

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,)	
)	
Respondents)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER, COMPLAINANTS' ALTERNATIVE MOTION TO STRIKE PORTIONS OF AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER, and COMPLAINANTS' ALTERNATIVE MOTION FOR LEAVE TO RESPOND TO AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



Gregory E. Wannier
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Dated: October 28, 2019

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MIDWEST GENERATION, LLC,)	
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Respondent.)	

COMPLAINANTS' OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER

Complainants oppose the Motion for Leave to File Amicus Curiae Brief in Support of Midwest Generation, LLC's Motion to Reconsider and Clarify the Interim Order ("Amicus Motion" and "Amicus Brief"). As a preliminary matter, Complainants note that all legal arguments raised in the Amicus Brief have already been raised by Midwest Generation, so the Amicus Brief does not add any value to this proceeding. Complainants also oppose the Amicus Motion for two additional reasons. First, the Amicus Motion and Amicus Brief repeatedly raise numerous facts that are not in evidence, which is prohibited by Board Rules. Second, the Amicus Brief contains numerous statements that are speculative and not grounded in fact, let alone based on facts in the record. If the Board decides to grant the Amicus Motion, Complainants alternatively move to strike the portions of the Brief that raise facts that are not in evidence and that are speculative.

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First, the Amicus Motion and Amicus Brief repeatedly raises numerous facts that are not in evidence, as prohibited by Board Rules. Amicus curiae briefs “must consist of argument only and may not raise facts that are not in evidence in the relevant proceeding.” 35 Ill. Admin. Code. 101.110(c). The Amicus Motion and Amicus Brief raise facts, virtually all unsubstantiated, that are not part of the record in this case and have not been admitted into evidence by the Hearing Officer and Board. The facts that are not part of the existing record include statements that “the Board’s Interim Order will directly affect the numerous member companies . . .”, Amicus Mot. ¶ 8, and related discussions of the impacts of the Board’s Interim Order. *See, e.g.*, Amicus Mot. ¶ 10 (“[c]ertain findings . . . have widespread impacts . . .” and “the far-reaching impacts . . .”). Other facts not in evidence include discussions of “the historical Illinois EPA practice” Amicus Mot. ¶ 10. *See also* Amicus Br. at 8-9 (discussing “historical practice of Illinois EPA”); *id.* at 10-11 (discussing IEPA’s use of and claimed benefits of GMZs); *id.* at 11 (discussing members with GMZs, claims of IEPA’s historical practice, and making claims as to natural attenuation); *id.* at 11-12 (making claims as to “useful . . . mechanisms” of CCAs). Finally, the Amicus Brief attaches a document that is not an exhibit in evidence. Amicus Br. Att. 1. The motion for leave to file an Amicus Curiae brief and the Amicus Brief itself do not conform to Board rules and the motion should not be granted.

Second, the motion and brief include numerous speculative statements. Speculative statements are not established by facts, let alone based on evidence in the record, and therefore inadmissible. *Berke v. Manilow*, 63 N.E.3d 194, 200; 407 Ill. Dec. 270, 277 (Ill. App. 1st Dist. 2016); *North Shore Sanitary District v. EPA*, PCB No. 71-36, 1972 WL 5294, *3, *5-6 (1972). The Amicus Motion includes the speculative statements that “the Board’s Interim Order may have drastic . . . consequences” Amicus Mot. ¶ 8 (emphasis added) and “[t]he collateral

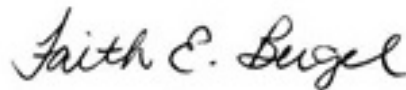
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effects of the Board's Interim Order may include ..." *Id.* (emphasis added). The Amicus Brief also includes numerous speculative statements. *See, e.g.*, Amicus Br. at 1 ("... [T]he Illinois Pollution Control Board's recent interpretation . . . may have a significant and widespread . . . impact . . ." (emphasis added)); *id.* at 2 ("[T]he Board's Interim Order may have drastic . . . consequences . . ."); *id.* (discussing what "businesses may be . . . inclined" to do or not do); *id.* at 5 (discussing effects of GMZs that "may be drastically reduced"); *id.* at 11 (repeating speculation that the "Order may have drastic . . . consequences"). Any statements as to what effects the Board's decision "may" have in the future are speculative, not grounded in facts contained in the record of evidence already admitted in this proceeding, and not permissibly considered by the Board in this proceeding. As such, the Amicus Motion must be denied.

For the foregoing reasons, Complainants' request that the Board deny the Amicus Motion.

Dated: October 28, 2019

Respectfully submitted,



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COMPLAINANTS’ ALTERNATIVE MOTION TO STRIKE PORTIONS OF AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC’S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER

In the event that the Board grants the Motion for Leave to File the Amicus Curiae Brief in Support of Midwest Generation, LLC’s Motion to Reconsider and Clarify the Interim Order (“Amicus Motion” and “Amicus Brief”), pursuant to 35 Ill. Adm. Code 101.500, Complainants Sierra Club, Inc., Environmental Law and Policy Center, Prairies Rivers Network and Citizens Against Ruining the Environment by and through their counsel, respectfully request that the Hearing Officer enter an order striking the portions of the Amicus Brief that fail to conform to Board Rule by raising facts that are not in evidence and that are speculative. In support of that request, Citizens Groups state as follows:

1. Amicus curiae briefs “must consist of argument only and may not raise facts that are not in evidence in the relevant proceeding.” 35 Ill. Admin. Code. 101.110(c).
2. The Amicus Brief raises facts that are unsubstantiated and not part of the record in

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this proceeding. These facts have not been admitted into evidence by the Hearing Officer and Board. The facts that are not part of the existing record are as follows:

- i. Discussion of “historical practice of Illinois EPA”. Amicus Br. at 8-9
 - ii. Discussion of IEPA’s use of and claimed benefits of GMZs. *Id.* at 10-11.
 - iii. Discussion of members with GMZs, claims of IEPA’s historical practice, and claims as to natural attenuation. *Id.* at 11.
 - iv. Claims regarding “useful . . . mechanisms” of CCAs. *Id.* at 11-12.
3. The Amicus Brief includes the speculative statements that, by the very nature, are not based on facts and, therefore, are not based on the existing record in this case. The speculative statements are as follows:
- i. “. . . [T]he Illinois Pollution Control Board’s recent interpretation . . . may have a significant and widespread . . . impact” Amicus Br. at 1.
 - ii. “[T]he Board’s Interim Order may have drastic . . . consequences” *Id.* at 2.
 - iii. Discussion of what “businesses may be . . . inclined” to do or not do. *Id.*
 - iv. Discussion of effects of GMZs that “may be drastically reduced”. *Id.* at 5.
 - v. Speculation that the “Order may have drastic . . . consequences”. *Id.* at 11.
4. Finally, the Amicus Brief attaches a document that is not an exhibit in evidence. Amicus Br. Att. 1.
5. The above statements and the Attachment are not grounded in facts contained in the record of evidence already admitted in this proceeding and not permissibly considered by the Board.

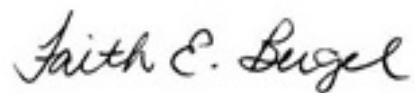
WHEREFORE, if the Board grants the Amicus Motion, Complainants respectfully request that the hearing officer enter an order striking the following portions of the Amicus

Brief:

- i. The sentence beginning “If not . . .” and ending “. . . throughout the State.”
Amicus Br. at 1.
- ii. The sentence beginning “If not . . .” and ending “. . . already established GMZs.”
Amicus Br. at 2.
- iii. The sentence beginning “Without this certainty . . .” and ending “. . . impacted site.” Amicus Br. at 2.
- iv. The two sentences beginning “The impact . . .” and ending “. . . drastically reduced.” Amicus Br. at 5.
- v. The paragraph consisting of 25 lines of text, beginning “Additionally, the Board’s findings . . .” and ending “. . . before a GMZ can expire.” Amicus Br. at 8-9.
- vi. The sentence beginning “GMZs have been utilized . . .” and ending “since the early 1990s.” Amicus Br. at 10.
- vii. The 20 lines beginning “Numerous member companies . . .” and ending “. . . litigation delaying action.” Amicus Br. at 11-12.
- viii. Attachment 1 to the Amicus Brief.

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Respectfully submitted,



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COMPLAINANTS' ALTERNATIVE MOTION FOR LEAVE TO RESPOND TO AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER

In the event that the Board grants the Motion for Leave to File the Amicus Curiae Brief in Support of Midwest Generation, LLC's Motion to Reconsider and Clarify the Interim Order ("Amicus Motion" and "Amicus Brief"), pursuant to 35 Ill. Admin. Code. 101.110(c), Complainants move the Illinois Pollution Control Board ("Board") for leave to respond to the Amicus Curiae Brief in Support of Midwest Generation, LLC's Motion to Reconsider and Clarify the Interim Order ("Amicus Motion" and "Amicus Brief") and respectfully request and expedited decision. In support of this motion, Complainants state as follows:

1. On October 14, 2019, Illinois Environmental Regulatory Group, the Illinois Coal Association, the Chemical Industry Council of Illinois, and the Illinois Chapter of the National Waste & Recycling Association (collectively, "the Amicus Groups") filed the Amicus Motion and Amicus Brief.

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2. 35 Ill. Admin. Code. 101.110(c) provides

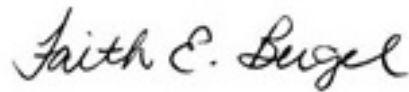
Amicus curiae briefs may be filed in any adjudicatory proceeding by any interested person, if the Board grants permission. Response briefs will be allowed only with Board permission. The briefs must consist of argument only and must not raise facts that are not in evidence in the relevant proceeding. Amicus curiae briefs, and any responses, will be considered by the Board only as time allows. The briefs will not delay the Board's decision-making. (See also Section 101.302(k).)

3. In order for the Board to benefit from a full and fair picture of the issues raised by the Amicus Brief, Complainants should be granted an opportunity to respond. Complainants request an expedited decision so that Complainants have the opportunity to respond to the Amicus Brief in a timely manner before the Board decides the Motion for Reconsideration.

WHEREFORE, if the Board grants the Amicus Motion, Complainants respectfully request an expedited decision and that the Board grant Complainants Alternative Motion for Leave to Respond to the Amicus Brief.

Dated: October 28, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, Gregory E. Wannier, 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' OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER, COMPLAINANTS' ALTERNATIVE MOTION TO STRIKE PORTIONS OF AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER, and COMPLAINANTS' ALTERNATIVE MOTION FOR LEAVE TO RESPOND TO AMICUS CURIAE BRIEF IN SUPPORT OF MIDWEST GENERATION, LLC'S MOTION TO RECONSIDER AND CLARIFY THE INTERIM ORDER** before 5 p.m. Central Time on October 28, 2019 to the email addresses of the parties on the attached Service List.

Respectfully submitted,



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