

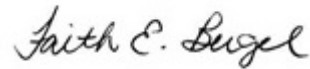
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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' APPEAL OF HEARING OFFICER'S RULING ON ARSENIC** via electronic mail to the parties listed on the attached service list before 5:00 p.m.

Respectfully submitted,



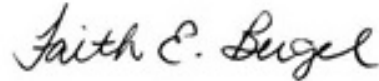
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Dated: June 16, 2026

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' APPEAL OF HEARING OFFICER'S RULING ON ARSENIC** before 5 p.m. Central Time on June 16, 2026 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 12 pages.

Respectfully submitted,



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COMPLAINANTS’ APPEAL OF HEARING OFFICER’S RULING ON ARSENIC

Sierra Club, Prairie Rivers Network, and National Association for the Advancement of Colored People (collectively “Complainants”) hereby appeal to the Board the Hearing Officer’s Ruling on Respondent Springfield, Office of Public Utilities d/b/a City Water, Light and Power’s (“Respondent”) objection to Complainant’s expert witness testimony on arsenic at the May 5, 2026. Respondent’s objection was ill-founded because the Section 33(c) factors broaden relevance in the remedy phase.

PROCEDURAL BACKGROUND

On April 7, 2026, CWLP filed a motion in limine seeking to exclude evidence of (1) exceedances of groundwater standards for contaminants other than boron, sulfate and TDS; and (2) exceedances of groundwater standards at monitoring wells other than AP-1R, AP-2, AP-2R and AP-3. As noted by Hearing Officer Webb, the Board advised parties to use the hearing to “present facts that enable the post-hearing briefs to propose a remedy that addresses 33(c)

factors.” Hr’g Off. Order at 3 (April 27, 2026). Hearing Officer Webb ruled that because “the purpose of this hearing is to assist the Board in fashioning a remedy for the violation of Section 12(a) of the Act and Part 620 for the discharge of boron, sulfate, and TDS at the aforementioned wells,” that “[e]vidence of other constituents, including those found in well AW-3, will be admitted with limitations to argue 33(c)/42(h) factors.” *Id.* In short, Hearing Officer Webb’s ruling permits Complainants to submit limited evidence on arsenic to “argue 33(c) ... factors”.

Respondent objected to Complainants’ limited arsenic testimony and argued again that they are prejudiced by it. *Id.* at 131:15-132:3 (arguing that the Complainants’ questions seemed to be aimed at “presenting evidence about whether arsenic concentrations are caused by the ash ponds or not”). Respondent concluded by stating that “[u]nder Illinois law, boron, sulfate, and TDS is enough to require a remedy” and allowing discussion of arsenic pollution would only “complicate things for the Board to focus on something that hasn't been established as a liability.” *Id.* at 135:14-22 (conceding that arsenic pollution would be relevant under federal law, “[b]ut under Illinois law, we have to fix the boron, sulfate, and TDS”).

Hearing Officer Webb subsequently reversed course and ruled that because Complainants received “the adjudication already on the boron, sulfate, and TDS,” that additional discussion about arsenic was not need for the remedy. *Id.* at 136:2-12 (noting that the Hearing Officer also indicated that such additional discussion might be considered unfair).

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 144. 145 (5th Dist. 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 S. Group et al. v. IPCB and Village of Matteson*, 275 Ill. App. 3d 547, 553-54 (1st Dist. 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.

Complainants’ testimony on arsenic exceedances is consistent with the Board’s 2023 Summary Judgment Order. In that Order, the Board clarified that Complainants were “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, AP-1R, 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.

PCB 2018-11, Interim Opinion and Order of the Board at 9 (Sep. 7, 2023) (hereinafter “2023 SJ Order”). Accordingly, the Board stated that it was not making any findings on constituents at well AW-3, contamination that was below background, or isolated arsenic exceedances. *Id.* (explaining that “the Board makes no findings on those specific issues”). The arsenic exceedances Complainants raise now do not contradict their prior stated position or the Board’s findings in the 2023 Order because they take place at multiple wells—AP-4 and AP-7—in addition to well RW-3 (the replacement well for AW-3), they exceed background, and they are not isolated.

First, as shown in one of the recent groundwater monitoring report prepared under 40 C.F.R. Part 257, arsenic exceedances were detected at not only well RW-3, but also at wells AP-7 and AW-1. *See, e.g.,* Hr'g Ex. 8, 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. 21. Second, all these arsenic exceedances at RW-3, AP-7, and AW-1 in 2024 also exceeded background. *Id.* Finally, these exceedances were not isolated because there were twelve quarterly exceedances at just three wells in the year 2024 alone. *Id.* The sampling events in 2022 likewise showed arsenic exceedances above both background and the federal MCL for arsenic at RW-3. Hr'g Ex. 27, City Water, Light & Power, *Annual Groundwater Monitoring and Corrective Action Report, Year Ending Dec. 31, 2022* (Jan. 2023) at PDF p. 17 (referencing Table 1). This happened again in 2023, when arsenic exceeded both background and the federal MCL at RW-3. Hr'g Ex. 13, City Water, Light & Power, *Annual Groundwater Monitoring and Corrective Action Report, Year Ending Dec. 31, 2023* (Jan. 2024) at PDF p. 17 (referencing Table 2).

The evidence shows that arsenic exceedances are not confined to wells AW-3 or RW-3, are demonstrably above background, and are not isolated incidents. 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.

II. Discussion about arsenic exceedances is necessary to understand the full scope of contamination that should inform the remedy.

Contrary to Respondent's objections, Arsenic exceedances are related to the violations at issue and appropriate to consider during the remedy phase of this litigation. Arsenic contamination is not far afield from boron, sulfate and TDS contamination. At the CWLP site, these constituents together are indicators demonstrating the severity of 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 CCR-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). Sierra Club's expert witness, Mark Hutson, further 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.” Hr'g Ex. 15, 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).

Conversely, Mr. Hutson explained that “unimpacted background groundwater quality from monitoring well AP-5 contains no reportable concentrations of arsenic,” which further suggests that CWLP’s ash pond system is the source of the arsenic contamination. *Id.*

Putting aside the exact source of the arsenic exceedances, there is still a good reason for this Board to consider arsenic when ordering a remedy for this case. 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 are 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 CWLP’s move from detection monitoring to assessment monitoring to quantify the releases and determine if corrective action would be needed. *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). Even though Complainants’ did not initially raise arsenic

contamination, discussion about arsenic exceedances is still relevant here because arsenic is a coal ash contaminant that has been found throughout CWLP's ash pond site in the downgradient monitoring wells and also at heightened levels the Lakeside Ash Pond porewater. These exceedances amplify concerns about the pervasiveness of coal ash contamination at the site that are highly relevant in this remedy phase proceeding and should be considered instructive when the Board considers an appropriate remedy.

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

The only requirement for admissibility in this remedy phase of the case is not whether the evidence is relevant to or was admitted in the liability phase, but whether the evidence is reliable and relevant to the remedy phase. As explained above, Respondent's primary objection to discussion of arsenic exceedances was that it was irrelevant to the remedy for boron, sulfate, and TDS because it was not included as part of the liability finding. May 5, 2026 Tr. 135:3-22. Hearing Officer Webb ruled that because Complainants received "the adjudication already on the boron, sulfate, and TDS," that additional discussion about arsenic was not needed for the remedy. *Id.* at 136:2-12 (stating that there was "no discussion about arsenic for a number of years, and then it just kind of resurfaced here at the end right as we were getting ready for hearing"). The issue here, however, is not necessarily about the violations attributable to arsenic but rather that arsenic exceedances go to considerations under the Section 33(c) factors. It is those considerations that make arsenic relevant to this remedy phase of litigation.

The Hearing Officer did not explicitly consider the Section 33(c) factors when she ruled that Complainants don't need arsenic testimony for our remedy. *Id.* at 135:24-136:7. 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. Hearing Officer Webb acknowledged this when ruling on the Motion in Limine related to arsenic stating that “[e]vidence of other constituents, including those found in well AW-3, will be admitted with limitations to argue 33(c)/42(h) factors in the post-hearing brief.” Hr’g Off. Order at 3 (April 27, 2026).

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. PCB*, 59 Ill.2d 290, 299 (1974); *Processing & Books, Inc. v. PCB*, 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. PCB*, 73 Ill. 2d 226, 232-39 (1978) (explaining that application of the Section 33(c) factors “does not mean, however, that the Board must find against the respondent on each of the four statutory criteria of section 33(c), or that the Board is precluded from considering additional relevant factors”). 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. This same standard applies to the Board’s assessment of an

appropriate remedy. *So. Illinois Asphalt Co. v. PCB*, 60 Ill. 2d 204, 208 (1975) (stating that “the standards of section 33(c) are also relevant standards which the Board must consider in mitigation or aggravation in determining the particular action to be taken or penalty to be imposed under section 33(b) of the Act”). 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.¹ Therefore, evidence is admissible if it pertains to these statutory factors.

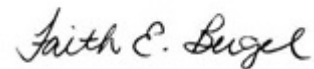
Here, Complainants are presenting evidence of arsenic contamination because it would aggravate the violations already found by the Board during the liability phase. It is relevant to the Section 33(c) factors of (i) the character and degree of injury to, or interference with, the protection of health, general welfare, and physical property; and (v) any subsequent compliance. The presence of arsenic augments the harm from the coal ash contamination, which goes to the character and degree of injury because, with the addition of arsenic, the contamination poses a greater risk of injury to health, general welfare, and physical property. While arsenic was not a subject of the liability phase of this case, continued arsenic contamination at the coal ash site also shows that CWLP has not come into compliance with Illinois regulations regarding groundwater contamination. Moreover, as discussed above, CWLP’s level of compliance is worsened given the presence of arsenic exceedances in multiple wells (e.g., not just well AW-3 or RW-3). Accordingly, the arsenic evidence is relevant to this phase of the proceeding because it directly pertains to the Section 33(c) factors.

¹ 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. *So. Illinois Asphalt Co. v. PCB*, 60 Ill. 2d 204, 207-08 (1975).

CONCLUSION

For all the reasons stated above, Complainants respectfully request that the Board reverse Hearing Officer's Webb's ruling on Respondent's objection to Mark Hutson's testimony on arsenic.

Respectfully submitted,



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