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	)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO RESPONDENT'S PROPOSED MOTION *IN LIMINE* REGARDING EXPERT TESTIMONY**, copies of which are served on you along with this notice.

Respectfully submitted,

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Dated: June 8, 2017

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MIDWEST GENERATION, LLC,	)	
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Respondents	)	

COMPLAINANTS' RESPONSE TO RESPONDENT'S PROPOSED MOTION *IN LIMINE* REGARDING EXPERT TESTIMONY

Complainants Sierra Club, Environmental Law & Policy Center ("ELPC"), Prairie Rivers Network, and Citizens Against Ruining the Environment ("CARE"), by their undersigned counsel, hereby submit this Response to the Motion *in Limine* ("Motion") submitted by Respondent Midwest Generation, LLC ("MWG") regarding expert testimony.

Complainants oppose the Motion as written. A significant amount of discovery was produced after the expert reports and depositions. The experts must be free to update their opinions to incorporate this new information. Such updates to expert opinions do not cause any surprise or prejudice, because the updated opinions are based upon properly produced discovery and are merely updates to previously disclosed opinions. Complainants would not object to an order barring new opinions (*i.e.*, opinions that were not provided in the expert reports and depositions). Complainants also would not object to an order barring expert testimony or opinions based on information not produced during discovery. However, Respondent's Motion

crosses the line by requesting a broader exclusion of expert opinions than is justified. Accordingly, Complainants must object.

I. BACKGROUND

On June 9, 2014, the Hearing Officer entered a discovery schedule, which included deadlines for expert reports and depositions. Pursuant to the discovery schedule, as modified by the Hearing Officer, the Parties timely exchanged expert reports and took the depositions of the opposing Parties' experts. Also pursuant to the discovery schedule, the Parties have continued to supplement their discovery responses to ensure that all relevant information is fully updated in preparation for the upcoming hearing in this matter. These updated responses have included updated logs of communications with experts, periodic groundwater monitoring reports, updated site maps, and other documents that relate directly to the questions at issue in this proceeding.

Complainants' expert, Dr. James Kunkel, submitted his initial expert report in this matter on July 1, 2015. He submitted a rebuttal report responding to Respondent's expert John Seymour on December 8, 2015.[1] On March 16, 2016, Dr. Kunkel submitted a supplemental report that responded to newly produced documents Respondent provided at the March 1, 2016 deposition of Mr. Seymour. Respondent took Dr. Kunkel's deposition on March 17, 2016. Since these reports and depositions, the parties have exchanged over 4,000 pages of additional discovery, including documents relevant to the opinions of both parties' expert witnesses.

II. DISCUSSION

While Respondent is correct that Illinois evidentiary rules explicitly require all expert opinions and bases thereto to be disclosed in advance of a hearing, the rules do not and are not intended to restrict experts from incorporating updated information into their opinions, so long as

[1] Dr. Kunkel submitted a supplemental rebuttal report on March 9, 2016 to include several additional citations to documents produced by Respondent during discovery.

sufficient notice is given to the opposing party. Rules 213(f)(3) and (g) of the Illinois Supreme Court Rules require that parties disclose expert witnesses' proposed testimony, including the conclusions and the bases for those conclusions. Ill. Sup. Ct. Rule 213(f)(3), (g). Under Rule 213(i), parties must supplement these responses "whenever new or additional information subsequently becomes known to that party." *Id.* at 213(i). As Respondent notes, the Illinois Supreme Court has said that the purpose of this rule is to avoid surprise. *Sullivan v. Edward Hosp.*, 209 Ill. 2d 100, 110 (2004). But the very existence of Rule 213(i) and Illinois case law make clear that the duty to supplement carries with it a presumption that experts may expand their analysis to incorporate any newly discovered information. *See, e.g.*, *McGrew v. Pearlman*, 304 Ill. App. 3d 697, 705 (1st Dis. 1999) (contemplating that parties will share new or additional information that may form an additional basis for an expert's opinion). Indeed, any other result would be nonsensical: the purpose of supplemental discovery is to ensure that all available information is provided to all parties before a hearing, and that purpose would be undermined if experts were forbidden from incorporating new, properly produced information into their analyses.

Respondent cites several Illinois cases that emphasize the importance of disclosing all expert opinions in a timely manner, but none of those cases address a situation where an expert refines his or her analysis based on new information disclosed by the opposing party. Instead, Respondent's cases address situations where parties failed to disclose entire categories of testimony. *See Sullivan*, 209 Ill. 2d at 108-09 (excluding testimony related to a nurse's communication practices because expert disclosures did not list communication practices as an issue); *Clayton v. Cnty. of Cook*, 346 Ill. App. 3d 367 (1st Dist. 2004) (excluding an entire line of testimony about lack of supervision because it was not mentioned in pretrial disclosures); *Dep't*

of Transp. v. Crull, 294 Ill. App. 3d 531, 536-538, (4th Dist. 1998) (disallowing testimony on previously undisclosed opinions).

By contrast, courts have consistently allowed experts to update and modify their previously disclosed opinions based on newly discovered information, so long as proper notice is provided. *See, e.g.*, *Coleman v. Abella*, 322 Ill. App. 3d 792, 799-800 (1st Dist. 2001) (allowing updated testimony from an expert where that expert had relied on disclosed information that "influenced [her] testimony . . . and deepened [her] understanding of what [she] wanted to say"). As the court in *Coleman* properly noted:

> Unless we are prepared to put expert witnesses in space or the deep freeze during the period between the deposition and the testimony at trial, deepening of a witness' understanding of some of the issues that were the subject of the deposition testimony must be a common matter.[2]

Id. In the case at hand, the benefit of the new information would merely be to identify new bases for existing opinions and, at most perhaps, expanding and deepening the expert witnesses' analyses to incorporate the new information. This benefit accrues to both experts for both parties. All new bases for experts' opinions were timely disclosed to the opposing party, so there is no surprise or prejudice. But more fundamentally, expanding upon or deepening expert testimony as new information comes to light is part of what experts are properly asked to do, and allowing that process to continue even after depositions are taken is completely different from allowing experts to develop new opinions from whole cloth (which is properly disfavored by Illinois courts). Thus, there is no basis for barring expert testimony that expands upon or deepens previously disclosed opinions based on newly discovered, properly disclosed information.

[2] This case is even more powerful because Plaintiffs in that discovery process had failed to disclose the additional sources their expert relied on; this formed the basis for Defendant's motion to strike the expert testimony. In the case at hand, the parties have fully disclosed supplemental information that may influence expert testimony well in advance of hearing.

III. CONCLUSION

For the reasons stated above, Complainants request that the Hearing Officer deny Respondent's Motion to the extent that it seeks to prohibit expert testimony based on new, properly disclosed evidence.

Respectfully submitted,

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Dated: June 8, 2017

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **COMPLAINANTS' RESPONSE TO RESPONDENT'S PROPOSED MOTION *IN LIMINE* REGARDING EXPERT TESTIMONY** was served electronically to all parties of record listed below, on June 8, 2017.

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