BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' MOTION FOR LEAVE TO FILE *INSTANTER* A REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANTS' MOTION TO STRIKE**, copies of which are served on you along with this notice.

Respectfully submitted,

_/s/ Abel Russ

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Dated: April 3, 2018

Attorney for Prairie Rivers Network

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **COMPLAINANTS' MOTION FOR LEAVE TO FILE *INSTANTER* A REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANTS' MOTION TO STRIKE**, was served electronically to all parties of record listed below on April 3, 2018.

Respectfully submitted,

__/s/ Akriti Bhargava________________

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Electronic Filing: Received, Clerk's Office 4/3/2018

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<u>COMPLAINANTS' MOTION FOR LEAVE TO FILE *INSTANTER* A REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANTS' MOTION TO STRIKE</u>

Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") submit this motion for leave to file *instanter* Complainants' Reply to Respondent Midwest Generation's ("Respondent") reply to Complainants' Motion to Strike. In support of this motion, Complainants state as follows:

1. On March 26, 2018, Complainants moved to strike portions of Respondent expert's reports and testimony ("Motion to Strike").

2. On March 20, 2018, Respondent filed a response to the Motion to Strike ("Response"). While only providing a limited response to the substance of Complainants' Motion to Strike, the Response raised several new procedural and legal arguments. Specifically, Respondent argued, among other things, that Complainants had waived any objection to the evidence and testimony

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at issue, and that Complainants had violated Hearing Officer orders and Illinois Pollution Control Board ("Board") rules by filing the Motion to Strike.

3. Complainants would be prejudiced if they were not allowed to address these new and harmful arguments.

WHEREFORE, for the reasons stated above, Complainants request that the Hearing Officer grant leave to file *instanter* the attached Reply brief.

Respectfully submitted,

/s/ Faith Bugel

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Dated: April 3, 2018

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MIDEWEST GENERATION, LLC,	)	
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<u>COMPLAINANTS' REPLY TO RESPONDENT'S RESPONSE TO COMPLAINANTS' MOTION TO STRIKE PORTIONS OF RESPONDENT EXPERT'S REPORTS AND TESTIMONY</u>

Complainants' Motion to Strike Portions of Respondent Expert's Reports and Testimony ("Motion to Strike") was timely, was not in violation of any Hearing Officer order or Illinois Pollution Control Board ("Board") rule, and supports the removal of the relevant evidence and testimony from the record. Respondent Midwest Generation ("Respondent") filed a Response to the Motion to Strike ("Response") on March 20, 2018. In its Response, Respondent largely ignored the substance of Complainants' Motion, presumably because their expert conceded that his methodology was flawed. *See* Complainants' Memorandum in Support of Motion to Strike at 7-9, 11-12. Instead, Respondent focuses its argument on the incorrect claim that Complainants' Motion was not properly filed. In fact, Board rules are silent on this issue, and post-hearing Motions to Strike are not prohibited. Furthermore, the facts here clearly indicate that Complainants filed the Motion at the first proper procedural opportunity.

Complainants moved to strike parts of certain exhibits and testimony of Respondent's expert—Mr. John Seymour—as soon as they had an opportunity to review the hearing transcript. Contrary to Respondent's assertions, Mr. Seymour's hearing testimony was significantly more illuminating than his deposition testimony. For example, it was only at the hearing that Mr. Seymour conceded error (in fact, multiple errors) and admitted that his approach should have shown a 100% match between coal ash leachate and groundwater. It was only after reviewing the transcript that Complainants were able to compile a motion detailing how his methodology failed the Illinois standard for expert opinions. Since there was nothing improper about the Motion to Strike, and because the evidence at issue in the Motion has a high likelihood of misleading the Board, the Motion should be granted and the evidence and related testimony struck from the record.

I. Controlling case law does not prohibit post-hearing motions to strike.

As an initial matter, there is no rule or precedent disallowing parties from filing motions to strike like the Motion Complainants filed here. Respondent cites numerous examples of evidentiary objections being waived for purposes of appeal, MWG Response at 4 – 7, but none of these cases suggest that a motion to strike without a prior objection is inconsistent with Board or Illinois precedent. Because Complainants' did not file the Motion to Strike as part of any appeal, and Respondent does not cite any precedent suggesting that a post-hearing motion to strike is waived if no objection was made, there is no basis for dismissing Complainants' Motion.

What Respondent's cited research and other controlling law does indicate is that, for purposes of appeal, "[a] party must make a timely objection" or they waive their right to do so. *People v. Carlson*, 70 Ill. 2d 564, 576 (1980), citing *People v. Roberts*, 75 Ill. 2d 1, 10 (1979).

Again, this case refers to waiver on appeal, but even were the waiver doctrine to apply to post-hearing motions before the Board, it would not justify dismissing Complainants' Motion to Strike, because the Motion was timely. Case law indicates that whether an objection is "timely" depends on the circumstances. Objections can be timely even when raised after evidence is introduced, in motions to strike, and in post-trial or post-hearing motions. *See, e.g., Netto v. Goldenberg,* 266 Ill. App. 3d 174, 178 (1994), ("A motion to strike is required to preserve errors in the admission of evidence. If the objectionable nature of evidence is not apparent until after it is admitted, the opponent should move to strike the offending evidence"); *Bosel v. Marriott Corp*., 65 Ill. App. 3d 649, 654 (1978) (disallowing defendant from raising objections for the first time on appeal when no objection or motion to strike was made); *West Suburban Recycling and Energy Center, L.P. v. Illinois EPA*, PCB 95-119 and 95-125, 1996 WL 633368 (Oct. 17, 1996) (holding that a party had waived an argument by failing to raise the argument when it objected at the hearing or in a written motion to the Hearing Officer); *Peoria Disposal Co.*, PCB 06-184 at * 22 (holding that an objection was only waived because petitioner failed to object at the original proceeding or in a "post-meeting response"). As these cases indicate, courts have often allowed for the possibility of filing post-hearing evidentiary motions even without a prior objection, which is exactly what Complainants have done here.

Treating post-hearing motions to strike before the Board as timely is also consistent with the rationale for the waiver doctrine as articulated by both the Board and Illinois Courts, combined with the Board's distinct procedure for hearing cases. For example, in *Peoria Disposal Co.*, the Board stated that "it would be improper to allow a party to withhold a claim of bias until it obtains an unfavorable ruling." *Id*. In the present case, there has been no "ruling" on the merits of the case, so there would be nothing improper about allowing the Motion to Strike. Similarly,

in *Goldberg v. Capitol Freight Lines*, the court explained the rule as one that requires objections to be made before a jury makes a decision. *Goldberg v. Capitol Freight Lines, 382 Ill. 283, 291 (1943); see also People v. Carlson*, 79 Ill. 2d at 577 ("The failure of counsel to object at trial waives those errors which the court can correct by sustaining an objection and admonishing the jury"). In short, the only objections that can be raised on appeal are those that were brought to the attention of the lower court (or other body) before the court or other body made a decision. In a trial court setting, this is typically the trial itself. In other settings, such as cases before the Pollution Control Board, there is of course no jury, and a decision is not reached until well after the end of the hearing. Consequently, a post-hearing motion to strike directed to the Hearing Officer before the Board has made its decision is still timely. In this case, Complainants filed the Motion to Strike "as soon as practicable," that is, as soon as Complainants received the hearing transcript and were able to compile a motion. *People v. Koch*, 248 Ill. App. 3d 584, 593 (1993), Complaints also filed the Motion before a decision had been reached on the merits of the case. The Motion was therefore not only properly filed, but also preserved for appeal.

II. Complainants did not needlessly delay filing their motion

In an effort to paint Complainants' motion as needlessly delayed, Respondent relies on misrepresentations of fact. To begin with, it ignores the relevant event that enabled filing of the motion, claiming that Complainants filed the Motion to Strike "long after the hearing." MWG Response at 4. This claim is both incorrect—the Motion to Strike was filed on February 26, roughly three weeks after the hearing ended—and irrelevant, because it ignores that Complainants filed this motion only six days after the transcripts were made available.[1] As

[1] Although the Pollution Control Board docket lists the transcripts as being filed between February 6 and 9, the transcripts were not in fact available until roughly February 20. The Hearing Officer and the parties agreed on this point during a status call, and the Hearing Officer subsequently set the deadline for motions to correct the transcripts

discussed above, the Motion to Strike was filed “as soon as practicable,” *People v. Koch*, 248 Ill. App. 3d 584, 593 (1993), and was therefore timely.

Respondent’s Response then implies that the hearing testimony of its expert was substantially identical to the expert’s deposition testimony, and that Complainants therefore had adequate grounds for objecting prior to the hearing. MWG Response at 9. This is false. Mr. Seymour’s testimony was different, and much more damaging to his methodology, at the hearing. During cross-examination, Mr. Seymour conceded multiple errors in his methodology, and conceded that his approach, properly applied, should have found a 100% match between coal ash leachate and on-site groundwater contamination. *See* Complainants’ Memorandum in Support of Motion to Strike at 7-9, 11-12. Mr. Seymour did not make these concessions in his deposition, nor were these concessions on the record in any other manner (*e.g.*, in expert reports or in the testimony of other witnesses), when he gave his direct testimony or when the evidence at issue was introduced. Again, it was only after reviewing his testimony that Complainants were able to compile a motion detailing how his methodology failed the Illinois standard for expert opinions.

Respondents were not precluded from eliciting testimony on these issues, MWG Response at 11, and Respondents did in fact elicit such testimony. On re-direct examination at the hearing, Respondent asked Mr. Seymour numerous questions in response to Complainants’ cross-examination, specifically focused on the issues identified in the Motion to Strike. PCB 13-15 Hearing Transcript, Feb. 2, 2018, pp. 312-316, 322-323.

Finally, Respondents have no basis for their claim that Complainants violated a Hearing Officer order or Board rule, MWG Response at 11-12. Complainants have not appealed, and do

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for January 29, February 1, and February 2 as March 13, using February 20 as the beginning date for the three-week deadline.

not plan to appeal, the Hearing Officer's order admitting the exhibits at issue in the Motion to Strike. Complainants agree that those exhibits are otherwise generally admissible and were properly admitted. Instead, Complainants take issue with Mr. Seymour's methodology, and seek to exclude that methodology and its misleading conclusions from the record. This would require striking portions, but by no means all, of the relevant exhibits. Since the grounds for the Motion to Strike arose after the evidence was admitted,[2] Complainants believe that partially striking some of that evidence is proper.

III. Respondent failed to effectively rebut the substance of Complainants' Motion

Respondent's limited response to the substance of the Motion to Strike is not persuasive. Respondent suggests that Mr. Seymour's methodology was "standard," and that Complainants failed to establish that Mr. Seymour's methodology was "new or novel"; but this is plainly inaccurate. As laid out in the Motion to Strike, Mr. Seymour's methodology has never been used before, not even by Mr. Seymour himself. Complainants' Memorandum in Support of Motion to Strike at 15-17 ("…his inherently unreliable and biased methodology is novel, untested, and not generally accepted in the field") (emphasis added). It is hard to imagine a more "new or novel" methodology than one never used before.

While it is standard practice to compare various sources of data in a general sense, Mr. Seymour's methodology was unique, and much more than a casual comparison. Instead, Mr. Seymour's methodology made numerous specific and inappropriate quantitative comparisons, *Id*. at 10-15, evaluated those comparisons using critically flawed assumptions about whether the data "matched," *Id*. at 6-9, calculated "matching percentages" for each well, *Id.* at 4-5, and drew flawed conclusions about whether these matching percentages supported that the possibility that

[2] The exhibits at issue here were introduced during Mr. Seymour's direct testimony, while the grounds for the Motion to Strike arose during his subsequent cross-examination.

groundwater had been affected by coal ash leachate. *Id.* at 8-9, 11, 17. That Mr. Seymour's method is much more complicated than a simple comparison can be seen in Mr. Seymour's repeated confusion upon being shown his errors. *See, e.g.,* PCB 13-15 Hearing Transcript, Feb. 2, p. 243:4-24 (MR. SEYMOUR: "Mr. Russ, I – I would agree that it looks that way. I – as I said, I am a little bit confused"); *see also* Complainants' Memorandum in Support of Motion to Strike at 9, 11, and 12.

IV. Conclusion

Ultimately, Complainants' Motion to Strike seeks to exclude inaccurate evidence and testimony that would mislead the Board by showing a "mismatch" between coal ash leachate and groundwater where there should instead be a 100% match. This critically important evidence is central to the case, and Complainants would be unduly prejudiced by having novel, unreliable, and inaccurate expert testimony in the record. For that reason, and because controlling law does not prohibit Complainants' Motion to Strike, the Hearing Officer should grant the Motion and ensure that the record does not mislead the Board.

Respectfully submitted,

___/s/ Faith Bugel___________

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Dated: April 3, 2018