

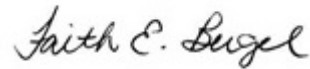
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB, PRAIRIE RIVERS)
NETWORK, and NATIONAL)
ASSOCIATION FOR THE)
ADVANCEMENT OF COLORED PEOPLE,)
)
Complainants,)
)
v.) PCB 18-11
) (Enforcement – Water)
)
CITY OF SPRINGFIELD, OFFICE OF)
PUBLIC UTILITIES d/b/a)
CITY WATER, LIGHT and POWER,)
)
Respondent.)

NOTICE OF FILING

PLEASE TAKE NOTICE that I have served a true and correct copy of **COMPLAINANTS' RESPONSE TO RESPONDENT'S MOTION IN LIMINE** via electronic mail to the parties listed on the attached service list before 5:00 p.m.

Respectfully submitted,



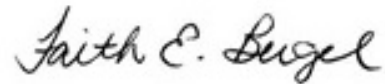
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Dated: April 21, 2026

CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, 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' RESPONSE TO RESPONDENT'S MOTION IN LIMINE** before 5 p.m. Central Time on April 21, 2026 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 175 pages.

Respectfully submitted,



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COMPLAINANTS’ RESPONSE TO RESPONDENT’S MOTION IN LIMINE

Sierra Club, Prairie Rivers Network, and National Association for the Advancement of Colored People (collectively “Complainants”) hereby oppose City of Springfield, Office of Public Utilities d/b/a City Water, Light and Power’s (“Respondent”) Motion In Limine (“Motion” or “Mot. In Limine”). Respondent seeks a ruling barring evidence of exceedances of groundwater standards for parameters other than boron, sulfate and TDS and at wells not identified in the Complaint (hereinafter “arsenic evidence”) on the grounds that such evidence is irrelevant, prejudicial and would cause undue delay. Respondent’s motion must fail because relevance in the remedy phase is not constrained by the liability phase and Respondents ignore the Section 33(c) factors and how they affect and broaden relevance.

LEGAL BACKGROUND

The Illinois Pollution Control Board (“Board”) applies a broad standard of relevance in enforcement proceedings, when applying the statutory factors enumerated in Section 33(c) of the

Illinois Environmental Protection Act (the "Act"). 415 ILCS 5/33; *Highland v. Pollution Control Bd.*, 66 Ill. App. 3d 143,145 (1978). Evidence is admissible if it is “material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged.” 35 Ill. Adm. Code § 101.626. Additionally, the Board has discretion to admit evidence that supports a good faith argument regarding the interpretation of substantive law. *Id.*

In general, the Board admits evidence more liberally than the Illinois Courts that strictly adhere to the Rules of Evidence. That is, while the Board follows “[t]he rules of evidence and privilege as applied in civil cases in the circuit courts of this State,” it may also admit “[e]vidence not [otherwise] admissible under those rules of evidence . . . if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.” 5 ILCS 100/10-40; *see also Discovery South Group et al. v. PCB and Village of Matteson*, 275 Ill. App. 3d 547, 553-54 (1995) (noting that the records at issue were admissible because they were of the type that a reasonably prudent person would rely on and despite being hearsay evidence).

ARGUMENT

I. Complainants’ Reliance on Arsenic Evidence is Consistent with the Board’s Summary Judgement Order

Respondent first suggests that Complainants reliance on arsenic evidence is somehow inconsistent with the Board’s order stating that it was not making any findings on constituents at well AW-3, contamination that was below background, or isolated arsenic exceedances. Mot. In Limine, para. 6, 13 (citing PCB 2018-11, Interim Opinion and Order of the Board at 8 (Sep. 7, 2023) (hereinafter “Bd. Order”)). Respondent’s interpretation is incorrect for several reasons.

Consistent with Complainants' Summary Judgment motion and as shown in the groundwater monitoring report prepared under 40 C.F.R. Part 257, arsenic exceedances were most recently detected at not only well RW-3 (the replacement well for AW-3), but also at wells AP-4, AP-7 and AP-8 throughout the year in 2025. City Water, Light & Power, *Annual Groundwater Monitoring and Corrective Action Report, 40 CFR Part 257, Year Ending Dec. 31, 2025* (Jan. 2026) at PDF p. 22 (referencing Table 2) (attachment omitted) (groundwater reports attached collectively as Exhibit A). Furthermore, all of the arsenic exceedances in 2025 exceeded background. *Id.* These exceedances were not isolated because there were 12 quarterly exceedances at just four wells in the year 2025 alone. *Id.* These patterns of arsenic exceedances were true historically as well. The sampling events in 2022 likewise showed arsenic exceedances above both background and the Illinois Groundwater Quality Standards ("Illinois GWQS") for arsenic at RW-3. City Water, Light & Power, *Annual Groundwater Monitoring and Corrective Action Report, Year Ending Dec. 31, 2022* (Jan. 2023) at PDF p. 15 (referencing Table 1) (appendices omitted) (Ex. A). This happened again in 2023 which showed that arsenic exceeded both background and the Illinois GWQS for all four sampling events at RW-3. City Water, Light & Power, *Annual Groundwater Monitoring and Corrective Action Report, Year Ending Dec. 31, 2023* (Jan. 2024) at PDF p. 27 (referencing Table 2) (appendices omitted) (Ex. A). Finally in 2024, all four sampling events showed arsenic exceeded both background and the Illinois GWQS for arsenic at wells RW-3, AP-7 and AP-8. City Water, Light & Power, *Annual Groundwater Monitoring and Corrective Action Report, Year Ending Dec. 31, 2024* (Jan. 2025) at PDF p. 30 (referencing Table 2) (appendices omitted) (Ex. A).

The evidence shows that arsenic exceedances are not isolated, are demonstrably above background, and are not confined to AW-3 or RW-3. Therefore, Complainants' introduction of

the arsenic evidence is not at all inconsistent with the Board's statement that it makes no findings on those specific issues.¹

II. Relevance in the Remedy Phase of a Case is Not Constrained to Relevance in the Liability Phase

Respondent argues that contamination for parameters not raised in Complainants' summary judgment motion cannot possibly be relevant at this remedy phase of the case. Mot. In Limine, para. 13. Respondent's arguments regarding the relevance or admissibility of evidence during the liability or summary judgment phases of this proceeding are inapposite to the current phase of this matter. *See, e.g., id.* at para. 18. The admissibility of evidence during the liability phase of a bifurcated proceeding is not determinative of relevance during the remedy phase. *People v. Young*, 128 Ill. 2d 1 (1989).

This is true of other types of bifurcated cases in Illinois as well which have addressed the issue of the admissibility of evidence in the remedy phase of a case when that evidence was not admitted during the liability phase. Criminal proceedings are an apt example, where the determination of guilt is routinely bifurcated from sentencing. For criminal proceedings, the Illinois Supreme Court has routinely held that relevance during the guilt phase is not determinative of relevance during the sentencing phase. In *People v. Young*, the Supreme Court explained that during the sentencing phase of a bifurcated hearing, evidence may be introduced

¹ "Having resolved the contested allegations in the renewed motion for partial summary judgment, the Board does not make a finding on the following allegations from the complaint and the amended complaint that the Citizen Groups are not seeking a finding on: 1. whether CWLP surface impoundments caused exceedances of groundwater quality standards at monitoring well AW-3; 2. whether exceedances of groundwater quality standards for arsenic, chromium iron, lead, and manganese detected at downgradient monitoring wells AP-1, AP1R, AP-2, AP-2R, AP-3, and AW-3 at concentrations less than corresponding background levels were caused by CWLP surface impoundments; and 3. whether isolated manganese and arsenic concentrations detected reflect contaminant releases from CWLP surface impoundments. Mot. at 2. Therefore, the Board makes no findings on those specific issues, and instead relies on the findings of the June 2021 Order." Bd. Order at 9 (Sep. 7, 2023).

regardless of whether it was admissible during the guilt phase of the trial. *Id.* Evidence only needs to be reliable and relevant to be admissible at the sentencing stage. *Id.*

Another Illinois case, *People v. Sanchez*, further affirms the standards for admissibility of evidence in bifurcated cases. In *People v. Sanchez*, the Defendant made a similar argument to Respondent's argument in the present case—that the jury should not be allowed to consider evidence of crimes for which the defendant had not been convicted. *People v. Sanchez*, 115 Ill. 2d 238, 277 (1986) (citing *People v. Collins*, 106 Ill. 2d 237, 282 (1985).) The Court in *Sanchez* pointed out that the formal rules of evidence do not apply because the sentencing stage is a wide-ranging inquiry into all factors that may aggravate or mitigate the crime. *Id.* The Court held that during the second phase of a sentencing hearing, the jury may consider any evidence that is reliable and relevant, including evidence of crimes for which the defendant has been charged but not convicted. *Id.*

Similarly here, the only requirement for admissibility in this remedy phase of the case is not whether the evidence was relevant to or admitted in the liability phase, but whether the evidence is reliable and relevant to the remedy phase. As a result, Respondent's arguments as to the admissibility of evidence in the liability phase of this case have no bearing on the admissibility during the current phase.

Nevertheless, arsenic exceedances are highly related to the violations at issue in this litigation. Arsenic contamination is not far afield from boron, sulfate and TDS contamination. At the CWLP site, these constituents together are indicators demonstrating coal ash contamination. See *Supplemental Expert Report of Mark A. Hutson, PG Prepared for: Sierra Club* at 16 (Mar. 26, 2019) (“[T]he wells ... routinely show impacts by ash-related contaminants of concern in the Dallman Ash Pond groundwater monitoring system.”). In addition, it is

indisputable that CWLP's on-site coal ash disposal is the source of the contamination at issue in this case. *See* Bd. Order at 25-26 (June 17, 2021). As explained in Sierra Club's initial expert report, "[o]ther than the CWLP waste facilities that are being discussed herein, there are no other known sources that could be contributing the CCW-related constituents to groundwater." *Expert Report of Mark A. Hutson, PG Prepared for: Sierra Club* at 11 (Oct. 15, 2018); *see also* Bd. Order at 25-26 (June 17, 2021).

It is incontrovertible that the ash pond system is the source of the arsenic contamination. Sierra Club's expert witness noted that "[t]he total arsenic concentrations detected in Lakeside waste porewater ranged from 32.8 to 139 ug/l" which "clearly indicates that porewater contained in the Lakeside Ash Pond is an apparent source of arsenic that is impacting groundwater quality downgradient of the impoundment at AP-4." Mark A. Hutson, *Review of Closure Permit Application and Other Pertinent Materials [at] City, Water, Light and Power Coal Combustion Residual Impoundment* at 16 (Jan. 5, 2025) (attached as Exhibit B). Additionally, "[t]he data also show that unimpacted background groundwater quality from monitoring well AP-5 contains no reportable concentrations of arsenic." *Id.*

Arsenic raises heightened concerns in terms of groundwater contamination because it is an Appendix IV constituent as opposed to an Appendix III constituent. Appendix IV constituents are made up of heavier metals and constituents with health based standards. 40 C.F.R. § 257.95 Assessment monitoring program; *Util. Solid Waste Activities Grp. v. EPA*, 901 F.3d 414 (2018), *Gavin Power, LLC v. EPA*, 2025 U.S. Dist. LEXIS 202823 (2025). CWLP's annual groundwater monitoring reports reflect the concerns around arsenic exceedances given that they require characterization of the nature and extent of arsenic contamination. In fact, CWLP's own report states that "[g]roundwater monitoring wells AP-6 and AP-7 were installed

at downgradient locations to characterize the nature and extent of the total arsenic concentrations at well RW-3.” City Water, Light & Power, *Annual Groundwater Monitoring and Corrective Action Report, 40 CFR Part 257, Year Ending Dec. 31, 2023* (Jan. 2024) at PDF p. 5) (Ex. A). Concerns about arsenic contamination also triggered the move from detection monitoring to assessment monitoring. See City Water, Light & Power, *Annual Groundwater Monitoring and Corrective Action Report, 40 CFR Part 257, Year Ending Dec. 31, 2024* (Jan. 2025) at PDF p. 9 (“In accordance with §257.95, an Assessment Monitoring Program was implemented in February 2018 in response to the statistically significant increase (SSI) over background levels for arsenic and continued in 2024 for both arsenic and cobalt.”)) (Ex. A).

In short, arsenic contamination raises heightened concerns regarding coal ash impacts to the groundwater and these concerns demonstrate why arsenic contamination should not be excluded from remedy phase proceedings.

III. Relevance is Broadened by the Application of the Section 33(c) Factors

Importantly here, evidence is relevant and admissible not only when it pertains to the violations at issue, but also more broadly when the evidence pertains to Section 33(c) of the Illinois Environmental Protection Act. 415 ILCS 5/33. At this remedy phase of the case, the Board is engaged in a wide-ranging inquiry into the Section 33(c) factors which may aggravate or mitigate the violations found during the liability phase. *Incinerator, Inc. v. Pollution Control Board*, 59 Ill.2d 290, 299 (1974); *Processing & Books, Inc. v. Pollution Control Bd.*, 64 Ill. 2d 68, 74 (1976). Section 33(c) of the Act requires the Board to consider "all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved," including the following factors: “(i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the

people; (ii) the social and economic value of the pollution source; (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and (v) any subsequent compliance.” 415 ILCS 5/33(c); *see also Wells Mfg. Co. v. Pollution Control Board*, 73 Ill. 2d 226 (1978). The Section 33(c) factors play a significant part in the Board’s determinations regarding the relevance or admissibility of evidence in its proceedings because they provide a framework for evaluating the reasonableness of violations and exceedances. Evidence is admissible if it pertains to these statutory factors. In *Southern Illinois Asphalt Co.*, the court highlighted that the Section 33(c) factors are relevant not only to determining the reasonableness of pollution but also to assessing a remedy. *Southern Illinois Asphalt Co. v. Pollution Control Bd.*, 60 Ill. 2d 204, 208 (1975). The Board uses the Section 33(c) factors to determine the relevance of evidence presented during proceedings, which at this phase of this proceeding is the determination of a remedy.² Since this is a different determination than liability, the relevance of evidence in this phase will, by definition, be different than the liability phase.

Here, Complainants are presenting evidence of arsenic contamination because it is relevant to the Section 33(c) factors of (i) the character and degree of injury to, or interference with, the protection of health, general welfare, and physical property; and (v) any subsequent compliance. The presence of arsenic shows the magnitude of harm from the coal ash contamination, and this specifically goes to the character and degree of injury because, with the

² The Board's discretion to consider "all the facts and circumstances" ensures that its decisions are not arbitrarily limited to the five enumerated factors. Courts have consistently upheld this broad standard, emphasizing that the Board is not confined to these factors but must consider them alongside any other relevant circumstances. *Southern Illinois Asphalt Co. v. Pollution Control Bd.*, 60 Ill. 2d 204, 207-08 (1975).

presence of arsenic, the contamination poses a greater risk of injury to health, general welfare, and physical property. The continued arsenic contamination also shows that CWLP has not come into compliance with Illinois regulations regarding groundwater contamination. Moreover, as a discussed above, CWLP is even further out of compliance given the presence of arsenic exceedances in multiple wells (e.g. not just well AW-3 or RW-3). *See, supra*, Section II, at p. 2. Accordingly, the arsenic evidence is relevant to this phase of the proceeding because it pertains to Section 33(c) factors.

IV. The Probative Value of the Arsenic Evidence is Not Outweighed by the Risk of Prejudice, Confusion, or Undue Delay

Respondent argues that the arsenic evidence is prejudicial, risks confusion of the issues, and is a waste of time and resources. Mot. In Limine, para. 15. However, Respondent's arguments are not compelling. Pursuant to the Illinois Rules of Evidence, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Illinois Rule of Evid. 403. Importantly, the probative value must *substantially* outweigh the risk of prejudice. *See id.* In other words, the balance tilts in favor of admitting the evidence.

An examination of cases where evidence has been declared to be prejudicial shows that such cases are not at all analogous to the present case. As the court caveated in *People v. Reichert*, "[a]ll evidence is prejudicial in the sense that it compels the factfinder in one direction or the other; the issue posed by Rule 403 is when it becomes unfair[ly] so." *People v. Reichert*, 239 N.E.3d 728, 749 (Ill. App. Ct. 5d Dist. 2023) (citing *People v. Woodson*, 2023 IL App (1st) 191353, ¶ 101). However, evidence is unfairly prejudicial when it serves only to arouse or

influence the emotions of the factfinder. *People v. Reichert*, 239 N.E.3d at 748-749 (citing *People v. Burrell*, 228 Ill. App. 3d 133, 144 (1992)). “Unfair prejudice” is a term that “speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.” *People v. Reichert*, 239 N.E.3d at 749 (citing *People v. Parker*, 335 Ill. App. 3d 474, 487-88 (2002)).

Various Illinois cases further elaborate on this concept. In *People v. Reichert*, the court concluded that evidence that a shooting resulted in an injury to an officer did not cast the defendant in “a negative light that would have nothing to do with the case.” *Id.* In *People v. O’Daniell*, the court indicated that “unfair prejudice” under Rule 403 refers to evidence that casts a negative light on a party for reasons unrelated to the case at hand. *People v. O’Daniell*, 2024 IL App (5th) 230084 (2024) (finding that the video of an interrogation of the defendant unfairly prejudiced him when the video “reveal[ed] the Defendant punching his hand, cursing at the officers while becoming visibly hostile”). Here, the arsenic testimony at issue does not risk arousing or influencing the emotions of the hearing officer or the Board.

While the arsenic testimony may cast a negative light on CWLP for causing such contamination, that information is completely related to the case. The arsenic evidence contributes to the factual determinations regarding the character and degree of injury and whether CWLP has come into compliance with Illinois regulations pertaining to groundwater contamination. The arsenic contamination, lack of compliance, and injury to groundwater are at the heart of this case as opposed to being unrelated to the case. Similar to *People v. Reichert*, the arsenic evidence does not cast Respondent in “a negative light that [has] nothing to do with the case.” *Id.*

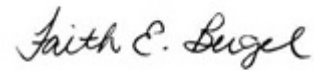
Finally, Respondent's argument that Mr. Hutson's arsenic testimony "would require CWLP cross-examine Complainants' witness and present testimony in its case rebutting evidence of these allegations which will cause a waste of time and resources for a matter that has already been pending for over eight years" falls flat. Mot. In Limine, para. 15. As noted above, Rule 403 is a balancing test and the undue delay must *substantially* outweigh the probative value of the evidence. *People v. Epstein*, 2022 IL 127824 (2022).

In the present case, the probative value of the evidence is high and outweighs the additional time needed for cross examination and additional direct testimony. Cross examining Mr. Hutson and presenting testimony will take time but considering how the arsenic evidence is highly relevant to factors that the Board must consider in its remedy decision, it is hardly a waste of time or undue delay.

CONCLUSION

For all the reasons stated above, Complainants respectfully request that the Hearing Officer deny Respondent's Motion in Limine.

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