

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 **MOTION FOR LEAVE TO FILE, INSTANTER, A SURREPLY AND RESPONSE TO RESPONDENT’S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY TO COMPLAINANTS’ RESPONSE TO MOTION TO CLARIFY AND CONFIRM THE HEARING OFFICER’S LIMITATION ON THE USE OF THE HISTORIC PHASE I AND PHASE II REPORTS** and **COMPLAINANTS’ PROPOSED SURREPLY IN RESPONSE TO RESPONDENT’S MOTION TO CLARIFY AND CONFIRM THE HEARING OFFICER’S LIMITATION ON THE USE OF THE HISTORIC PHASE I AND PHASE II REPORTS**, copies of which are served on you along with this notice.

Respectfully submitted,



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Dated: December 29, 2017

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Pursuant to Section 101.500(e) of the Illinois Pollution Control Board General Rules, and as supported by the accompanying proposed Surreply Brief, Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairies Rivers Network and Citizens Against Ruining the Environment (collectively, “Citizens Groups” or “Complainants”) move the Illinois Pollution Control Board (“the Board”) for leave to file a surreply to Midwest Generation, LLC’s (“MWG’s” or “Respondent’s”) Reply in support of its Motion to Clarify and Confirm the Hearing Officer’s Limitation on the Use of the Historic Phase I and Phase II Reports. As grounds for the motion, Complainants state as follows:

1. The Board may allow parties to file replies and surreplies where they would aid the Board in its consideration of the relevant factual and legal issues. *American Disposal Services of*

Illinois, Inc. v. Mclean County, et al., PCB 11-60 at 2 (Oct. 16, 2014) (J.D. O’Leary) (allowing a reply “[i]n the interest of administrative efficiency and to aid in the consideration of the issues presented”). In particular, reply briefs should be allowed where “material prejudice will result for respondents if the reply is not allowed.” *Sierra Club v. Ameren Energy Medina Valley Cogen, LLC, et al.*, PCB 14-134 at 4 (Nov. 6, 2014) (D. Glosser) (allowing a reply where necessary to respond to “substantial arguments” raised in opposition).

2. Material prejudice can result from mischaracterizations by the opposing party of relevant issues to the motion. *City of Quincy v. Illinois Env. Prot. Agency*, PCB 08-86 at 2-3 (June 17, 2010) (T.E. Johnson) (holding that material prejudice may result from being unable to respond to alleged mischaracterizations by the other party). This material prejudice can result from both “factual and legal misrepresentations.” *Johns Manville v. Illinois Dep. of Transportation*, PCB 14-03 at 2 (Sept. 4, 2014) (J.A. Burke); see *Prairie Rivers Network, et al. v. Illinois Env. Prot. Agency, et al.*, PCB 14-106 at 2 (Dec. 18, 2014) (J.A. Burke) (noting that misapplication of precedent presents a basis for a reply); *Illinois v. Amsted Rail Company, Inc.*, PCB 16-61 at 1 (Mar. 3, 2016) (J.A. Burke) (granting leave to reply where an opposition brief “cite[d] irrelevant or distinguishable cases”).
3. Even when the chance of material prejudice is low, leave to reply may be granted to avoid even the possibility that such prejudice could result. *Kyle Nash v. Luis Jimenez*, PCB 07-97 at 3 (Aug. 19, 2010) (C.K. Zalewski).
4. Here, as explained in the attached proposed surreply brief, Respondent has made multiple factual misstatements in replying to Citizens Groups’ Opposition to the Motion. In particular, Respondent mischaracterizes Citizens Groups’ motion as seeking new relief when, in reality,

Complainants were simply responding to Respondent's "Motion to Clarify and Confirm the Hearing Officer's Limitation on the Use of the Historic Phase I and Phase II Reports" with a fair and concrete approach to clarifying and confirming the Hearing Officer's Limitation. (Resp. Reply Br. at 1.) By delineating the specific pages from the Phase I and Phase II Reports that can be used during post-hearing briefing, Citizens Groups were attempting to clarify the Hearing Officer's ruling on Respondent's request at the hearing that use of the reports during briefing be limited to sections that were relevant and for which Respondents were on notice. The proposed surreply brief, in responding to and identifying MWG's misstatements, will aid the Board in its consideration of the relevant facts.

5. In addition, Respondent's allegation that Complainants' response exceeds the scope of Respondent's original motion is without merit. To begin with, Respondent has been unable to consistently articulate the scope of its own motion. In its reply, MWG states that its original motion was to clarify "that the limitation the Hearing Officer clearly applied to Exhibits 17D, 18D, 19D, 20D, and 21, also applied to Exhibit 38." (Resp. Reply Br. at 2.) However, this is not reflected in the title of MWG's original motion, its introduction, nor its request for relief. Rather, Respondent titled its motion "Motion to Clarify and Confirm the Hearing Officer's Limitation on the Use of the Historic Phase I and Phase II Reports." Additionally, the introduction of MWG's original motion states that it is a "Motion to Confirm and Clarify the Hearing Officer's Limitation on the Use of the Historic Phase I and Phase II Reports, identified as Exhibits 17D, 18D, 19D, 20D, 21, and 38." In its ultimate request for relief in its original motion, Respondent states: "MWG requests that the Hearing Officer confirm that the parties' use of or reliance on each of the Phase I and Phase II Reports identified as Exhibits 17D, 18D, 19D, 20D, 21 and 38, is limited to the information discussed at the hearing with

Ms. Race.” (Resp. Mot. at 3.) Setting aside the precise language used by MWG, it cannot be denied that MWG’s motion was intended to clarify the Hearing Officer’s ruling on the admissibility of certain reports. Complainants’ response was confined to the same issue – the admissibility of the reports at issue in MWG’s motion – and did not exceed the scope of that motion.

6. The mischaracterizations and additions identified above and discussed in the attached proposed surreply brief are significant enough that Citizens Groups would be materially prejudiced if they are not allowed to respond and clarify the record for the Board.
7. Although Complainants are not opposed to MWG’s Motion for Leave to Reply if Complainants also are granted leave to file a surreply, if leave is not granted to file a surreply, Respondent’s Reply should also be disallowed because of the mischaracterizations delineated above and contained in the attached brief.

WHEREFORE the Board should grant Citizens Groups’ leave to file the attached surreply brief and consider it before deciding the Motion.

Dated: December 29, 2017

Respectfully submitted,



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**COMPLAINANTS’ PROPOSED SURREPLY IN RESPONSE TO RESPONDENT’S
MOTION TO CLARIFY AND CONFIRM THE HEARING OFFICER’S
LIMITATION ON THE USE OF THE HISTORIC PHASE I AND PHASE II
REPORTS**

Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Citizens Groups” or “Complainants”) submit this surreply in reply to Midwest Generation LLC’s (“MWG’s” or “Respondent’s”) Reply to Complainants’ Response to Motion to Clarify and Confirm the Hearing Officer’s Limitation on the Use of the Historic Phase I and Phase II Reports.

ARGUMENT

The standard for admissibility of evidence at an Illinois Pollution Control Board (“PCB” or “Board”) hearing is as follows:

In accordance with Section 10-40 of the IAPA, the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part. . . . The hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged.

35 Ill. Adm. Code 101.626(a). This is a “relaxed standard.” *People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at 9 (Jan. 9, 2014). This standard was also articulated by Hearing Officer Halloran at the hearing when ruling on the admissibility of these exhibits. “I consider Ms. Race a reasonable and prudent person and she reviewed these documents and I don't think she would have reviewed them for a waste of time and, you know, that's all Section 101.626 requires.” (Oct. 23 Tr. 126:7-12.)

Respondent's motion and reply requested clarification of the hearing officer's ruling in admitting certain exhibits.¹ Citizens Groups agree that there is a lack of clarity around precisely what portions of the exhibits are admitted based on the Hearing Officer's ruling, which allowed briefing on “the questions [Ms. Bugel] ha[s] asked.” (Oct. 23 Tr. 127:1-3.) Consequently, in response to Respondent's motion for clarification of the Hearing Officer's previous ruling, Complainants suggest that both the Board and the parties would benefit from clarification in the form of specific page numbers of the Phase I and II Reports that the Hearing Officer admitted into evidence at the hearing. Otherwise, and as indicated by Respondent's motion, the parties are left to their own devices to interpret the scope of the ruling.

There are several problems with Respondent's Reply that merit a response. First, Respondent objects to Complainants' use of page numbers to identify the portions admitted, but provides an alternative, subjective approach that would fail to clarify anything. Respondent refers to the “sections” or “information discussed at the hearing” as a means of identifying the

¹ MWG claims that their whole original motion was solely for the purpose of confirming that the ruling on the Phase I and Phase II Reports also applied to Exhibit 38. (Resp. Reply Br. at 2.) This is not at all clear from Respondent's original motion, especially considering the paragraph with the ultimate relief Respondent was seeking: “the Hearing Officer confirm that the parties' use of or reliance on each of the Phase I and Phase II Reports identified as Exhibits 17D, 18D, 19D, 20D, 21 and 38, is limited to the information discussed at the hearing with Ms. Race.” (Resp. Mot. at 3).”

portions of the exhibit admitted. (Resp. Reply Br. at 2, 4; Resp. Mot. at ¶ 7.)² Both “sections” and “information” are imprecise descriptors that are open to interpretation. Identification of specific page numbers would provide both the Board and all parties with clarity on exactly what parts of the exhibit were admitted into evidence and what parts of the exhibit all parties may rely on. This clarification would eliminate the possibility of numerous motions seeking to limit parties’ use of these documents in post-hearing briefs.

Respondent’s original motion states that “MWG respectfully request [sic] that the Hearing Officer confirm and clarify that parties’ use of or reliance on each of the Phase I and Phase II Reports, identified as Exhibits 17D, 18D, 19D, 20D, 21 and 38, is limited to the information discussed at the hearing with Ms. Race.” (Resp. Mot. at ¶ 7.) Respondent’s original objection at the hearing indicated that the basis was both relevance and notice. (Oct. 23 Tr. 126:15-22.)³ The “information discussed at the hearing with Ms. Race” included, but was not limited to, boring logs and maps.⁴ Complainants’ questions about these topics in the Phase I and II Reports provided Respondent with notice of the possibility that we would be relying on the boring logs and maps in our briefing. Ms. Race indicated that she reviewed the boring logs and the maps for the Phase I and II Reports. When asked about “environmental site assessments,” Ms. Race explicitly stated, “sometimes when I would look at the information, you know, something like these *borings* you could look at it and think, well, this is what they were finding the way that they were sampling.” (Oct. 23 Tr. 103:15-19 (emphasis added).) In the same

² “The purpose of the limitation was to prevent the use of information in another *section* of the Reports that was unrelated to the testimony.” (Resp. Reply Br. at 2 (emphasis added).) “[D]uring the hearing, MWG discussed other *sections* of the Reports.” (Resp. Reply Br. at 4 (emphasis added).)

³ “We would ask that the ruling be limited then to -- for the purpose of relevancy the questions that are actually asked from that document. In other words, the concern is that there is a discussion with Ms. Race on one issue and then the closing brief comes around and something is pulled out of the back of that report that has nothing to do with the testimony.” (Oct. 23 Tr. 126:15-22.)

⁴ Please note that these maps are also often referred to in the Phase I and II Reports as “site plans.”

response, Ms. Race went on to state, “if you looked at one of the *maps* in here you could gather information about where an old switch yard was or, you know, if the coal pile had always been in the same place” (Oct. 23 Tr. 103:19-23 (emphasis added).)

Because these sections of the document were specifically identified at the hearing by Ms. Race, the maps and boring logs all fall within the scope of the Hearing Officer’s ruling.⁵ (Oct. 23 Tr. 103:15-23.) This is consistent with the Hearing Officer’s ruling that if Ms. Race reviewed a certain portion, it was important to her and it is admissible. “I’ve already ruled on 101.626. So, you know, Ms. Race looked at it, reviewed it, it was important to her.” (Oct. 23 Tr. 134:2-5). Consequently, the ruling on MWG’s motion for clarification should specifically indicate that all maps/site plans and all boring logs for all Phase I and Phase II Reports were admitted.⁶

Further, consistent with Respondent’s request for clarification of the Hearing Officer’s ruling on Exhibits 17D, 18D, 19D, 20D, 21 and 38, the following table describes the sections of the Phase I and Phase II reports that include “the information discussed at the hearing with Ms. Race,” (Resp. Mot. at ¶ 7), with citations to the transcript as to when and where it was discussed.

Exhibit Number	Exhibit Name	Exhibit Pages that Parties May Use or Rely Upon	Transcript Citation Where Discussed
Comp. Ex. 17D	ENSR Consulting, Phase II Environmental Site Assessment of the ComEd Powerton Generating Station, Route 29 & Mantino Road, Pekin, Illinois, (1998)	<ul style="list-style-type: none"> • Bates MWG 13-15_3257: Executive Summary Phase II Environmental Site Assessment activities and the purpose of the assessment • Bates MWG 13-15_3297: Soil 	<ul style="list-style-type: none"> • Oct. 23 Tr. 107:18 • Oct. 23 Tr. 131:13-23

⁵ Complainants agree with Respondent that the Joliet 9 boring logs attached to the Joliet 29 Phase II Report are not relevant and need not be admitted into evidence.

⁶ Specific pages number for the boring logs and maps are included in the table below.

		<p>Boring/Monitoring Well Site Plan for the Powerton Plant</p> <ul style="list-style-type: none"> • Bates MWG 13-15_3298: Groundwater Elevation Map for the Powerton Plant • Bates MWG 13-15_3299-3342: Logs of Boreholes B-1 to B-36 at the Powerton Plant 	<ul style="list-style-type: none"> • Oct. 23 Tr. 131:24-132:5 • Oct. 23 Tr. 100:21-24; 128:1-131:10
Comp. Ex. 18D	ENSR Consulting, Phase II Environmental Site Assessment of the ComEd Will County Generating Station, (1998)	<ul style="list-style-type: none"> • Bates MWG 13-15_5739: Site Plan for the Will County Plant • Bates MWG 13-15_5742: Soil Boring/Monitoring Well Site Plan for the Will County Plant • Bates MWG 13-15_5746-5763: Logs of Boreholes B-1 to B-18 at the Will County Plant 	<ul style="list-style-type: none"> • Oct. 23 Tr. 132:6-14 • Oct. 23 Tr. 132:15-18 • Oct. 23 Tr. 111:18-20
Comp. Ex. 19D	ENSR Phase II Environmental Site Assessment Waukegan Generating Station	<ul style="list-style-type: none"> • Bates MWG 13-15_45814: Site Plan for the Waukegan Plant • Bates MWG 13-15_45817: Soil Boring/Monitoring Well Site Plan for the 	<ul style="list-style-type: none"> • Oct. 23 Tr. 135:12-18 • Oct. 23 Tr. 113:8-10⁷

⁷ While Complainants did not specifically ask Ms. Race about the Waukegan Soil Boring/Monitoring Well Site Plan for Waukegan, Complainants did ask about the boring logs. The Soil Boring/Monitoring Well Site Plan goes hand-in-hand with the boring logs because it indicates where the borings were taken on the property. The boring logs are only useful to the Board in conjunction with the maps showing where they were taken. Indeed, Ms. Race's testimony indicates that she reviewed the locations of the borings when reviewing environmental site assessments. (Oct. 23 Tr. 103:15-19) ("[S]ometimes when I would look at the information, you know, something like these borings you could look at it and think, well, this is what they were finding the way that they were sampling, you know, *in this area.*" (emphasis added).)

		<p>Waukegan Plant</p> <ul style="list-style-type: none"> • Bates MWG 13-15_45820-45842: Logs of Boreholes B-1 to B-23 at the Waukegan Plant 	<ul style="list-style-type: none"> • Oct. 23 Tr. 113:8-10; 135:19-24.
Comp. Ex. 20D	ENSR, Phase II Environmental Site Assessment for Joliet 29 (Dec. 1998).	<ul style="list-style-type: none"> • Bates MWG 13-15_23339: Site Plan for the Joliet 29 plant 	<ul style="list-style-type: none"> • Oct. 23 Tr. 114:24-115:7
Comp. Ex. 21	ENSR, Phase I Environmental Site Assessment for Joliet 29 (Oct. 1998)	<ul style="list-style-type: none"> • Bates MWG 13-15_25149: Site Plan for the Joliet 29 plant 	<ul style="list-style-type: none"> • Oct. 23 Tr. 122:23-123:1
Comp. Ex. 38	ENSR, Phase I Environmental Site Assessment of the ComEd Waukegan Generating Station, (Oct. 1998)	<ul style="list-style-type: none"> • Bates MWG 13-15_12012: Site Plan for the Waukegan plant 	<ul style="list-style-type: none"> • Oct. 23 Tr. 136:22-23

Finally, Complainants object to incorporating several of the bates ranges identified by Respondent into the list of pages from the Phase I and Phase II Reports that parties can rely upon during post-hearing briefing.⁸ The bates ranges at issue are Ex. 17D, MWG13-15_3260-3261; Ex. 18D, MWG13-15_5706-5707; Ex. 19D, MWG13-15_45786-45787; and Ex. 20D, MWG13-15_23308-23309. (*See* Resp. Reply Br. at 4 *citing* Oct. 23, 2017 Tr. 117:20-119:9.) Counsel for Respondent did not ask the witness any questions about these pages, nor did the witness discuss them. Rather, these pages were only discussed by counsel for Respondent when objecting to the admission of the Reports. This information, therefore, does not fall within the Hearing Officer's

⁸ Respondent objected to the fact that Complainants identified the page numbers of the Phase Is and IIs that Complainants discussed at the hearing with Ms. Race, but not the information that Respondent discussed. (Resp. Reply Br. at 4-5.) If Respondent chooses to identify additional content from the Phase I and II Reports that was discussed at hearing that it hopes to make available during briefing, it is the responsibility of Respondent to do so. Complainants do not object to including the following bates ranges identified by Respondents in the list of bates ranges that the parties can cite to during post-hearing briefing: Ex. 17D, MWG13-15_3276-3277, Ex. 18D, MWG13-15_5723, Ex. 19D, MWG13-15_45801, and Ex. 20D, MWG13-15_23323-23324 (Resp. Reply Br. at 5).

limitation to “the questions you have asked of Ms. Race” nor does it meet Respondent’s own request for relief that that briefing be limited “to the information discussed at the hearing with Ms. Race.” Moreover, opposing counsel did not discuss content on all pages of the bates ranges at issue here. Rather, Ms. Franzetti only discussed content on the following pages: Ex. 17D, MWG13-15_3261; Ex. 18D, MWG13-15_5807; Ex. 19D, MWG13-15_45787; and Ex. 20D, MWG13-15_23309. *See* Oct. 23, 2017 Tr. 117:20-119:9. Therefore, Ex. 17D, MWG13-15_3260-3261; Ex. 18D, MWG13-15_5706-5807; Ex. 19D, MWG13-15_45786-45787; and Ex. 20D, MWG13-15_23308-23309 should not be included in the list of bates ranges from the Phase I and II Reports that were admitted.

CONCLUSION

WHEREFORE, for the reasons described above, Complainants respectfully request that the Hearing Officer clarify and confirm that the parties may rely on all content in the above table of pages of the Phase I and Phase II Reports; or in the alternative, Complainants believe it would be appropriate to allow Complainants to recall Ms. Race for further questioning relating to the Phase I and II Reports, because Complainants were not on notice that the sections described above would not be admitted and therefore would be materially prejudiced.

Dated December 29, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **MOTION FOR LEAVE TO FILE, INSTANTER, A SURREPLY AND RESPONSE TO RESPONDENT'S MOTION FOR LEAVE TO FILE, INSTANTER, ITS REPLY TO COMPLAINANTS' RESPONSE TO MOTION TO CLARIFY AND CONFIRM THE HEARING OFFICER'S LIMITATION ON THE USE OF THE HISTORIC PHASE I AND PHASE II REPORTS** and **COMPLAINANTS' PROPOSED SURREPLY IN RESPONSE TO RESPONDENT'S MOTION TO CLARIFY AND CONFIRM THE HEARING OFFICER'S LIMITATION ON THE USE OF THE HISTORIC PHASE I AND PHASE II REPORTS** was served electronically to all parties of record listed below, on December 29, 2017.

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