

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,)	
)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ RESPONSE TO MIDWEST GENERATION, LLC’S MOTION TO INCORPORATE THE PRE-FILED TESTIMONY OF G. ALLEN BURTON INTO THE PCB 13-15 DOCKET** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: May 4, 2023

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COMPLAINANTS’ RESPONSE TO MIDWEST GENERATION, LLC’S MOTION TO INCORPORATE THE PRE-FILED TESTIMONY OF G. ALLEN BURTON INTO THE PCB 13-15 DOCKET

Complainants request that the Hearing Officer enter an Order denying Respondent’s Motion to Incorporate the Pre-filed Testimony of G. Allen Burton into the PCB 13-15 Docket. The G. Allen Burton testimony was untimely disclosed by Respondent as a document that the Weaver expert witnesses would be relying on; the Weaver witnesses would thereby be offering a new opinion on sediment chemistry not previously disclosed in their expert reports. In support of their opposition, Complainants state as follows:

1. On January 10, 2022, Respondent filed Respondent’s Identification of Additional Documents Midwest Generation’s Experts May Rely Upon which included as item 2 “Midwest Generation LLC’s Pre-filed Testimony of G. Allen Burton and Greg Seegert and the attachments to the pre-filed testimony filed *In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River Proposed*

Amendments to 35 Ill. Adm. Code 301, 302, 3030 [sic], and 304, Sept. 8, 2008.” (Ex. A)

2. On March 29, 2023, Respondent filed its Proposed Exhibit List which included as item 19, Ex. 369 and 378 of In the Matter of: Water Quality Standards and Effluent Limitations for the Chicago Area Waterway System and Lower Des Plaines River: Proposed Amendments to 35 Ill. Adm. Code 301, 302, 303 and 304, PCB R08-09, Pre-filed Testimony of Dr. G. Allen Burton, Sediment Chemistry Study, Upper Illinois Waterway, Dresden and Lower Brandon Pools, Prepared by EA Engineering, Science, and Technology, Fig. 2 of Appen. C (“Burton Testimony”). This entry in Respondent’s Exhibit List identifies “Weaver” as the witness or witnesses who will discuss this exhibit.

3. Counsel for Respondent and counsel for Complainants conferred by phone about the respective exhibit lists of the parties and objections that counsel had to exhibits on the opposing party’s list. Counsel for Complainants communicated their objection to the Burton Testimony. Counsel for Respondents indicated that material from other dockets has been incorporated into this docket. Counsel for Complainants indicated that other material had been incorporated after a motion to incorporate.

4. On April 20, 2023 Respondent filed its Motion to Incorporate the Pre-filed Testimony of G. Allen Burton into the PCB 13-15 Docket (“Respondent’s Motion” or “Motion to Incorporate”).

5. While Respondent’s exhibit list indicates that the Weaver witnesses will rely on the Burton Testimony and Respondent’s Identification of Additional Documents Midwest Generation’s Experts May Rely Upon also included the Burton Testimony, Respondent has not identified any opinion offered by the Weaver witnesses that is related to the Burton Testimony. Respondent’s Motion to Incorporate focuses on “Dr. Burton’s discussion about the analysis of

the sediments in the Des Plaines River near the Joliet Generating Station.” Resp. Mot. at ¶7.
Further, the Burton testimony itself appears to center on a “Sediment Chemistry Study.”

6. The Expert Report on Relief and Remedy by Weaver Consultants (“Weaver Report”), however, offers no analysis of sediments, no opinions on sediment chemistry, and virtually no opinions on sediments at all. In fact, the Weaver Report includes only four limited references to sediments – references that are observations, not opinions. Weaver Consultants, Expert Report on Relief and Remedy, at 34, 38, 39, 41 (April 22, 2021). The four references to sediments in the Weaver report simply indicate that 1998 ENSR Phase II Environmental Site Assessments at each of the four stations included a certain number of sediment samples. See Weaver Report, at 34, 38, 39, 41. For example, the Weaver Report states that for Waukegan, “The Phase II ESA included the results from 22 soil borings, 5 monitoring wells, 13 surface soil samples, and 6 sediment samples.” Weaver Report, at 41. The other three mentions are the same exact format providing the number of soil borings, monitoring wells, surface soil samples, and sediment samples. See Weaver Report, at 34, 38, 39. The Weaver Report also provides Figures 5-8 which delineates the locations of the soil borings, monitoring wells, surface soil samples, and sediment samples. See Weaver Report, Figures 5-8. Aside from these mentions of the number and location of sediment samples in the Phase II ESA for each station, there is no further discussion of sediments in relation to the Midwest Generation stations in the Weaver Report. Most notably, the Weaver Report fails to provide any sediment sampling results or data, and no discussion of the significance of the sediment sampling. Since the Weaver Report offers no opinions on sediment, the Burton testimony is not relevant to the Weaver Report and cannot be offered through the Weaver witnesses.

7. When questioned about sediments in their deposition, the Weaver witnesses testified as

follows:

Q Did you say you're aware that there has been sediment sampling of adjacent water bodies?

MR. DORGAN: Yes. That sampling wasn't done as part of the work on these stations, but there has been some sediment sampling that's been performed in the water bodies.

Q Do you know who's performed that?

MR. DORGAN: I don't recall offhand, but there's stretches of the Des Plaines River that have been subject of just general studies of the area and the quality of the Des Plaines River and river bottoms.

Q Okay. Did anyone on your team consider the possibility that contaminants could be accumulating in sediment?

MR. DORGAN: We considered it as part of our evaluation, but, again, the sediments – the concentration on this matter has been with the remedy for groundwater, and the groundwater is not likely to be contributing to an impact to sediments. Sediments can be impacted in other ways, but -- so relative to the focus of what we were tasked to do with respect to this particular matter, we didn't pursue that in any great detail.

Tr. of Douglas G. Dorgan Jr. and Michael B. Maxwell, at 183:7-185:6 (Oct. 6, 2021); (Ex. B).

When questioned in their deposition about sediments, the Weaver witnesses could not identify who had performed the sediment sampling and stated that “we didn’t pursue that in any great detail.” The only opinion that the Weaver witnesses offered is that “the groundwater is not likely to be contributing to an impact to sediments.”

8. Respondent’s failure to provide adequate notice of these new opinions on sediments prejudices Complainants. Complainants have not been given the opportunity to have their expert review and respond to the Burton Testimony or the Sediment Chemistry Study and attachments which consist of more than 400 pages of material. Complainants expert has not had an opportunity to form an opinion on this material. And since Respondent did not supplement the Weaver report to indicate how these documents support their opinions, Complainant cannot properly prepare for cross-examination of the Weaver witnesses on sediments or sediment chemistry.

9. The addition of the Burton testimony and any Weaver witness opinions about sediments at this stage is not consistent with discovery protocols. Discovery rules require that parties disclose the subject matter, conclusions, opinions, qualifications, and all reports of any witness who will offer any opinion testimony. *Sinclair v. Berlin*, 325 Ill. App. 3d 458, 469 (2001).

10. The purpose of this rule is to avoid surprise and permit litigants to ascertain and rely upon the opinions of experts retained by their adversaries. *Dept. of Trans. v. Crull*, 294 Ill. App. 3d 531, 537 (1998). If not contained in the original report, Respondent has an ongoing duty to timely supplement or amend prior opinions or responses whenever new or additional information subsequently becomes known to that party. *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).

11. This is consistent with the Hearing Officer's Order of July 18, 2017 on MWG's Motion in Limine to limit Complainants' Expert Testimony.¹ In that instance, Respondents produced the documents at issue after the expert's deposition. Respondent then brought a motion in limine to exclude Complainant's experts from relying on these documents.

12. Complainants are prejudiced and will be unfairly surprised at the hearing as to how MWG will use—or have their experts testify about—these untimely produced documents. If the Burton testimony and associated materials are admitted as an exhibit that the Weaver witnesses may rely on, MWG's experts would have the ability to change or modify their previously written opinions and/or deposition testimonies based on information found in these untimely documents, all without providing any supplement to their reports or being deposed on their new opinions.

13. Indeed, Respondent has failed to take any steps to supplement their expert's report or

¹ Available at <https://pcb.illinois.gov/documents/dsweb/Get/Document-95451>.

opinion, instead providing the most minimal notice possible that the Weaver witnesses will be relying on 400 pages of new material all without identifying what those new opinions based on that material will be.

14. To allow Respondent to ignore the plain language of the discovery rules defeats their purpose. *See Chicago & Illinois Midland Ry. Co. v. Crystal Lake Indus. Park, Inc*, 225 Ill. App. 3d 653, 658-59 (1992) (the trial court's admission of an expert witness' testimony that was inconsistent with his deposition testimony constituted an “egregious violation” of discovery rules, as the party did not have time to investigate and prepare accordingly).

15. Respondent’s failure to supplement their expert opinion as required by the discovery rules benefits Respondent while preventing Complainants from preparing rebuttal testimony or preparing for cross examination.

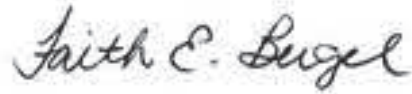
16. Finally, the date of the Burton Testimony and the sediment chemistry study call into question its reliability. The testimony was filed in 2008, 15 years ago. It is quite possible that the sediment study is outdated. It is unclear whether the sediments in the Des Plaines River near the Joliet Station has changed in the intervening 15 years or whether there is any more current sediment sampling available. Thus, the age of these documents creates questions about it being up-to-date and reliable. It is possible that the documents are the most current sediment sampling; but this is an issue that should be explored in discovery and not on the eve of the hearing. These questions about the Burton Testimony’s reliability provide a basis alone for denying Respondent’s Motion to Incorporate.

17. As a result of Respondent’s identification of new expert material without supplementing or amending the Weaver experts’ opinions and the dated nature of the material, Respondent’s motion to incorporate the Burton testimony should be denied.

WHEREFORE, for the reasons stated above, Complainants request that the Hearing Officer deny Respondent's Motion to Incorporate

Dated: May 4, 2023

Respectfully submitted,



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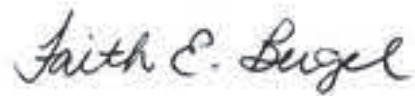
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CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION TO INCORPORATE THE PRE-FILED TESTIMONY OF G. ALLEN BURTON INTO THE PCB 13-15 DOCKET** before 5 p.m. Central Time on May 4, 2023 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 17 pages.

Respectfully submitted,

A handwritten signature in black ink that reads "Faith E. Bugel". The signature is written in a cursive style with a clear, legible font.

Faith E. Bugel

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