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STATE OF ILLINOIS  
Pollution Control Board

ILLINOIS POLLUTION CONTROL BOARD

January 25, 2016

SIERRA CLUB, ENVIRONMENTAL )  
LAW AND POLICY CENTER, )  
PRAIRIE RIVERS NETWORK, and )  
CITIZENS AGAINST RUINING THE )  
ENVIRONMENT, )  
Complainants, ) PCB 13-15  
v. ) (Enforcement – Water)  
MIDWEST GENERATION, LLC, )  
Respondent. )

 ORIGINAL

**HEARING OFFICER ORDER**

On October 3, 2012, complainants filed a seven-count complaint alleging that Midwest Generation LLC's (MWG) disposal of coal ash in ash ponds at four electric generating stations resulted in violations of open dumping and water pollution provisions of the Environmental Protection Act (Act) (415 ILCS 5/12(a), 12(d), 21(a) (2012)); groundwater quality standards (35 Ill. Adm. Code 620.115, 620.301(a), 620.405); and various regulations promulgated under the federal Resource Conservation and Recovery Act. The four plants are MWG's Powerton Station located in Tazewell County; the Joliet 29 Station located in Will and Kendall Counties; the Will County Generating Station, located in Will County; and Waukegan Station, located in Lake County. On October 3, 2013, the Board denied MWG's motion to dismiss the complaint but granted MWG's request to strike portion of three counts alleging that MWG had violated federal regulations.

On December 22, 2015, MWG filed a motion to strike (Mot.) the discussion of federal Coal Combustion Residual (CCR) rules, 40 CFR §§257.50-257.107, from the *Rebuttal Report to Expert Report of John Seymour, P.E.*, prepared by complainants' expert James Kunkel, Ph.D. (Reply Report). MWG also filed a memorandum in support. (Memo.). On January 20, 2016, complainants filed a response. (Resp.).

MWG first argues the complainants' expert's Reply Report presents opinions in violation of the "law of the case" doctrine and presents new opinions not in Dr. Kunkel's original report. Mot. at 1. MWG asserts that the allegations in the report of violations of federal CCR rules is in direct contradiction to the Board's October 3, 2013 Order dismissing the federal allegations in the complaint. *Id.* at 2. The Board's order held, "the Board lacks authority to hear claims for violation of 40 C.F.R. part 257." MWG reasons that Dr. Kunkel should not be able to discuss the CCR rules because they outside the Board's authority.

Second, MWG argues that this new opinion should and could have been introduced in Dr. Kunkel's initial expert report. *Id.* at 3. MWG explains that rebuttal evidence is not admissible if it could have been introduced in the plaintiff's "case-in-chief." Naleway v. Agnich, 386 Ill. App. 3d 635, 649, 897 N.E.2d 902, 917 (2nd Dist. 2008). Memo. at 5-6. MWG argues that this issue arose in a discovery dispute in Sloan Valve Co. v. Zurn Industries, Inc. et al., 10 C 204, U.S. Northern District of Illinois (June 19, 2013) (Sloan Valve). MWG notes that the court found in that case that "Experts must limit their reply reports to the scope of the issues raised in the rebuttal reports." Memo. at 6, quoting Sloan Valve.

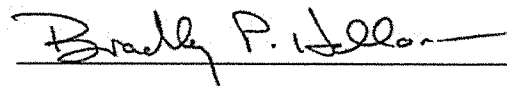
Complainants oppose the motion to strike first because they do not seek to insert federal claims or have the Board enforce federal law. Resp. at 1. Complainants argue that Dr. Kunkel discussed federal CCR rules for factual background evidence to rebut MWG's expert report. Resp. at 2. Complainants state further that Dr. Kunkel complies with the Oct. 3, 2013 Board Order by not alleging any violations of federal law. Complainants focus on the fact that Dr. Kunkel used the federal rules as a guide for finding "remediation-industry-accepted approaches" to disposal of coal ash in ash ponds. *Id.* at 4. Complainants also claim that Dr. Kunkel's discussion of federal CCR rules is in direct response to MWG's expert report. *Id.* at 6. Complainants contend the federal CCR rules are used by Dr. Kunkel to support opinions raised in his initial expert report and to contradict or disprove MWG's expert's report.

Complainants also argue that Sloan Valve supports Dr. Kunkel's discussion on federal CCR rules. Resp. at 6. Complainants maintain that the court did not strike new calculations that were included to refute the expert testimony offered in rebuttal. Complainants assert that new evidence is permissible as long as it is responsive to the opposing expert's opinion. *Id.* at 6-7.

### **Discussion and Ruling**

I find that complainants do not raise legal claims related to federal law, or seek to have the Board enforce federal regulations. Dr. Kunkel discussed the federal CCR rules for evidentiary purposes as allowed by the Board's October 3, 2013 ruling. Furthermore, MWG improperly relies on Sloan Valve. Consistent with Sloan Valve, complainants "limit their reply report to the scope of the issues raised in the rebuttal report." *Id.* The federal CCR rules are within the scope of the issues raised by MWG's expert report by Mr. Seymour. Therefore, respondent's motion to strike is denied.

IT IS SO ORDERED.



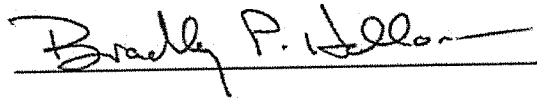
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were mailed, first class, on January 25, 2016, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on January 25, 2016:

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

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