

ILLINOIS POLLUTION CONTROL BOARD  
May 12, 2023

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

**HEARING OFFICER ORDER**

On May 11, 2023, all parties participated in a telephonic status conference with the hearing officer. The parties represented that they are ready for hearing that commences on May 15, 2023.

**Respondent’s Motion to Incorporate**

On April 20, 2023, Midwest Generation, LLC (MWG), filed a motion to incorporate the pre-filed testimony of G. Allen Burton. Burton’s pre-filed testimony dated September 8, 2008, was filed in the Board’s R8-9 Rulemaking. (Mot.). The Rulemaking regarded water quality standards and effluent limitations for the Chicago area waterway system and the lower Des Plaines River. Mot. at 2. MWG argues that “Dr. Burton’s discussion about the analysis of the sediments in the Des Plaines River near the Joliet Generating Station” is relevant to the Board’s consideration of Section 33 factors. 415 ILCS 5/33(c)(i) and (iv). *Id.* at 3.

**Complainants’ Response**

On May 4, 2023, complainants filed their response objecting to MWG’s motion. (Resp.) The complainants argue that MWG’s expert witnesses, by relying on Burton’s pre-filed testimony, would be providing new opinions not previously disclosed. Rep. at 1. Complainants state that MWG, on January 10, 2022, “filed Respondent’s Identification of Additional Documents Midwest Generation’s Experts May Rely Upon” that included Burton’s pre-filed testimony. *Id.* Complainants further state that on March 29, 2023, MWG” filed its Proposed Exhibit List which included” Burton’s pre-filed testimony. *Id.* at 2.

Complainants state that MWG’s expert reports on relief and remedy “offers no analysis of sediments, no opinions on sediment chemistry, and virtually no opinions on sediments at all.” *Id.* at 3. Complainants argue that because of inadequate notice, “[c]omplainants expert has not had an opportunity to form an opinion on this material.” *Id.* at 4. Nor can “properly prepare for cross-examination of the Weaver witnesses on sediments or sediment chemistry.” *Id.*

Complainants add that MWG's late notice of the Burton pre-hearing testimony creates unfair surprise and "is not consistent with discovery protocols." *Id.* at 5. Finally, complainants argue that the pre-filed testimony could be outdated. *Id.* at 6.

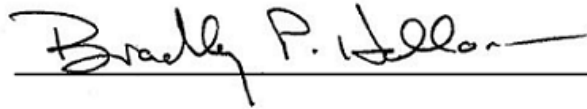
### **Ruling**

The Board may take official notice of documents on its website, and "notice of matters of record in another administrative order, determination or judgment, especially where these proceedings are related." ESG Watts v. PCB, 282 Ill. App. 3d 43, 54, 668 N.E. 2d 1015, 1023 (4<sup>th</sup> Dist. 1996); Board's procedural rules, 101.306.

Burton's pre-filed testimony was filed with the Board in the Rulemaking docket, R08-09, in 2008. On January 10, 2022, MWG filed a document that indicated Burton's pre-filed testimony filed in the 2008 Rulemaking may be relied upon. On March 29, 2023, MWG filed a proposed exhibit list that included Burton's pre-filed testimony. I find Burton's pre-filed testimony relevant and may assist the Board. Complainants were aware of Burton's pre-filed testimony and I find no unfair surprise. Indeed, complainants' argument that the pre-filed testimony "could be outdated" can be explored at hearing.

Respondent's motion to incorporate Burton's pre-filed testimony is granted.

IT IS SO ORDERED

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

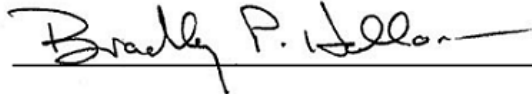
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
60 E. Van Buren Street, Suite 630  
Chicago, Illinois 60605  
312.814.8917  
[Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on May 12, 2023, 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 May 12, 2023:

Don Brown  
Illinois Pollution Control Board  
60 E. Van Buren Street  
Suite 630  
Chicago, Illinois 60605

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

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
60 E. Van Buren Street  
Suite 630  
Chicago, Illinois 60601  
312.814.8917

@ Consents to electronic service

SERVICE LIST

PCB 2013-015@  
Jennifer T. Nijman  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3400  
Chicago, IL 60603

PCB 2013-015@  
Cantrell Jones  
Environmental Law & Policy Center  
35 E. Wacker Drive  
Suite 1600  
Chicago, IL 60601

PCB 2013-015@  
Keith I. Harley  
Chicago Legal Clinic, Inc.  
211 W. Wacker Drive  
Suite 750  
Chicago, IL 60606

PCB 2013-015@  
Abel Russ  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Suite 1100  
Washington, DC 20005

PCB 2013-015@  
Susan M. Franzetti  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3400  
Chicago, IL 60603

PCB 2013-015@  
Kristen Laughridge Gale  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3400  
Chicago, IL 60603

PCB 2013-015@  
Greg Wannier  
Sierra Club Environmental Law Program  
2101 Webster St.  
Suite 1300  
Oakland, CA 94612

PCB 2013-015@  
Kelly Emerson  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3400  
Chicago, IL 60603

PCB 2013-015@  
Faith Bugel  
1004 Mohawk  
Wilmette, IL 60091

PCB 2013-015@  
James M. Morpew  
Sorling, Northrup, Hanna, Cullen & Cochran,  
Ltd.  
1 North Old State Capitol Plaza, Suite 200  
P.O. Box 5131  
Springfield, IL 62705

PCB 2013-015@  
Melissa S. Brown  
Heplerbroom LLC  
4340 Acer Grove Drive  
Springfield, IL 62711

PCB 2013-015@  
Megan Wachspress  
Sierra Club Environmental Law Program  
2101 Webster St.  
Suite 1300  
Oakland, CA 94612

PCB 2013-015@  
Albert Ettinger  
Law Firm of Albert Ettinger  
7100 N. Greenview  
Chicago, IL 60606