon written interrogatory, to identify a controlled expert witness's opinions and the opinions' bases. Rule 213(g) then limits the expert's testimony at trial to the information disclosed in the interrogatory's answer. Though Rule 213 does not directly apply to Board procedures, its intent still provides general guidance: the rule is intended "to prevent unfair surprise at trial, without creating an undue burden on the parties before trial." Committee Comment to Ill. Sup. Ct. R. 213(f).

Rule 213 does not guide the Hearing Officer to limit expert testimony to exchanged reports and deposition testimony, as Midwest Gen requests. *See* Mot. at ¶ 4. The Environmental Groups argue that discovery produced after the experts' depositions may be used to expand upon experts' already-stated opinions. Resp. at 4. Although the experts have not stated exactly how post-deposition discovery informs their opinions, it would be unduly restrictive to completely bar experts from testifying about these documents. The testimony at hearing from Environmental Groups' experts may rely on discovery documents produced after those experts' depositions in order to elaborate previously disclosed opinions. The motion is denied.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

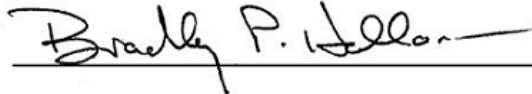
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on July 18, 2017, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on July 18, 2017:

Don Brown
Illinois Pollution Control Board
James R. Thompson Center
100 W. Randolph St., Ste. 11-500
Chicago, Illinois 60601

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath.

Bradley P. Halloran
Hearing Officer
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@ Consents to electronic service

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EXHIBIT 2

April 22, 2021

EXPERT REPORT ON RELIEF AND REMEDY

**SIERRA CLUB, ET AL (COMPLAINANTS) V.
MIDWEST GENERATION, LLC (RESPONDENT)**

PREPARED BY



for a wide range of industrial, commercial, and institutional properties. I have implemented various projects involving compliance with the Resource Conservation Recovery Act (RCRA) Subtitle D (solid waste disposal facilities) and Subtitle C (hazardous waste disposal facilities), as well as the 40 CFR 257 Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments (Federal CCR Rules). Additionally, I have implemented various technical projects involving compliance with CERCLA. Since the beginning of my professional practice in 1996, I have regularly applied the SRP regulations and related TACO regulations to a variety of different Illinois sites. I have regularly interfaced with both the USEPA and Illinois EPA on behalf of various industrial clients involving RCRA and alleged violations of the Illinois Environmental Protection Act, including negotiations and compliance with various Compliance Commitment Agreements (CCAs).

I have provided previous testimony before the Illinois Pollution Control Board (Board or IPCB) in connection with an Adjusted Standard Hazardous Waste Delisting Petition that was approved by the Board in 2008. I provided technical assistance and support in a case involving CERCLA liability, cost allocation, appropriateness, and costs associated with the selected remedy related to a former zinc smelter located in downstate Illinois. I have also played the key supporting role in toxic tort and property damage claims related to the historical use of chlorinated solvents at an industrial facility in St. Louis, MO.

I have worked on various different projects involving regulatory compliance/permitting, investigation, and remediation of coal ash surface impoundments, and coal ash fill disposal sites. At one such site in northwest Indiana, I manage the permitting, closure, groundwater monitoring, and corrective action at a restricted waste site (RWS). I have overseen the design and installation of the initial groundwater monitoring system required under the Federal CCR Rules and managed the collection of background groundwater quality data, as well as the statistical evaluation of the groundwater monitoring data at two former coal ash surface impoundment sites in Indiana. I also managed the review of Groundwater Monitoring Reports prepared under the Federal CCR Rules for two former coal ash impoundment sites in northern New Jersey.

1.2 Information Considered

For purposes of this Report, WCG has reviewed the documents presented within the Quarles Report, select publicly available information obtained from the administrative record on the IPCB website (available at <https://pcb.illinois.gov/>), select publicly available information available concerning MWG on the CCR Rule Compliance Data and Information website (available at:

<https://www.nrg.com/legal/coal-combustion-residuals.html>) and other information provided by MWG. These sources are listed in **Appendix B**.

1.3 Background

MWG owns/operates the following electric generating stations:

1. Joliet #29 Generating Station, located in Joliet, IL (Joliet 29);
2. Powerton Generating Station, located in Pekin, IL (Powerton);
3. Will County Generating Station, located Romeoville, IL (Will County); and
4. Waukegan Generating Station, located in Waukegan, IL (Waukegan).

Each of the above facilities have been operated by MWG since 1999, when MWG acquired the Stations from a prior owner. On October 3, 2012, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, “Complainants”) filed a complaint against MWG, alleging that MWG allowed groundwater contamination and open dumping at the above facilities in violation of the Environmental Protection Act (Act) and Board regulations.

The Interim Opinion and Order of the Board dated June 20, 2019, (2019 Board Order) concluded that “it is more probable than not” that MWG violated certain portions of the Act and Board Regulations¹, identifying areas at each facility. Specifically, the Board found that MWG violated Sections 12(a) and 21(a) of the Act at each of the four Stations. The Section 12(a) violation identified by the Board relates to causing or allowing discharge of coal ash constituents into groundwater causing water pollution. Section 21(a) relates to allowing coal ash to consolidate in fill areas around ash ponds and historical ash storage areas. In addition, the Board found that MWG violated Section 12(d) of the Act (open dumping of coal ash onto the ground) at the Powerton Station (only) by temporarily storing coal ash outside of the surface impoundments on a single occasion.

The 2019 Board Order was reconsidered and modified by a February 6, 2020 Order of the Board (2020 Board Order). Importantly, the subsequent 2020 Board Order found that the Groundwater Management Zones (GMZs) previously established at the Joliet 29, Powerton, and Will County Stations in 2013 had not been terminated and are still in place. With the continued applicability

¹ 2019 Board Order, pg. 79.

the development of alternative capacity for the Ash Surge Basin at Powerton, Ash Pond 2S at Will County and the East Ash Pond at Waukegan. Continued operation of the CCR Ponds until the alternate closure deadlines identified for each Station will be monitored to mitigate any potential impacts to groundwater. The detection and assessment groundwater monitoring programs implemented by MWG are designed to identify potential issues with the regulated impoundments until such time that the ponds are taken out of service and formally closed in accordance with the applicable permits. According to IL Public Act 101-171, signed into law July 30, 2019, closure activities related to Federal/State Ponds cannot be completed until a permit is attained from Illinois EPA.

Contrary to Quarles's opinion, the scope of the ASDs associated with the Powerton, Will Co., and Waukegan Stations is appropriate and complies with the Federal CCR Rules and likely also the Illinois CCR Rules. Quarles's suggestion that MWG should have used the ASD process to specifically identify the source of statistically significant increases in groundwater concentrations is incorrect. It is not appropriate nor required by the Federal CCR Rules or the Illinois CCR Rules to pursue additional investigation of non-regulated units as part of this process. The Federal CCR Rules and the Illinois CCR Rules require the owner/operator to evaluate whether the *regulated unit(s)* are adversely impacting groundwater, but neither require an exhaustive site-wide study to identify a specific alternate source.

Moreover, additional investigation is not needed for purposes of identifying the appropriate relief/remedy related to groundwater conditions attributed by the Board to MWG. The appropriate action recommended by WCG is based on the existing applicable regulatory framework and data historically collected at the Stations.

In closing, no additional relief is warranted at the Stations with respect to Section 33(c), criteria (i), the character and degree of injury to, or interference with the protection of the health, general welfare, and physical property of the people. MWG is actively complying with the detection and assessment groundwater monitoring requirements of the Federal CCR Rules at these Stations and has created a long-term plan for closure of the regulated active and inactive CCR surface impoundments, as appropriate. The plans comply with the existing Federal CCR Rules and MWG is aware of, and further intends to comply with the IL CCR Rules, once promulgated.

EXHIBIT 3

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BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

- - - - - x

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

- - - - - x

Deposition of
DOUGLAS G. DORGAN, JR., and MICHAEL B. MAXWELL
Conducted Virtually
Wednesday, October 6, 2021
9:27 a.m. CT

Job No.: 402611
Pages: 1 - 228
Reported By: Courtney Petros, RPR, CSR

1 Q Is groundwater monitoring a form of source
2 control?

3 MR. DORGAN: Groundwater monitoring is a
4 means to evaluate the ongoing conditions at the
5 site and whether monitored natural attenuation
6 continues to take place.

7 MR. MAXWELL: Could we go back to the next
8 -- your question prior to that, the question about
9 further source control. We did recommend that the
10 -- to the extent that there are ponds, CCR ponds,
11 there that are applicable to the Federal and State
12 CCR rules that the Federal and State CCR rules be
13 followed as it relates to closure -- appropriate
14 closure of the appropriate ponds.

15 Q Okay. Understood. And I want to go back
16 to my last question, because I don't believe you
17 answered the question, which is a yes or no
18 question.

19 Is groundwater monitoring a form of source
20 control?

21 MS. NIJMAN: Asked and answered.

22 MR. DORGAN: And I don't think that can be
23 answered with a yes or no question [sic]. The
24 groundwater monitoring is uniquely designed to the

1 identified a path forward as far as a remedy
2 that's risk based for the Powerton Station.

3 Q And if my understanding is correct, the
4 remedy is continue complying with the CCA
5 measures, comply with the Illinois Coal Ash Rule,
6 comply with the Federal CCR Rules, that that's
7 sufficient for a remedy going forward; is that
8 fair?

9 MS. NIJMAN: Objection. Form of the
10 question. Compound. Misstates testimony.

11 Q You can still answer.

12 MR. DORGAN: You had several pieces of
13 that question. And I would agree that, yes, we
14 believe that continued compliance with the CCA
15 should be followed; that monitored natural
16 attenuation is occurring at the site, which is a
17 form of a remedy; that in the areas where
18 groundwater protection standards have been
19 exceeded, there is a groundwater management zone
20 or an ELUC in a number of the instances, not in
21 all; and, that continued conformance with the
22 requirements of where groundwater management zones
23 or ELUCs have been approved should be implemented.
24 And the monitoring, which is required

1 which monitored natural attenuation at these three
2 stations is occurring and how it will continue to
3 be evaluated.

4 And, in summary, I can read the three
5 bullet points. Groundwater monitoring will
6 continue to be performed while the GMZs are in
7 place to confirm monitored natural attenuation
8 continues to be effective. As discussed above,
9 the existing regulatory framework does not require
10 additional action at the historical fill areas,
11 and Illinois EPA has not identified any
12 noncompliance with the CCAs or pursued any
13 enforcement action against MWG since the CCAs were
14 signed in 2012.

15 Q Is it fair to say your position is beyond
16 what Midwest -- sorry -- beyond what Midwest
17 Generation has already committed to, no further
18 remedy is warranted?

19 MR. DORGAN: Yeah. I mean, earlier in the
20 report, we discussed the fact that there are
21 regulated units there and that Midwest Gen is
22 complying with the regulatory framework that
23 applies to those regulatory units, both the --
24 both the federal and the state rules. They'll

1 continue to abide by those obligations for those
2 regulated units. And so we're just referencing
3 that the remedial action that's already taking
4 place will continue and continue to be monitored
5 at Will County.

6 Q So is it fair to say that despite the fact
7 that the ASD has pointed to other potential
8 sources, you do not believe any further remedy is
9 warranted beyond what Midwest Generation has
10 already committed to doing at Will County as
11 summarized in these three bullet points?

12 MR. DORGAN: I believe our report says
13 that at Will County, what already has been
14 implemented, we continue to comply with the
15 federal and state CCR rules, we continue to apply
16 the groundwater monitoring program, that the
17 conditions at the site are adequately protective
18 of human health and the environment, and that
19 further work beyond that which is already being
20 implemented or would have to be implemented
21 pursuant to the regulations would be needed at
22 this time.

23 Q All right. Let's turn back to your
24 report, page 30. And we're pivoting to Powerton.

1 MS. NIJMAN: Objection. Overbroad. Asked
2 and answered. I think their discussion is -- the
3 entire day has discussed this question.

4 MR. DORGAN: Yeah. If you could restate
5 that question. It sounds like one we've answered
6 a few times already.

7 Q Well, we would need to find the same exact
8 question in the record, and I know we've discussed
9 this generally. But I've got my questions written
10 down, and I don't think I've asked this question
11 before. So I'll repeat it again.

12 Did you recommend any remedial measure
13 that would prevent ash from coming in contact with
14 groundwater at any of the four stations?

15 MS. NIJMAN: Objection. Asked and
16 answered. Great deal of detail on Waukegan. Just
17 because you use different words doesn't mean it
18 hasn't been asked several times.

19 MR. DORGAN: We certainly have not made
20 any recommendations with regard to anything other
21 than the continued compliance with the CCR
22 requirements at each of the four sites that would
23 prevent ash from coming in contact with
24 groundwater. So that -- we've not specified any



October 18, 2021

Jennifer T. Nijman, Esquire
Nijman Franzetti LLP
10 S LaSalle Street Suite 3600
Chicago, IL 60603

Re: Deposition of **Douglas G Dorgan, Jr. and Michael B. Maxwell**

Date: 10/6/2021

Case: Sierra Club, et al. -v- MidWest Generation, LLC

Dear Sir/Madam,

Attached please find the above-referenced deposition transcript. If applicable, signature is required within 28 days from the date of this letter.

In accordance with the disposition of signature at the deposition or the pertinent jurisdictional rules, the deponent should follow these instructions to complete the Errata Sheet:

- (1) Read the transcript and indicate any corrections or changes in ink on the enclosed Errata Sheet. Please include page and line numbers. If more space is needed for corrections, please use a blank sheet of paper. If no corrections or changes are necessary, please indicate "no corrections" or "no changes" on the Errata Sheet.
- (2) Sign and date the Errata Sheet and Acknowledgement of Deponent/Affiant pages.
- (3) Please return the executed Errata Sheet and Acknowledgement pages to the address indicated below, submit via fax (888-503-3767) or email (transcripts@planetdepos.com).

A copy of this letter and the returned signature pages, if any, will be distributed to counsel.

Sincerely,

Production Department
Planet Depos, LLC
451 Hungerford Drive
Suite 400
Rockville, Maryland 20850

No. 402611

No. 402611

Re: Deposition of **Douglas G Dorgan, Jr. and Michael B. Maxwell**

Date: 10/6/2021

Case: Sierra Club, et al. -v- MidWest Generation, LLC

Return to: transcripts@planetdepos.com

ACKNOWLEDGMENT OF DEPONENT

I, Douglas G Dorgan, Jr. and Michael B. Maxwell, do hereby acknowledge that I have read and examined the foregoing testimony, and the same is a true, correct and complete transcription of the testimony given by me and any corrections appear on the attached Errata sheet signed by me.

10/28/2021

(Date)

10/28/2021

Douglas D Dorgan Jr

(Signature)

Michael B Maxwell

EXHIBIT 4

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	AS 2021-003
Petition of Midwest Generation, LLC)	
for Adjusted Standards from)	(Adjusted Standard)
35 Ill. Admin. Code, Part 845)	
(Waukegan Station))	

ENVIRONMENTAL ORGANIZATIONS’ RENEWED REQUEST FOR PUBLIC HEARING

Pursuant to 35 Ill. Adm. Code 104.420(a), Clean Power Lake County, Earthjustice, Environmental Law and Policy Center, Prairie Rivers Network, and Sierra Club (collectively, “Environmental Organizations) renew our request for a public hearing in the above-referenced matter. In support of that request, the Environmental Organizations incorporate as if fully set out herein their previously-submitted request for hearing, filed on June 7, 2021, in this matter, and ask that a hearing be held on Midwest Generation, LLC’s Amended Petition for an Adjusted Standard And A Finding of Inapplicability For Waukegan Station, filed on September 17, 2021, for the reasons expressed in our June 7, 2021 request for hearing.

In addition, because the COVID pandemic continues to pose a danger for Illinois residents¹ and the need to travel to either Chicago or Springfield could, for some staff or members of our organizations, limit their ability to participate in the hearing (whether due to the inability to travel or limits on travel associated with COVID risks), we request that the hearing be held in a hybrid manner similar to the public hearings held in R2020-19. If a full hybrid hearing is not possible, we request that the portion of the hearing dedicated to oral public comment be conducted in a hybrid manner.

Finally, we request that the Board act to ensure that the delay of the recommendations required for this adjusted standard petition to move forward is kept to a minimum. We understand that, notwithstanding the Board’s extension of Illinois EPA’s recommendation deadline for this Adjusted Standard petition to Nov. 22, 2021, Illinois EPA has informed Waukegan leaders that it does not plan to submit until **January 31, 2022** its recommendation on Midwest Generation’s request to exclude the leaking Old Pond from Part 845. See attached presentation by Illinois EPA. The Coal Ash Pollution Prevention Act requires prioritization of the closure of CCR surface impoundments in areas of environmental justice concern, such as Waukegan. Consistent with that mandate, this adjusted standard proceeding should be concluded as soon as possible to ensure prompt, safe closure of leaking coal ash impoundments at the site.

Thank you for your consideration of this request.

¹ All but three counties in Illinois are currently classified by the Illinois Department of Public Health as “high transmission” counties, with the remaining three classified as “substantial transmission.” See <https://www.dph.illinois.gov/covid19> (viewed October 7, 2021).

Respectfully Submitted,

Dulce Ortiz
Clean Power Lake County

Jennifer Cassel
Mychal Ozaeta
Earthjustice

Kiana Courtney
Environmental Law & Policy Center

Andrew Rehn
Prairie Rivers Network

Faith Bugel
On behalf of Sierra Club



BUREAU OF WATER WAUKEGAN POWER STATION: PART 845 - CCR SURFACE IMPOUNDMENTS

Darin LeCrone, P.E.

Manager, Permit Section

Division of Water Pollution Control

CCR STATUTE AND REGULATIONS

- On July 30, 2019, Governor Pritzker signed Public Act 101-171 which directed the Illinois Pollution Control Board (IPCB) to adopt rules for a coal combustion residuals (CCR) surface impoundment permitting program. This amendment to the Act requires additional protections and closure requirements for CCR Surface Impoundments (also known as coal ash ponds) at electric utilities and independent power producers.
- Final Rule – 35 Ill. Adm. Code 845 - adopted by the Board in April 2021.
- There are 23 site locations - the Illinois EPA recognizes 72 CCR surface impoundments at power generating facilities, based on best available information.

CCR PERMITTING TIMELINE

- The rule requires all facilities to submit **initial operating permit** applications to the Illinois EPA by **October 31, 2021**.
- **Closure construction permit** applications in EJ areas are due **February 2022**.

WAUKEGAN POWER STATION – COAL ASH PONDS

- IEPA recognizes 3 CCR Surface Impoundments subject to Part 845: East Pond, West Pond & Old Pond.
- NRG acknowledges East Pond & West Pond are subject to 40 CFR Part 257 and Ill. Adm. Code Part 845.
- NRG disputes that Old Pond is subject to Part 845.

WAUKEGAN POWER STATION – GROUNDWATER STANDARDS

- In 2012, IEPA issued a violation notice (VN) to NRG Waukegan for exceedances of Class I groundwater standards. Continued groundwater monitoring indicated a source other than East or West Ponds.
- Additional groundwater monitoring conducted indicates exceedances of Groundwater Protection Standards.
- IEPA will evaluate the adequacy of the facility's groundwater monitoring system and data during the review of the application for the Initial Operating Permit.
- Exceedances of groundwater protection standards under Part 845 requires an Alternative Source Demonstration or corrective action.

PERMITTING - PUBLIC PARTICIPATION

- **Initial Operating Permit:** Requires a 45-day public notice period with opportunity to submit written comments and request a public hearing.
- **Construction Permit:** Requires a 45-day public notice period with opportunity to submit written comments and request a public hearing. Facility will be required to hold 2 public meetings to outline their chosen closure method and discuss closure alternatives. The meetings must be held at least 30 days prior to submittal of a construction permit application.
- At least 30 days prior to the public meetings, the applicant must post on their publicly available website, all documentation relied upon in making their tentative application.
- If located in an area with significant non-English speaking residents, the notifications must be made in both English and the appropriate non-English language, and translation services must be provided at the meetings.
- Within 14 days after the public meetings, the applicant must distribute a general summary of the issues raised by the public, as well as a response to those issues.

WAUKEGAN POWER STATION – AGENCY DECISION

- The Agency will provide notice of its final permitting decision, along with responses to comments received during the public notice, and public hearing (if applicable).
- Notice of the final decision will be made to the applicant, to any person who provides comments or an email address to the Agency during the public notice or hearing process, and to any person on the Agency's listserv for the facility.
- Such a notice will briefly describe any significant changes or revisions made to the permit.

WAUKEGAN POWER STATION – NRG ADJUSTED STANDARD REQUESTS

- NRG filed an adjusted standard (AS) petition with Illinois Pollution Control Board on 5/11/21
- Petition was filed timely resulting in an automatic stay of Part 845 provisions for which relief sought
- NRG seeks inapplicability of Part 845 relative to Old Pond
- Initial petition sought reuse of existing HDPE liner in East Pond for low volume waste streams unrelated to coal ash

WAUKEGAN POWER STATION – NRG ADJUSTED STANDARD REQUESTS CONT.

- NRG filed an amended adjusted standard petition with the Board on 9/17/21
- The amended petition still seeks inapplicability of Part 845 relative to Old Pond
- Amended petition seeks reuse of existing HDPE liner in West Pond for low volume waste streams (not ash related)
- Amended petition states that East Pond will be closed in place

WAUKEGAN POWER STATION – NRG ADJUSTED STANDARD REQUESTS CONT.

- The Agency intends to file Adjusted Standard recommendation with the Board for the Old Pond applicability petition by 1/31/22
- The Agency intends to file the Adjusted Standard recommendation with the Board for the West Pond liner petition as a separate recommendation
- The Adjusted Standard petitions will not affect the due date of the initial operating permit application.
- Depending on the Board's final decisions on the adjusted standard petition, the date of closure construction permit applications may be changed
- Station closure scheduled for June 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)
) AS 2021-003
Petition of Midwest Generation, LLC)
for Adjusted Standards from) (Adjusted Standard)
35 Ill. Admin. Code, Part 845)
(Waukegan Station))

CERTIFICATE OF SERVICE

The undersigned, Jennifer Cassel, an attorney, certifies that I have served by email the Clerk and by email the individuals with email addresses named on the Service List provided on the Board's website, available at <https://pcb.illinois.gov/Cases/GetCaseDetailsById?caseId=17032>, a true and correct copy of the **ENVIRONMENTAL ORGANIZATIONS' RENEWED REQUEST FOR PUBLIC HEARING**, before 5 p.m. Central Time on October 18, 2021. The number of pages in the email transmission is 15 pages.

Dated: October 18, 2021

Respectfully Submitted,

/s/ Jennifer Cassel

Jennifer Cassel (IL Bar No. 6296047)
Earthjustice
311 S. Wacker Dr., Suite 1400
Chicago, IL 60606
(312) 500-2198 (phone)
jcassel@earthjustice.org

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EXHIBIT 5

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

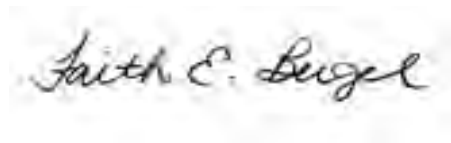
In the Matter of:)	
)	
SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
CITIZENS AGAINST RUINING THE)	
ENVIRONMENT)	
)	PCB No-2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondents)	

**COMPLAINANTS' NOTICE OF ADDITIONAL
ITEMS EXPERTS WILL RELY ON**

PLEASE TAKE NOTICE that in addition to any items previously identified, Complainants' Experts will rely on the documents found at the following ranges of Bates numbers:

- MWG_13-15 79493-79771
- MWG_13-15 108251-108252
- MWG_13-15 108447-108718
- MWG_13-15 109155-109637
- MWG_13-15 110276-110621
- MWG_13-15 111265-111570

Respectfully submitted,



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