

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 2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

NOTICE OF FILING

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

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent, Midwest Generation, LLC's Response to Complainants' Motion to Strike Portions of Respondent Expert's Reports and Testimony, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 20, 2018

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service and Respondent, Midwest Generation, LLC's Response to Complainants' Motion to Strike Portions of Respondent Expert's Reports and Testimony was filed electronically on March 20, 2018 with the following:

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

and that true copies were emailed on March 20, 2018 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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**MIDWEST GENERATION, LLC’S RESPONSE TO COMPLAINANTS’
MOTION TO STRIKE PORTIONS OF RESPONDENT
EXPERT’S REPORTS AND TESTIMONY**

The Hearing Officer should deny Complainants’ Motion to Strike Portions of Respondent Expert’s Reports and Testimony (“Complainants’ Motion” or “Motion to Strike”), because the Motion to Strike violates the Hearing Officer’s Order and Illinois Pollution Control Board (“Board”) Rules. Complainants have waived any objection to the expert reports and the expert testimony by failing to object to the evidence when it was admitted by the Hearing Officer during the hearing. Even if Complainants could somehow avoid a waiver, Complainants’ Motion fails to fully address the analysis required by the Board’s Rules for admitting evidence or by Rule 702 of the Illinois Rules of Evidence.

Because the Motion to Strike is in violation of Board Rules and Complainants clearly waived any right to object to the evidence, the Motion to Strike is not warranted by existing law and has caused a needless increase in the costs of litigation for MWG. Complainants’ Motion is part of a pattern of delays and is consistent with the Sierra Club’s public “campaign” to shut down coal by

forcing MWG to incur unnecessary costs. Concurrent with this Response, Midwest Generation, LLC (“MWG”) is asking the Board to grant sanctions pursuant to 35 Ill. Adm. Code 101.800 and is seeking admission of MWG Exhibit 622, Sierra Club’s 2014 Team IL-Beyond Coal Campaign Plan.¹

I. Brief Background

During the hearing on this matter on February 1, 2018, MWG’s Expert Witness, Mr. John Seymour, presented his opinion that constituents in the groundwater under the MWG stations did not match the constituents detected in the MWG coal ash (the “constituent comparison”). PCB13-15 Hearing Transcript, Feb. 1, 2018, pages 281:13 – 284:4. Mr. Seymour originally presented this constituent comparison as part of his expert report submitted to Complainants on November 2, 2015 and supplemented on February 29, 2016. MWG Exhibits 903, Section 5.5.2 and 904. On March 1, 2016, Complainants deposed Mr. Seymour, and specifically asked him about his method of conducting the constituent comparison, the detection limits of the constituents, and even asked Mr. Seymour to compare the table in his report to a groundwater monitoring report. *See* excerpt of John Seymour Dep. March 1, 2016, attached as Exhibit 1. Pursuant to the Hearing Officer’s Order dated April 11, 2017, all motions *in limine* were to be filed by May 22, 2017. Despite having notice of Mr. Seymour’s opinion and opportunity to object, Complainants did not file any motion *in limine* to limit Mr. Seymour’s opinion or testimony.

Mr. Seymour supported his testimony about the constituent comparison with a detailed PowerPoint presentation that contained more recent, updated groundwater data. MWG Exhibit

¹ The Hearing Officer declined to admit or exclude Exhibit 662, but ordered the parties to brief the issues. On March 1, 2018, after briefs were submitted, the Hearing Officer ruled to exclude Exhibit 622 finding that it was not relevant. MWG will file a timely appeal of the Hearing Officer’s decision to exclude Exhibit 662. Complainants’ Motion to Strike provides additional grounds to establish the relevancy of Exhibit 622 and Complainants’ pattern of conduct.

901, pp 11-12. The PowerPoint was provided to the Complainants on January 30, 2018. Still, Complainants did not file an objection or a motion *in limine* regarding Mr. Seymour's opinion or conclusions.

At the hearing, Mr. Seymour provided detailed testimony about the process he used for his constituent comparison. He testified that he conducted a comparison of the occurrence of constituents in groundwater with constituents of the ash stored in the MWG ash ponds and concluded that the profiles of the constituents in the groundwater did not match the profiles of leachate constituents in the ponds at the plant sites. PCB13-15 Hearing Transcript, Feb. 1, 2018, pp. 281:4-284:4, Feb. 2, 2018, pp. 14:6-20:17, 69:4-70:9, 92:11-93:2, 118:18-119:18. He further testified that this type of comparison is performed all the time and is "standard" in his field. PCB13-15 Hearing Transcript, Feb. 1, 2018, p. 283:1-3. Throughout Mr. Seymour's lengthy testimony, Complainants made no objections to any of his statements regarding his constituent comparison. *Id.* At the end of Mr. Seymour's direct testimony, MWG moved to enter the exhibits discussed during Mr. Seymour's testimony including his expert report as Exhibit 903, the supplement to Mr. Seymour's report as Exhibit 904, and the updates to Mr. Seymour's report as part of the expert hearing presentation as Exhibit 901. PCB13-15 Hearing Transcript, Feb. 2, 2018, p. 128:7-9. Complainants stated they had "No objection" to the admission of all of the exhibits. PCB13-15 Hearing Transcript, Feb. 2, 2018, p. 128:18. Thereupon, the Hearing Officer held that "Respondent Exhibits 900, 901, 902, 903, 904, 905, 906, 907, and 908 [were] admitted." PCB13-15 Hearing Transcript, Feb. 2, 2018, p. 128:21-23.

During their cross-examination, Complainants asked Mr. Seymour questions regarding his constituent comparison. PCB13-15 Hearing Transcript, Feb. 2, 2018, pp. 231:2-280:22. Complainants repeated the same line of questions during Mr. Seymour's cross-examination at the

hearing on February 2, 2018 as the questions that they asked during his March 1, 2016 deposition. PCB13-15 Hearing Transcript, Feb. 2, 2018, pp. 231:2-280:22, and Exhibit 1, Seymour Dep. Yet, throughout Mr. Seymour's testimony regarding his constituent comparison, Complainants did not object to Mr. Seymour's testimony, nor move to strike Mr. Seymour's testimony. *Id.*

On February 26, 2018, long after the hearing, Complainants filed their Motion to Strike, which they directed to the Hearing Officer. Complainants' Motion to Strike is the first time that Complainants made *any* objection to Mr. Seymour's expert opinion, expert report or expert testimony. Following receipt of Complainants' Motion, MWG notified Complainants that their Motion to Strike was in contravention of established law, asked for the basis of the motion, and requested that they withdraw the motion. Without giving MWG any information as to why their motion was not waived and barred by Board Rules or Illinois law, Complainants declined MWG's request to withdraw the motion.

II. Sierra Club Waived Any Right to Appeal Admission of the Expert Reports or Testimony By Failing to Object at the Hearing

There is no question that Complainants have waived the right to appeal or strike the admission of any part of the expert reports or testimony. A "...failure to object to the admission of evidence operates as a waiver of the right to consider the question on appeal. *People v. Carlson*, 79 Ill. 2d 564, 576, 38 Ill. Dec. 809, 814, 404 N.E.2d 233, 238 (1980), *citing People v. Newbury*, 53 Ill. 2d 228, 238-39 (1972); *People v. Scott*, 52 Ill. 2d 432, 439 (1972), cert. denied (1973), 410 U.S. 941, 35 L. Ed. 2d 607, 93 S. Ct. 1406; *People v. McCorry*, 51 Ill. 2d 343, 349, (1972); *People v. Linus*, 48 Ill. 2d 349, 355 (1971). The Illinois Supreme Court noted that "it is fundamental to our adversarial system that counsel object at trial to errors," so that there can be a "timely resolution of evidentiary questions at trial." *People v. Carlson*, 79 Ill. 2d at 576, *citing People v. Roberts*, 75 Ill. 2d 1, 10 (1979). "A party must make a timely objection to preserve an issue for appellate

review.” *Spurgeon v. Mruz*, 358 Ill. App. 3d 358, 360, 295 Ill. Dec. 170, 172, 832 N.E.2d 321, 323 (1st Dist. 2005). “Timeliness requires that objections to evidence be made at the time the evidence is offered or as soon as grounds for the objection become apparent. *Id.*, citing *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 467, 758 N.E.2d 442, 259 Ill. Dec. 319 (1st Dist. 2001). Thus, when a party acquiesces to the admission of evidence, the party “cannot contest the admission of the evidence on appeal.” *People v. Bush*, 214 Ill. 2d 318, 332-33, 292 Ill. Dec. 926, 934-35, 827 N.E.2d 455, 463-64 (2005). Even when the grounds “for the objection do not appear until after the admission of the evidence, the opponent must make a motion to strike at that time.” *Hardy v. Cordero*, 399 Ill. App. 3d 1126, 1135, 340 Ill. Dec. 718, 725, 929 N.E.2d 22, 29 (3rd Dist., 2010); *Netto v. Goldenberg*, 266 Ill. App. 3d 174, 179, 203 Ill. Dec. 798, 802, 640 N.E.2d 948, 952 (1st Dist. 1994), *People v. Koch*, 248 Ill. App. 3d 584, 593-94, 188 Ill. Dec. 77, 83, 618 N.E.2d 647, 653 (1st Dist. 1993), *Levin v. Welsh Brothers Motor Service, Inc.*, 164 Ill. App. 3d 640, 659, 518 N.E.2d 205, 217, 115 Ill. Dec. 680 (1st Dist. 1987), appeal denied, (1988), 119 Ill. 2d 558, 522 N.E.2d 1246.

In *Levin v. Welsh Brothers Motor Service, Inc.*, the defendant argued that part of the expert witness’s testimony should be stricken because the opinion was not within the expert’s expertise. *Levin*, 164 Ill. App. 3d at 658. However, the defendant did not object to the expert’s conclusions during the expert’s testimony, nor move to strike the testimony while the expert was on the stand. *Id.* Instead, the defendant moved to strike the testimony after both parties had rested their cases. *Id.* Because defendant had waited until both parties had rested their case to move to strike the expert’s testimony, the Court held that the defendant waived that motion. *Id.*²

² Additionally, the Court found that the defendant had conducted a “vigorous cross-examination” of the expert witness, and thus was not unduly prejudiced by the testimony. *Levin*, 164 Ill. App. 3d at 659. Similarly, at the hearing in this matter, Complainants conducted a four hour cross-examination of Mr. Seymour, including his

Similarly, in *People v. Koch*, the defendant did not object to the admissibility of a witness's testimony at the trial, but instead first objected to the testimony in a post-trial motion. *People v. Koch*, 248 Ill. App. 3d at 593. The defendant argued that he could not object to the testimony at the time it was given because it was not evident that it was hearsay and inadmissible until another witness testified later in the proceeding. *Id.* The Court rejected that argument, stating:

“It has long been established that an objection to evidence is untimely if not asserted as soon as its ground becomes apparent. Where the ground for objection does not appear until after the admission of the evidence, the appropriate action for its opponent is to make a motion to strike. After the basis of the motion to strike is available, **it must be made as soon as practicable, or the would-be movant will be deemed to have waived any complaint with regard to that evidence.**” *Id.* (*internal citations omitted*, emphasis added).

The Court found that the defendant was aware of the hearsay nature of the testimony well before the objection to the testimony was asserted for the first time in the post-trial motion. *Id.* Relying upon two similar cases in which the movant failed to move to strike the inadmissible evidence until after long after the movant was aware of an objection to the evidence, the Court found that defendant's failure to move to strike constituted a waiver of the issue. *Id.* at 594, *citing People v. Driver*, 62 Ill. App. 3d 847, 379 N.E. 840 (4th Dist. 1978), *People v. Bean*, 17 Ill. App. 3d 377, 308 N.E.2d 334 (1st Dist. 1974).

Consistent with Illinois courts, the Board has also held that it “is well-settled that a failure to object at the original proceeding generally constitutes a waiver of the right to raise an issue on appeal.” *Peoria Disposal Co. v. Peoria County Board*, PCB 06-184, 2007 Ill. ENV LEXIS 250, *58 (June 21, 2007), *citing E & E Hauling, Inc. v. Pollution Control Bd.*, 107 Ill. 2d 33, 38, 89 Ill. Dec. 821, 823, 481 N.E.2d 664, 666 (1985) (Board held that the complainants' failure to object to certain Peoria County Board members participation at the local meetings waived any later

objection to bias). *Barbara and Ronald Stuart v. Franklin Fisher and Phyllis Fisher*, PCB02-164, 2004 Ill. ENV LEXIS 513, *21-22 (September 16, 2004) (Board held that because complainants did not object to the hearing officer's order excluding the sound measurement evidence, complainants had waived any objection). *St. Clair County v. Village of Sauget et al*, PCB 93-51 1993 Ill. ENV LEXIS 635, *9-10 (July 1, 1993) (Citing *E & E Hauling, Inc.*, the Board found that St. Clair County waived its claim of violations of fundamental fairness by failing to object to the admission of evidence at the hearing).

In particular, in *West Suburban Recycling and Energy Center, L.P. v. Illinois EPA*, the Board held that a "failure to object at the original proceeding constitutes a waiver of the right to raise the issue on appeal." *West Suburban Recycling and Energy Center, L.P. v. Illinois EPA*, PCB 95-119 and 95-125, 1996 Ill. ENV. LEXIS 718, *slip op.* at 23-34, at 26 (Oct. 17, 1996). In that case, the Illinois EPA raised a specific objection to evidence for the first time in its post-hearing motion. *Id* at *25. The Board rejected Illinois EPA's claim because the Illinois EPA failed to raise its objections at the hearing. *Id* at *27.

Here, Complainants have waived the right to appeal the admission of any part of MWG's expert report, expert opinion, or expert testimony. Mr. Seymour's opinion regarding his constituent comparison were first made in his original report submitted to Complainants in November 2015. MWG Exhibit 903, section 5.5.2, pp 42-43. Mr. Seymour specifically updated his constituent comparison in February 2016 (MWG Exhibit 904), and Complainants took all the opportunity they needed to question Mr. Seymour on his constituent comparison opinion at his March 1, 2016 deposition. *See* excerpt of John Seymour Deposition attached as Exhibit 1. Complainants' deposition questions were remarkably similar to Complainants' questions at the hearing. *See* Seymour Dep., Exhibit 1. For example, during the deposition Complainants asked Mr. Seymour

about the constituent comparison methodology, "So what is -- if a pollutant is detected in both the groundwater and the leachate, then that's a match?" and Mr. Seymour responded in the affirmative. Seymour Dep., Exhibit 1, p. 123:13-15. Complainants also asked Mr. Seymour about constituent concentrations below the detection limit, "If there's a pollutant -- if a pollutant is below detection in groundwater, does that mean there is none of it in the groundwater?" Mr. Seymour responded that, "Well, by definition, if it's not detected, we're not including it." Seymour Dep., Exhibit 1, pp. 124:12 – 125:1. Further, Complainants compared groundwater data from a groundwater monitoring report to Mr. Seymour's table and Complainants specifically asked Mr. Seymour to compare the detection levels of antimony at Waukegan:

Q: Let's consider antimony, just as another point of comparison. If we look at Table 5-4 of your report –

A: For Waukegan?

Q: For Waukegan also.

A: Okay.

* * *

Q: So here we show in Table 5-4 of your report -- we show antimony as being in that leachate, correct? Because it was only an indicator if it was in it --

A: Yes.

Q: -- is that right? But it's not present in the groundwater samples for any of the wells; is that correct?

A: Yes.

Q: Let's see how much antimony was detected in the leachate data. So if we can look at 5-2, Table 5-2, page 1 of that table.

* * *

Q: So is it correct that the concentrations of antimony in leachate for sub-bituminous coal range between .00024 and .00062 milligrams per liter?

A: In the impoundment for sub-bituminous coal, antimony was found at those levels in parts per million.

Q: Okay. So that is less than .001 milligrams per liter, correct?

A: Yes.

Q: Now, let's compare how much antimony was detected in the groundwater. If you would look back at the same monitoring data, page 56445 [of the "Annual and Quarterly Groundwater Monitoring Results - Fourth Quarter, 2015," identified as Ex. 9 in the deposition]

A: I've got it.

Q: -- from Monitoring Well 2. We have a non-detect, right, for antimony for each of those dates in 2014?

A: Yes.

Q: And the detection level of that is .0030, correct?

A: Yes.

Q: So with the concentrations of antimony that were found in the EPRI leachate data, up to .00062 milligrams per liter, would that amount of antimony be detectable in groundwater using this detection limit?

A: It does not look like it would be.

(Seymour Dep., Ex. 1, pp. 134:19 – 139:24)

Despite being fully aware of the constituent comparison opinion, Complainants did not file a motion *in limine* regarding Mr. Seymour's opinion prior to the hearing.

Even though Complainants were aware of the constituent comparison opinion at least two years before the hearing, and even though Complainants' questioned Mr. Seymour about the opinion during his deposition, Complainants still failed to object when the very same opinion was presented at the hearing. Mr. Seymour supported his hearing testimony about the constituent comparison with a detailed PowerPoint presentation that contained more recent, updated groundwater data. MWG Exhibit 903, pp 11-12. The PowerPoint was provided to Complainants on January 30, 2018. Still, Complainants did not object. At the hearing, Complainants did not object to any of Mr. Seymour's testimony regarding his constituent comparison opinion, and explicitly stated that they had "No objection" to the admission of any of Mr. Seymour's reports or the PowerPoint. PCB13-15 Hearing Transcript, Feb. 2, 2018, p. 128:18 (emphasis added).

During cross-examination of Mr. Seymour at the hearing, Complainants asked practically *identical* questions as were asked of Mr. Seymour at the deposition. In particular, Complainants

again asked Mr. Seymour to compare the detection levels of antimony in the leachate results to the detection levels of antimony in the Waukegan groundwater monitoring results:

Q: If you look at Table 5-4 of your supplemental report, in the Waukegan -- we'll stick with Waukegan to keep it simple, I want to talk about antimony. Based on this table

* * *

Q: For purposes of this table, were you treating antimony as an indicator of coal ash leachate?

A: Yes.

Q: How much antimony was there in the leachate that EPRI tested? You might have to look at Table 5-2 of your original report.

* * *

A: For an [antimony], we found a range in EPRI the data -- ... of .2 to .6 micrograms per liter.

* * *

Q: Was the groundwater test used by Midwest Generation in 2014 sensitive enough to detect that amount of antimony?

A: I don't recall. I would have to look.

Q: You can look at 268-P. That should show you.

A: The results for antimony looks to be less than three micrograms per unit, I believe. I'd have to check the units. It's less than three micrograms per unit.

Q: Okay. That's -- the detection limit was three?

A: Yes.

Q: So was that test sensitive enough to detect the concentrations you saw in every leachate?

A: That doesn't look to be.

PCB13-15 Hearing Transcript, Feb. 2, 2018, p. 259:5 – 261:8

Despite having prior notice of Mr. Seymour's opinion, and despite replicating the deposition questions at the hearing, *still* Complainants did not object to any of his testimony, nor move to strike any of his testimony that they found objectionable. PCB13-15 Hearing Transcript, Feb. 2, 2018, pp. 231:2-280:22). Mr. Seymour's constituent comparison has not changed since it was

issued in his report in 2015. By filing the Motion to Strike now, Complainants unfairly preclude MWG from eliciting testimony from Mr. Seymour to address the objection.

Ultimately, the ship has sailed on any objections to Mr. Seymour's opinion. Complainants' Motion to Strike should be denied on the grounds they have waived the right to object to the constituent comparison opinion because they failed to raise the objection when it first arose. *E & E Hauling, Inc. v. Pollution Control Bd.*, 107 Ill. 2d at 38; *People v. Carlson*, 79 Ill. 2d at 576, *Peoria Disposal Co. v. Peoria County Board*, PCB 06-184, 2007 Ill. ENV LEXIS 250, *58 (June 21, 2007).

III. Sierra Club's Motion is an Improper Appeal of the Hearing Officer's Decision

Although Complainants title their motion a "Motion to Strike", it is actually an appeal of an order by the Hearing Officer. The Hearing Officer admitted as evidence the testimony and reports that contain MWG's constituent comparison analysis. Any disagreement with a Hearing Officer's Order must be preserved at the hearing and appealed to the Board. Complainants cannot be permitted to do an end-run around the Board Rules and their failure to timely object by simply re-naming their motion.

On February 1, 2018, the Hearing Officer, hearing no objection, held that MWG Exhibits 901, 903 and 904 were admitted. PCB13-15 Hearing Transcript, Feb. 2, 2018, p. 128:21-23. The Hearing Officer made his holding based upon Section 101.626 of the Illinois Pollution Control Board Rules. *Id* and 35 Ill. Adm. Code 101.626. A ruling to admit or deny admission of an exhibit is an order by the Hearing Officer. *People of the State of Illinois v. Panhandle Eastern Pipeline Company*, PCB99-191, Feb. 1, 2001, 2001 Ill. ENV LEXIS 66, *13 (Board called hearing officer's denial of admission of an exhibit an "order.>"). Pursuant to Section 101.502(b) and 101.518, an objection to a hearing officer ruling made at hearing must be filed within 14 days of receiving the transcript. 35 Ill. Adm. Code 101.502(b), 101.518.

Complainants already know this appeal process as there were at least four appeals of the Hearing Officer's rulings on exhibits from the first week of hearings, including two regarding appealing the Hearing Officer's Order to admit an exhibit. *See MWG's Objection and Appeal from Hearing Officer's Ruling to Admit the Discovery Responses*, Nov. 13, 2017 and *MWG's Objection and Appeal from Hearing Officer's Ruling to Admit Complainants' Exhibit 16*, Nov. 13, 2017. Because the Hearing Officer has already made his decision regarding MWG Exhibits 901, 903 and 904 and the corresponding testimony, under the Board's Rules, Complainants should have appealed the Hearing Officer's ruling to the Board. Of course, as explained above, they could not do so because they failed to timely object to the exhibits and testimony so their appeal was waived. Complainants cannot claim that their objection arose after the hearing because, as described above, Mr. Seymour's opinion was not new and Complainants had many opportunities both before and during the hearing to raise an objection.

As Complainants' Motion is not a proper appeal directed to the Board, the Hearing Officer should reject Complainants' Motion to Strike as improper, untimely (because it was not timely submitted to the Board), and violation of the Board Rules. Complainants cannot avoid the Board Rules by fashioning their appeal as a motion to strike when they have long known about the opinion at issue.

IV. MWG's Expert's Methodology Is Standard

Notwithstanding that Complainants have waived any objection to MWG's expert's constituent comparison opinion, Mr. Seymour's methodology is standard and admissible under Illinois law and the Board's admissibility standards. Mr. Seymour has the skill, expertise and specialized knowledge that will assist the Board to understand the evidence and determine whether the coal ash at the MWG stations are a source. Mr. Seymour specifically testified that comparing constituents is standard in his field, and thus is admissible as expert opinion. PCB13-15 Hearing

Transcript, Feb. 1, 2018 Hearing Transcript, pp. 282:12-13, Ill. R. Evid. 702. As Mr. Seymour's methodology is standard, it is neither new nor novel, and the analysis under *Frye* does not apply. *People v. Simons*, 213 Ill. 2d 523, 530, 821 N.E.2d 1184, 1189 (2004), citing, *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78-79, 767 N.E.2d 314 (2002).

Under Rule 702 of the Illinois Rules of Evidence, if “scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Ill. R. Evid. 702. Only when the methodology is “new or novel” does the proponent of the opinion have to show that it is generally accepted in its field under the *Frye* test. Ill. R. Evid. 702, *People v. Simons (In re Simons)*, 213 Ill. 2d 523, 530, 290 Ill. Dec. 610, 615, 821 N.E.2d 1184, 1189 (2004) (Illinois Supreme Court noted that “Significantly, the *Frye* test applies only to "new" or "novel" scientific methodologies”). In *People v. Simons*, the Illinois Supreme Court stated that a scientific methodology was "new" or "novel" if it “is 'original or striking' or "does not resemble something formerly known or used." *People v. Simons*, 213 Ill. 2d at 530, citing *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 79 quoting Webster's Third New International Dictionary 1546 (1993). In other words, Rule 702 is a two part analysis. First, a determination whether it is a standard or common methodology. If it is not a common methodology, then the *Frye* test is applied. Ill. R. Evid. 702.

Notably, Complainants have not identified any Board or Hearing Officer's Order excluding an expert opinion or testimony because it did not pass the *Frye* test. The absence of any applicable Board decisions is likely because the admission of evidence under the Board Rules, is a “relaxed standard,” and an expert's testimony and opinion will assist the Board to determine the facts at

issue. 35 Ill. Adm. Code 101.626, Ill. R. Evid. 702, *People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at 9 (Jan. 9, 2014).

In other matters before the Board, the Board has allowed experts to issue opinions comparing source constituents to the constituents in water. In *Harold Craig and Robert Craig v. The Pollution Control Board*, 59 Ill.App.3d 65 (4th Dist. 1978), the Craigs' expert analyzed the bacteria in the manure from their farm, and compared the bacteria found at the area of the fish kill. *Id.* The expert showed that a majority of the bacteria at the point the farm manure entered the water was from animal waste, but a majority of the bacteria at the location of the dead fish was from human waste and was not a match. *Id.* at 68. In *People ex rel. Ryan v. Agpro, Inc.*, the State of Illinois's expert witness, an Illinois EPA geologist, compared the pesticides in the soil samples on the defendant's property to the pesticides found in the water in the private wells close to or next to the defendant's property. *People ex rel. Ryan v. Agpro, Inc.*, 345 Ill. App. 1011, 1017, 803 N.E.2d 1007, 1010 (2nd Dist. 2004).

Comparing constituents from a potential source to the constituents found in another location is axiomatic and routinely conducted by scientists. As Mr. Seymour stated during the hearing: "Having reviewed a number of sites, we all do data comparisons..." PCB13-15 Hearing Transcript, Feb. 1, 2018, p. 282, ln. 12-13. Mr. Seymour repeated that his analysis was a standard practice on Feb. 2, 2018: "I do groundwater comparisons that match before and it's a common tool and we use it in these comparisons at all my sites." PCB13-15 Hearing Transcript, Feb. 2, 2018, p. 278:8-10. In fact, Complainants' own expert also conducted a comparison of constituents from source to groundwater in his report. Complainants Ex. 401. In Complainants' expert's report, he regularly stated that he compared and matched the constituents in groundwater to the leachate characteristics of coal ash. For example, on page two of his report he stated: "At all of the power plant sites, the

concentrations of B, Mn, and SO₄ **measured in groundwater match the leachate characteristics of coal ash.**” Complainants Ex. 401, p. 2. Complainants’ expert repeated that assertion throughout his report. Complainants Ex. 401, pp. 12, 18, 25, 32, and 35 (emphasis added). The comparison of constituents is neither new nor novel.

As Mr. Seymour explained during the hearing, he routinely conducts data comparisons and the results of the comparison can be presented in different ways. PCB13-15 Hearing Transcript, Feb. 1, 2018, pp. 283:12-14.) For his expert report in this case, Mr. Seymour “...simply put it in a percentage of matching or non-matching.” PCB13-15 Hearing Transcript, Feb. 1, 2018, pp. 282:14-15. He explained his reasoning that “...it seemed like a simple way to present it that people could understand whether it matched or did not match, was it consistent or was it inconsistent.” PCB13-15 Hearing Transcript, Feb. 1, 2018, pp. 282:22-24. Mr. Seymour again confirmed that the constituent comparison process was standard in his field. PCB13-15 Hearing Transcript, Feb. 1, 2018, pp. 283:1-3. Mr. Seymour repeatedly explained his point to Complainants during cross-examination, that groundwater comparisons and matching was a common tool used at all his sites, and that the presentation in this report was in percentage form in an effort to simplify his presentation. PCB13-15 Hearing Transcript, Feb. 2, 2018, p. 278:8-16. Simply because Mr. Seymour presented the results of his constituent comparison in mathematical percentages does not mean that the methodology is novel or new. The basic methodology of comparing data is well established. *See* Complainants’ Expert Report, Ex. 401, pp. 2, 12, 18, 25, 32, and 35. Because Mr. Seymour’s analysis is neither new nor novel, Complainants’ claims based upon the *Frye* standard are invalid.

V. Complainants’ Arguments Only Go to Weight and Not Admissibility

Assuming the Hearing Officer is able to get past the issue of waiver, the improper and untimely attempt to appeal, and the issue that Mr. Seymour’s methodology is standard and the same as

Complainants' own expert, Complainants' arguments about reliability of Mr. Seymour's comparison analysis only go to the weight of the opinion, not to its admissibility. *See*, PCB13-15 Hearing Transcript, Oct. 27, 2017, p. 53:16:21, Oct. 23, 2017, p. 104:15:18, Oct. 24, 2017, p. 111:5-11, Oct. 25, 2017, p. 62:15-18 and 185:2-6, Jan. 30, 2018, p. 67:14:18. Again, had Complainants' timely stated their objections before the hearing, or even during the hearing, MWG could have elicited additional testimony to resolve the objections. By filing a post-hearing Motion to Strike with no prior objections, Complainants rob MWG of the ability to timely resolve the evidentiary questions at the hearing. *People v. Carlson*, 79 Ill. 2d at 576. Accordingly, under the broad Board Rules on admissibility, the Hearing Officer should deny Complainants' Motion to Strike.

WHEREFORE, for the reasons stated above MWG requests that the Hearing Officer deny Complainants' Motion.

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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EXHIBIT 1

1 BEFORE THE ILLINOIS POLLUTION CONTROL BOARD
2 In the Matter of:
3 SIERRA CLUB, ENVIRONMENTAL)
 LAW AND POLICY CENTER,)
4 PRAIRIE RIVERS NETWORK, and)
 CITIZENS AGAINST RUINING THE)
5 ENVIRONMENT,)
) PCB No-2013-015
6 Complainants,) (Enforcement - Water)
)
7 v.)
)
8 MIDWEST GENERATION, LLC,)
)
9 Respondents.)

10
11 The discovery deposition of JOHN PATRICK
12 SEYMOUR, P.E., taken under oath on the 1st day of
13 March 2016, at 353 North Clark Street, 45th Floor,
14 Chicago, Illinois, pursuant to the Rules of the
15 Supreme Court of Illinois and the Code of Civil
16 Procedure, before Brad Benjamin, a certified
17 shorthand reporter in and for the State of Illinois,
18 pursuant to notice.

19
20
21
22
23
24

1 MS. CASSEL: We can go on the record.

2 BY MS. CASSEL:

3 Q Okay, sir. I would like to turn to page 42
4 of your report, please, Deposition Exhibit 2.

5 So this is Section 5.5.2, the matching
6 analysis that you did in this report and -- as well
7 as in Tables 5-4 and 5-5.

8 And, so the record is clear, we're
9 discussing the matching analysis in this initial
10 report since I only received the supplement to that
11 yesterday, and we're not prepared ask you questions
12 about it other than a single question just to
13 understand what was done.

14 So we will focus on this report and
15 those -- the tables in the initial report?

16 MS. NIJMAN: Okay. Then let me just state for
17 the record, though, depending upon on your
18 questions -- it was a mathematical error that was
19 corrected. So if you're going to ask him about his
20 document, these pages have been supplemented.

21 MS. CASSEL: Well, I don't know enough about
22 what was supplemented until I ask him.

23 MS. NIJMAN: Sure.

24 MS. CASSEL: So I'm going to focus on this and,

1 you know, I'll assume his answers based are on this
2 unless he tells me otherwise.

3 MS. NIJMAN: So you'll have to clarify --

4 THE WITNESS: We'll take each question as it
5 comes --

6 MS. CASSEL: Perfect.

7 THE WITNESS: -- and decide.

8 BY MS. CASSEL:

9 Q Okay. So you state on page 42 -- let's see
10 if I can find it -- quote, Conceptually -- this is
11 the second sentence of the paragraph under 5-5- --
12 or -- excuse me -- 5.5.2, page 42.

13 A Excuse me. Pardon me. I'm going to look
14 for my supplement just in case I want to check
15 something.

16 Go ahead. I'm sorry.

17 Q So you state on page 42, "Conceptually, if
18 all the constituents detected in groundwater samples
19 from a monitoring well match the constituents
20 detected in leachate from ash currently stored in
21 ponds, and if constituents not detected in
22 groundwater samples match the constituents not
23 detected in leachate from ash currently stored in
24 ponds, then it would be probable that leachate from

1 ash currently stored in ponds is impacting
2 groundwater."

3 Do you see where you state that?

4 A Yes.

5 Q What do you mean by "match"?

6 A Well, what we've done, in general --
7 because I know that you haven't seen the
8 supplement -- but, in general, we're looking to see
9 what you can find in the groundwater that's common to
10 the pond or what's found in the groundwater that's
11 inconsistent with what's in the pond. So if you look
12 at both matching and non-matching data.

13 Q So what is -- if a pollutant is detected in
14 both the groundwater and the leachate, then that's a
15 match?

16 A Yes.

17 Q And if it's not detected in groundwater and
18 not detected in leachate, that's a match?

19 A Well, that's one of the things that in the
20 supplement you'll notice that we've changed because
21 it came to us that by including that number in the
22 denominator, it was calculating a number that we
23 didn't think was representative of a matching versus
24 non-matching analysis.

1 Q So what is the diff- -- so please explain
2 to me what the difference is.

3 So is it not a match if the
4 constituent is not found in the leachate and not
5 found in the groundwater?

6 A Yes, because we felt that you could add a
7 series of elements or compounds that didn't exist in
8 the ash and didn't exist in the groundwater, and
9 theoretically that number keeps getting less and less
10 representative, so we took that data out.

11 Q But they are both in, then they are both a
12 match?

13 A If they're both in and they both -- then
14 they match.

15 Q When a pollutant is below detection, does
16 that mean that there is none of it in the sample
17 tested?

18 A In which media are you talking when you say
19 there's a pollutant detected?

20 Q In any media. We can say the groundwater.

21 If there's a pollutant -- if a
22 pollutant is below detection in groundwater, does
23 that mean there is none of it in the groundwater?

24 A Well, by definition, if it's not detected,

1 we're not including it.

2 Q But that's not my question, as to whether
3 you're including it.

4 I'm asking you, is there none of it in
5 the groundwater if it's below detection.

6 MS. NIJMAN: Object to vagueness.

7 THE WITNESS: Again, the -- the sci- -- I'm
8 sorry.

9 MS. NIJMAN: Go ahead.

10 THE WITNESS: The science is that if you don't
11 detect it, you assume it's not there.

12 BY MS. CASSEL:

13 Q And is that what you did?

14 A Correct.

15 Q Okay. If you ran a test on the same
16 groundwater that had a lower detection threshold and
17 the concentration of a pollutant was found to be
18 detectable under that test, but it was not found --
19 it was below detection in another test with a higher
20 detection threshold -- what am I trying to say? The
21 pollutant is, in fact, present in that groundwater in
22 that case; is that correct?

23 MS. NIJMAN: Object to form. Compound.

24 THE WITNESS: The practice that we follow is

1 Q This is for the groundwater?

2 A For the groundwater.

3 Q This is not for the leachate?

4 A Not for the leachate.

5 Q Okay. So let's look at the data for the
6 wells, just to see what it actually was.

7 MS. CASSEL: Can you hand me the next exhibit.

8 MS. DUBIN: 56445?

9 MS. CASSEL: Yes.

10 That's part of this whole thing,
11 right?

12 MS. DUBIN: Yes.

13 MS. CASSEL: Okay. Can you mark this exhibit,
14 please.

15 (Seymour Deposition Exhibit
16 No. 9 was marked for
17 identification.)

18 BY MS. CASSEL:

19 Q So you have been handed what's been marked
20 as Deposition Exhibit No. 9 -- Seymour Deposition
21 Exhibit No. 9.

22 A Uh-huh. Okay.

23 Q Do you recognize this document?

24 A I recognize it as a Groundwater Quarterly

1 Monitoring Report, Waukegan Station, and it is
2 labeled as the Fourth Quarter, 2015.

3 Q So let's take a look -- it says, "Annual
4 and Quarterly Groundwater Monitoring Results - Fourth
5 Quarter, 2015," right?

6 A Yes.

7 Q Okay. Just to make sure.

8 So let's look at Bates page 56445.

9 A Jenny, recognize, please, that this is 2015
10 data. This analysis is based on 2014 data.

11 Q It's fourth quarter, 2015. Okay.

12 I believe this data does have the 2014
13 concentrations in it, so we can look at those.

14 If you would look at 56445.

15 A Okay.

16 Q So the arsenic concentrations in Monitoring
17 Well 2, as an example, in 2014 were .0085, .0062,
18 .0081, and .0095.

19 I believe that's milligrams per liter;
20 is that correct?

21 A Yes.

22 Q So in the groundwater -- there was arsenic
23 in that groundwater in 2014, correct?

24 A Yes.

1 question.

2 MS. NIJMAN: -- a hypothetical that you're
3 giving?

4 MS. CASSEL: No.

5 BY MS. CASSEL:

6 Q Well, would this amount of arsenic that's
7 shown in the 2014 groundwater data for Monitoring
8 Well 2, would that amount of data show up in the
9 leachate test?

10 A If you had results, for example -- looking
11 for arsenic -- August 21st, 2014, the concentration
12 is .0081, and that would be below the leachate test
13 detection level.

14 Q And are all of the results for 2014 for
15 arsenic in Monitoring Well 2 below the leachate test
16 detection levels?

17 A They appear to be.

18 Q Okay. But the leachate could, in fact,
19 have that same concentration of arsenic in it,
20 correct?

21 A I think earlier the question that was asked
22 that the arsenic could be in the leachate sample up
23 to the detection level of the leachate test, which is
24 .05.

1 Q So, "yes"?

2 A So the answer would be "yes."

3 Q Yet -- so essentially you could have the
4 same concentration of arsenic, this concentration
5 that's shown in the groundwater levels for 2014, in
6 the leachate, but under your analysis that would not
7 match; is that correct?

8 A Correct.

9 Q And the detection limit for groundwater,
10 just to be clear, in 2014 for Monitoring Well 2 was
11 .001 milligrams per liter, right?

12 A For the monitoring groundwater sample --

13 Q For the groundwater sample.

14 A -- .001, yes.

15 Q Thank you.

16 Let's consider antimony, just as
17 another point of comparison. If we look at Table 5-4
18 of your report --

19 A For Waukegan?

20 Q For Waukegan also.

21 A Okay.

22 Q And this is looking at the -- 5-4 --
23 detected -- and here, we have a different list of
24 constituents as being indicators of leachate.

1 Why is there a different list in this
2 table?

3 A This list is based upon the EPRI leachate
4 data.

5 Q So here we show in Table 5-4 of your
6 report -- we show antimony as being in that leachate,
7 correct? Because it was only an indicator if it was
8 in it --

9 A Yes.

10 Q -- is that right?

11 But it's not present in the
12 groundwater samples for any of the wells; is that
13 correct?

14 A Yes.

15 Q Let's see how much antimony was detected in
16 the leachate data. So if we can look at 5-2, Table
17 5-2, page 1 of that table.

18 A Page 1.

19 Q Page 1 of Table 5-2, the first page of that
20 table.

21 A Okay.

22 Q So is it correct that the concentrations of
23 antimony in leachate for sub-bituminous coal range
24 between .00024 and .00062 milligrams per liter?

1 A In the impoundment for sub-bituminous coal,
2 antimony was found at those levels in parts per
3 million.

4 Q Okay. So that is less than .001 milligrams
5 per liter, correct?

6 A Yes.

7 Q Now, let's compare how much antimony was
8 detected in the groundwater.

9 If you would look back at the same
10 monitoring data, page 56445 --

11 A I've got it.

12 Q -- from Monitoring Well 2. We have a
13 non-detect, right, for antimony for each of those
14 dates in 2014?

15 A Yes.

16 Q And the detection level of that is .0030,
17 correct?

18 A Yes.

19 Q So with the concentrations of antimony that
20 were found in the EPRI leachate data, up to .00062
21 milligrams per liter, would that amount of antimony
22 be detectible in groundwater using this detection
23 limit?

24 A It does not look like it would be.

1 Q So even if the groundwater had the same
2 amount of antimony as the leachate, your matching
3 analysis would not show a match in this circumstance,
4 correct?

5 A What I would say is that if it was a
6 detection level of .003 for groundwater, that --

7 THE WITNESS: I'm sorry. I shouldn't answer a
8 question not asked.

9 Can you read the question again.

10 (The last question was read
11 by the reporter.)

12 THE WITNESS: Correct. It would not match.

13 BY MS. CASSEL:

14 Q Okay. Have you used this same matching
15 analysis before, matching the constituents in -- all
16 constituents found in leachate to all constituents
17 found in groundwater?

18 A For coal ash?

19 Q For coal ash.

20 A I have not.

21 Q Have you used it for other types of
22 sources?

23 A No, I have not.

24 Q Do you know of any other projects in which