

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter of:</b>	)	
	)	
<b>SIERRA CLUB, ENVIRONMENTAL</b>	)	
<b>LAW AND POLICY CENTER,</b>	)	
<b>PRAIRIE RIVERS NETWORK, and</b>	)	
<b>CITIZENS AGAINST RUINING THE</b>	)	
<b>ENVIRONMENT</b>	)	
	)	<b>PCB 2013-015</b>
<b>Complainants,</b>	)	<b>(Enforcement – Water)</b>
	)	
<b>v.</b>	)	
	)	
<b>MIDWEST GENERATION, LLC,</b>	)	
	)	
<b>Respondent.</b>	)	

**NOTICE OF FILING**

TO: Don Brown, 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, Midwest Generation, LLC’s Objection to Complainants’ Request for Leave to File Reply *Instanter* to Complainants’ Unwarranted Motion for Sanctions, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By:       /s/ Jennifer T. Nijman      

Dated: April 5, 2022

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	)	
<b>Respondent.</b>	)	

**MIDWEST GENERATION, LLC’S OBJECTION TO COMPLAINANTS’ REQUEST FOR LEAVE TO FILE REPLY *INSTANTER* TO COMPLAINANTS UNWARRANTED MOTION FOR SANCTIONS**

Midwest Generation, LLC (“MWG”) objects to Complainants’ Request to file a Reply brief (*instanter*) in support of their Motion for Sanctions and asks that the Board deny the request and disregard the reply brief. Complainants’ Reply in Support of Their Motion for Sanctions (“Sanctions Reply”) is nothing more than an attempt to submit a sur-reply in support of their objection to MWG’s Motion for Stay and Motions *in Limine* to Exclude Certain Areas. The Sanctions Reply provides no new information and does not respond to MWG’s Response to the Motion for Sanctions, except to provide an unconvincing claim that Complainants’ clear misrepresentation of a Board holding was somehow an inadvertent error and a weak explanation why Complainants failed to be candid about the Hearing Officer’s 2017 Order regarding expert opinions. Complainants will suffer no material prejudice if their Sanctions Reply is excluded because it provides no new information to support their motion.

Complainants repeat their argument that MWG’s motions (which MWG based on new facts) could possibly be sanctionable because the Board made previous rulings – now naming their

argument the “law of the case doctrine.” But Complainants conveniently ignore that the law of the case doctrine does not apply when there is a change in facts, which is the case here. *Elmhurst Memorial Healthcare et al v. Chevron, U.S.A et al*, PCB 09-066, 2011 WL 2838628, July 7, 2011, slip op. at \*27 (citations omitted); *See also Barnai v. Wal-Mart Stores, Inc.*, 2021 IL App (1st) 191306, ¶ 48 (1st Dist. 2021) (“A reviewing court may, however, revisit an issue 'where facts have changed or where we determine that our initial decision was clearly erroneous and would work a manifest injustice.’”). Complainants do not disagree that MWG’s motions are objectively reasonable, and do not disagree that Complainants have failed to demonstrate any bad faith or a finding of unreasonable noncompliance with a Board or Hearing Officer Order by MWG. Instead, Complainants rehash their arguments that MWG’s Motion to Stay and Motions *in Limine* should not be granted. That rehashing is not a basis for sanctions and does not support the need for a Reply.

Other than their restated claim that the law of the case doctrine applies, (and ignoring the changed facts), the only attempt Complainants make to reply to MWG’s response is their acknowledgement of two of their errors in their motions. Complainants admit that they falsely represented the Board’s holding in *Freedom Oil Co. v. Illinois EPA*, PCB 03-54 and consolidated appeals (Feb. 2, 2006), despite having specifically relied on that same case when it served their purposes in the past. In Complainants’ 2018 Response, Complainants solely rely upon the same two Board cases, *Freedom Oil*, and *Illinois E.P.A. v. Celotex Corp.*, 168 Ill. App. 3d 592 (3rd Dist. 1988) that they repeat in their 2022 Motion. *Compare* Complainants 2018 Response, p. 5 and Complainants’ 2022 Motion, p. 7. Considering the few Board cases regarding sanctions, Complainants’ claim of an inadvertent error is hard to accept on its face. A simple reading of the case immediately identifies Complainants’ obvious error in asserting a holding that the Court

simply did not make. Complainants had knowledge of the case due to their prior citations and arguments, and at very least they knew or should have known that they were falsely representing a case holding to the Board.

Complainants then attempt to explain their second disturbing error - their misrepresentation of the Hearing Officer's July 18, 2017 Order. Complainants now admit to a "subtle distinction" between their use of "consistent" and the term "support." Calling it "subtle" does not correct what on its face fails to be forthright to the Hearing Officer about his prior holding.

Because Complainants' Sanctions Reply is merely a sur-reply to MWG's Motion to Stay and provides no new information in support of their Motion for Sanctions, Complainants will not suffer material prejudice and their motion for leave to file the Reply must be denied.

Respectfully submitted,  
Midwest Generation, LLC

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

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