

ILLINOIS POLLUTION CONTROL BOARD  
September 14, 2020

SIERRA CLUB, ENVIRONMENTAL LAW )  
AND POLICY CENTER, PRAIRIE RIVERS )  
NETWORK, and CITIZENS AGAINST )  
RUINING THE ENVIRONMENT )  
Complainants, ) PCB No. 13-15  
v. ) (Enforcement – Water)  
MIDWEST GENERATION, LLC, )  
Respondent. )

**HEARING OFFICER ORDER**

On June 20, 2019, an Interim Board Order found respondent, Midwest Generation, LLC, (Midwest) liable for certain violations alleged by Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (Citizens Group) and held that the record is insufficient to determine the appropriate relief and any remedy. The Board directed the hearing officer to hold additional hearings to determine the appropriate relief. Sierra Club et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 92-92 (June 20, 2019).

**Summary of Procedural History of Citizens Group Motion to Designate New Experts<sup>1</sup>**

On April 1, 2020, the Citizens Group filed a motion for leave to designate substitute expert witnesses with supporting memorandum (Mot.). The Citizens Group request to substitute their expert witnesses for the Board ordered remedy hearing in this matter. Mot. at 1-3. The Citizens Group identified two expert witnesses for the initial hearing in this matter - Dr. James Kunkel and David Schlissel - but only Dr. Kunkel was deposed and later testified at hearing. *Id.* at 2. Complainants argue that “a new expert would be better placed than Dr. Kunkel to address the issues that remain to be resolved in the remedy phase of the litigation.” *Id.* Complainants report that David Schlissel “is no longer working in a full-time capacity, has reduced his project load, and does not have availability to re-engage as an expert in this matter.” *Id.*

On April 15, 2020, Midwest Gen filed a response to complainants’ motion (Resp.). In summary, Midwest Gen argues that discovery has closed, both parties have “presented opinions for the remedy phase of the litigation”, and that complainants have not demonstrated good cause to replace their experts for the remedy phase of the Board ordered hearing. Resp. at 1-4,13-15.

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<sup>1</sup> The parties respective and numerous motions for leave to file a reply and sur-reply are granted.

Midwest Gen further argues that if the Citizens Group is allowed to substitute its witnesses, “any new expert must maintain substantially the same opinions as the original experts”. *Id.* at 12-13.

On May 22, 2020, I issued an order directing the complainants file on or before June 1, 2020, a memorandum elaborating why Dr. Kunkel needs to be replaced and why a substitute expert would be better placed than Dr. Kunkel. Hearing Officer Order at 2 (May 22, 2020). Respondent was directed to file its response on or before June 9, 2020. *Id.*

On May 29, 2020, the Citizens Group filed a memorandum (Memo). Addressing my question of why Dr. Kunkel needs to be replaced and why a substitute expert would be better placed than Dr. Kunkel, complainants argue that providing an answer “requires divulging privileged attorney work product consisting of attorney mental impressions.” Memo at 1. Nevertheless, the Citizens Group states that if Dr. Kunkel is substituted for another expert better placed, “to the best of their knowledge, there will be no inconsistency or contradiction with Dr. Kunkel’s previous testimony or reports. Complainants expect that a new expert will provide more detail, focus on different elements, and elaborate on different points in comparison to Dr. Kunkel’s opinions on [sic]for a number of reasons.” *Id.* at 2-3.

Also, on May 29, 2020, complainants, pursuant to 35 Ill. Adm. Code 130.400 *et seq.*, filed an Application for Non-Disclosure (Application) of an Article consisting of an Affidavit. The affidavit is titled Confidential Affidavit of Faith E. Bugel Regarding Expert Witness. Complainants argued that the affidavit constituted non-disclosable information pursuant to 35 Ill Adm. Code §101.202 because it contained “information privileged against introduction in judicial proceedings.” Application at 2-3. Complainants contended that the affidavit included the mental impressions of Attorney Faith E. Bugel and that those mental impressions were protected from introduction in judicial proceedings by work product privilege. *Id.* at 3.

On June 15, 2020, respondent filed an objection to complainants’ Application. In its objection, respondent argued, *inter alia*, that 415 ILCS 5/7 authorizes the Board to designate information as non-disclosable with respect to the public, not with respect to opposing parties. Objection at 3-8.

On July 7, 2020, I found that 35 Ill. Adm. Code §130.400 *et seq.* authorizes the Board to designate information as non-disclosable only with respect to the public and not with respect to opposing parties, I directed complainants to disclose the Affidavit to respondents, barred Midwest from disclosing the Affidavit or the contents therein and ordered that the Affidavit was not to be injected into judicial proceedings. Hearing Officer Order at 2.

On July 21, 2020, Midwest Gen filed a supplemental response to complainants’ memorandum that essentially rehashed its opposition to designate new witnesses argued in its April 15, 2020, response.

On August 5, 2020, complainants filed a reply to Midwest’s July 21, 2020, supplemental response. (Reply). In its reply, Citizens Group argue that the “Board re-opened discovery when it remanded the case back to the Hearing Officer to conduct discovery in the remedy phase of this matter”. Reply at 2. Complainants contend that because discovery is open, any substituted expert opinions will be disclosed in adherence to the strict disclosure requirements of Rule 213. *Id.* at 3. Complainants contend that respondent’s July 21, 2020 supplemental response relies exclusively on caselaw which pertained to substitution after the close of discovery, and that the current case is

distinguishable because discovery is ongoing. *Id.* at 3-4. Complainants further argue that the cases respondent cites in its supplemental response scrutinize only the timeliness of substitution, not whether substitution was justified. *Id.* at 4-5. Because discovery is ongoing, complainants argue that respondent will face no prejudice by substituting expert witnesses. *Id.* at 5.

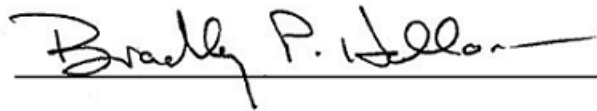
### **DISCUSSION AND ORDER**

On June 20, 2019, the Board, in its 93-page Interim Order, found that Midwest Gen violated the Act and Board regulations. Sierra Club et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 92-93 (June 20, 2019). It further found that the record lacks sufficient information for the Board to determine the appropriate remedy and directed the hearing officer to hold additional hearings to determine the appropriate relief and any remedy. *Id.* at 93.

The Board made clear in its Interim Order that it needed more information to arrive at the appropriate relief or any remedy, which leads to the logical conclusion that the experts who testified at the first hearing were not able or did not testify to remedy or relief issues the Board found lacking in the record. The Board's mandate necessarily reopened discovery in this enforcement matter to garner more information it needs to determine an appropriate remedy.

The parties may call additional witnesses to provide more information to the Board for the second hearing in this matter. To hold otherwise, I would fail my duty "to ensure development of a clear, complete, and concise record...". Section 101.610 of the Board's procedural rules. The discovery schedule regarding expert witnesses, including reports and depositions, have yet to be determined. If additional witnesses are identified, neither party will be surprised or prejudiced because it will have knowledge of any new expert reports and depose any new witnesses prior to the hearing. Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran" with a horizontal line underneath.

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