**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 2013-015** |
| **Complainants,** | ) | **(Enforcement – Water)** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **MIDWEST GENERATION, LLC,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**NOTICE OF FILING**

TO: Don Brown, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Respondent, Midwest Generation, LLC's Response to Complainants' Memorandum Regarding Replacement of Their Expert, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: June 9, 2020

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
(312) 251-5255

**SERVICE LIST**

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601

Jeffrey Hammons
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service for Respondent Midwest Generation, LLC's Response to Complainants' Memorandum Regarding Replacement of Their Expert was filed on June 9, 2020 with the following:

Don Brown, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies were emailed on June 9, 2020 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

**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 2013-015** |
| **Complainants,** | ) | **(Enforcement – Water)** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **MIDWEST GENERATION, LLC,** | ) | |
| | ) | |
| **Respondent.** | ) | |

**MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' MEMORANDUM REGARDING REPLACEMENT OF THEIR EXPERT**

Very simply, Complainants are asking the Hearing Officer to participate in an *ex parte* communication and condone a process that violates basic rules of motion practice, is fundamentally unfair as a matter of due process, and no doubt appealable. Complainants' cannot file a motion to completely change their expert, include an *ex parte* affidavit, and thus preclude Respondent from effectively addressing the motion. The Hearing Officer must further reject Complainants' request because Complainants failed to identify (as requested by the Hearing Officer) how a substituted expert's opinions would differ from existing opinions. Complainants' request is contrary to applicable case law and will result in an inaccurate and unnecessarily extensive record. Because the Hearing Officer has a duty "to conduct a fair hearing, … and to ensure development of a clear, complete, and concise record for timely transmission to the Board" (35 Ill. Adm. Code 101.610), the Hearing Officer should deny Complainants' unprecedented request.

## I. Complainants' Affidavit is an Impermissible *Ex Parte* Communication that Must be Disclosed

It is impossible for Midwest Generation, LLC ("MWG") to fully respond to Complainants' memorandum when Complainants' have withheld the supporting information in an *ex parte* communication that is impermissible on its face. The Illinois Pollution Control Board ("Board") rules defines *ex parte* communication as "any written or oral communication by any person that imparts or requests material information or makes a material argument regarding potential action concerning regulatory, quasi-adjudicatory, investment or licensing matters pending before or under consideration by the Board."[1] 35 Ill. Adm. Code 101.202 (emphasis added). Pursuant to Illinois law and Board rules, the Hearing Officer "must not engage in an *ex parte* communication designed to influence their action regarding an adjudicatory, regulatory, or a time-limited water quality standard proceeding pending before or under consideration by the Board." 35 Ill. Adm. Code 101.114(c).[2] Moreover, under Illinois law and the Board rules, when a Board employee receives an *ex parte* communication from a party, the Board employee in consultation with the Board's ethics officer, "will promptly memorialize the communication and make it part of the record of the proceeding." 35 Ill. Adm. Code 101.114(e), 5 ILCS 430/5-50 (b-5) (emphasis added). Here, Complainants' affidavit allegedly explaining why they believe their expert needs to be replaced is clearly an *ex parte* communication and the Hearing officer may not accept it. Instead, the Hearing Officer must memorialize the communication and make it a part of the record, including sending a copy of the affidavit to MWG.

[1] This definition is copied from the Illinois law on *ex parte* communications, located at 5 ILCS 430/5-50.

[2] Similarly, Illinois judges are barred from considering *ex parte* communications. Rule 63 of the Illinois Supreme Court Rules, under the Code of Judicial Conduct, states that "a judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."

Complainants cannot disguise their *ex parte* communication as "non-disclosable information." Complainants make the incredulous suggestion that they should be able to file a motion to replace their expert, attach an affidavit in support of that motion, but then keep that affidavit in support away from MWG as "non-disclosable". Complainants are abusing the Board regulations for non-disclosable information by seeking to disclose to the Hearing Officer (and ultimately the Board) the purported basis for a new expert but withholding that same information from MWG. The purpose for designating information as "non-disclosable" is to prevent *the public* from accessing files, not the other parties in a matter. See 415 ILCS 5/7(a). Complainants cannot cite any authority to support their claim that a movant may withhold from the non-movant information used in support of a motion – and no such authority exists because of the express rules against *ex parte* communications.

In any case, Complainants have no grounds to withhold information because the Parties have agreed to a Protective Order, entered in the record in this proceeding, that will maintain the confidential nature of material. Despite having this Protective Order, Complainants wrongfully engaged in an *ex parte* communication with the Hearing Officer by sending a document to the Hearing Officer outside the presence of MWG. There is no way to justify such conduct. 35 Ill. Adm. Code 101.114 (c); 5 ILCS 430/5-50 (b-5). It is axiomatic that a party opposing a motion must be able to review to the materials the movant relies upon and the decision maker is reviewing. MWG cannot effectively present a response without all of the relevant information, and the Hearing Officer cannot decide a motion that only one party has seen. In addition to the impermissible *ex parte* communicate, Complainants' motion should be denied based on fundamental unfairness and lack of due process. MWG will be filing a response in opposition to Complainants' Application for Non-Disclosure to oppose Complainants unprecedented

withholding of the information in support of their motion. MWG also reserves its right to supplement this response once Complainants' affidavit in support is provided to MWG.

## II. Complainants do not Have a Basis to Substitute Kunkel

Because Complainants have not shared with MWG their purported reason for substituting Dr. James Kunkel ("Kunkel"), it is clear that their basis to substitute Kunkel does not fall within the reasons allowed by the Hearing Officer and the courts. As established in MWG's Response in Opposition to Complainants Motion to Substitute their Experts, substitution of experts is only allowed if the expert is unavailable due to a change in roles, a death or illness, or the party could not continue to rely on the expert's opinion because they were in a dispute in another forum.[3] That is not the case here.

Complainants' refusal to share their basis for substitution of Kunkel also suggests that Complainants do not believe Kunkel is qualified to give an expert opinion. This calls into question the expert testimony he previously provided, which the Board relied upon and apparently found credible. If Complainants now believe that Kunkel is not a reliable expert, then justice requires that MWG and the Board be properly informed.

## III. Kunkel Testified to Issues of Remedy at the Hearing and in his Deposition

Complainants are wrong to state that a new opinion should be allowed because Kunkel did not opine on the issues related to remedy at the hearing. Complainants' motion is based upon a false premise that the next phase will decide the scope of the remedy to be established. Quite to the

[3] *People v. Pruim*, PCB 04-207 (Sept. 24, 2008) (Hearing Officer granted the complainant's request to substitute two original expert witnesses because both men were no longer in their roles as the Illinois EPA); *Nelson v. Upadhyaya*, 361 Ill. App. 3d 415, 417-18, 836 N.E.2d 784, 786-87 (1st Dist. 2005) (Court allowed the plaintiffs to replace their expert due to the original expert's illness); *Ins. Co. v. Valmont Elec., Inc.*, 2001 U.S. Dist. LEXIS 23256, at *4 (S.D. Ind. Dec. 27, 2001) (Court allowed the substitution of the expert because the originally named expert had died.); *United States for the Use & Benefit of Agate Steel, Inc. v. Jaynes Corp.*, 2015 U.S. Dist. LEXIS 45379, *4 (D. Nev. Apr. 6, 2015) (Court allowed a party to substitute its expert because the party and their expert became adverse parties in arbitration making it unfeasible for the party to continue to rely on the expert's opinion.)

contrary, the next phase is to decide whether a remedy is required at all. To conduct that evaluation on whether a remedy is required, the Board will evaluate the factors in Section 33(c) of the Act. Accordingly, with that in mind, MWG developed testimony at the hearing and during Kunkel's deposition related to those elements. Specifically, at the hearing Kunkel testified that there are no potable wells downgradient from any of the MWG wells and that the groundwater at MWG's stations have no impact on offsite drinking water. 10/27/17 Hearing Tr. p. 181:4-182:7. He also agreed that fly ash and bottom ash are not hazardous. 10/27/18 Hearing Tr. p. 178:10-15. Kunkel further testified that since the groundwater sampling began at Joliet 29, boron has only been detected above the groundwater Class I standards at Joliet 29 in one of the eleven wells in 2011 and never since, and that the concentrations of certain constitutes at the Joliet 29 Station were decreasing. 10/27/17 Hearing Tr. p. 246:4-250:20, 254:2-6. Similarly, Kunkel agreed that the concentrations at wells downgradient of the Former Ash Basin at the Powerton Station were below the Class I standards. 10/27/17 Hearing Tr. p. 210:16-22. Kunkel agreed that the engineered underdrain system installed in the Secondary Basin at the Powerton Station was designed to quickly move water away from the HDPE liner, protects the liner, and prevents uplift into the liner. 10/27/17 Hearing Tr. p. 108:24-109:9. Finally, Kunkel agreed that "the total recoverable and dissolved are the same for all practical purposes." 10/26/18 Afternoon Hearing Tr. p. 71:10-14. All of these conclusions and opinions go to the absence of gravity of the violations, the reduced duration and reduced severity of the violations, and MWG's due diligence to comply – the very issues that will be considered at the next hearing. Complainants do not state that their unnamed expert will have the same or substantially similar opinions that Kunkel stated at the hearing and during his deposition, and MWG will be highly prejudiced if Complainants were to be allowed to contradict those opinions and conclusions.

## IV. Complainants Acknowledge that the New Opinion Will be "Different"

Because Complainants state that a new opinion will be different, any replacement of the expert should be denied. Complainants state that the new expert's new opinions will "focus on different elements" and "elaborate on different points." Complainants' Memorandum, p. 3. Complainants appear to acknowledge that they are pursuing a different theory on remedy than presented by Kunkel in his report, in violation of Illinois discovery rules. As MWG explained in its Response and not rebutted by Complainants, Supreme Court Rule 213(g) limits expert opinions at trial to "[t]he information disclosed in answer to a Rule 213(f) interrogatory, or at deposition." ILSC 213(g). The committee comments to Rule 213 explain that, "in order to avoid surprise, the subject matter of all opinions must be disclosed pursuant to this rule… and that no new or additional opinions will be allowed unless the interests of justice require otherwise." 177 Ill. 2d R. 213 (g), Committee Comments. Accordingly, pursuant to Rule 213, parties' expert opinions are limited to the opinions expressed in the written report and depositions and new opinions are not allowed. Allowing Complainants to flout fundamental rules of discovery and change their expert's opinions at this late stage is fundamentally unfair to MWG and will result in a hearing that is conducted in an arbitrary manner.

## V. Complainants Fail to Explain how the New Expert Opinion will not Contradict Kunkel's Testimony

The Hearing Officer's order asked Complainants to explain whether the substitute expert's testimony "would be inconsistent and/or contradict Dr. Kunkel's previous testimony." Complainants failed to answer the specific question asked by the Hearing Officer and as a result their request should be denied. Kunkel's opinion is that there should be a remedy and the remedy should be removal, hauling, and backfilling of the existing ash ponds and selected areas of ash-impacted soils. Kunkel Remedy report, p. 2. Complainants fail to provide any specifics on how a

substitute expert's opinions will differ from Kunkel's opinion or how they will be consistent. Instead, Complainants make vague and broad references that the opinion will elaborate on different points based on "new" information which, as discussed below, is not at all new and merely updated. The purpose of allowing substation of an expert is to put the movant in the same position it would have been but for the need to change experts. *United States for the Use & Benefit of Agate Steel, Inc. v. Jaynes Corp*. 2015 U.S. Dist. LEXIS 45379, at *5-6. Plaintiffs have failed to explain how the new expert will place them in the same position as they would be with Kunkel, and failed to answer the Hearing Officer's question on whether the new expert's opinion will be inconsistent or contradict Kunkel's opinions.

## VI. The are no New Facts that Require New Opinions

Instead of answering the Hearing Officer's request to explain whether the new expert opinions' will be inconsistent or contradict Kunkel's opinion, Complainants attempt to claim that the Board's opinion changed the facts related to the remedy. This is incorrect. The facts the Board relied upon in its order have not changed. Moreover, none of the facts related to evaluation of whether a remedy is required have changed. There is no basis to require any different opinions than what were presented during discovery.

In particular, other than one unit, none of the areas of CCR at any of the Stations have changed or been modified.[4] The groundwater monitoring systems are the same, the inspections conducted at the Stations are the same, and the methods by which MWG operates and utilizes its CCR units at three of the Stations are the same.[5] It remains true that there are no potable wells downgradient

[4] Since the original hearing, all of the ash in Pond 2 at Joliet 29 has been removed. However, this is not new information as MWG testified that the ash was going to be removed during the hearing. 1/29/18 T. p. 198:19-199:1. Considering it is Kunkel's opinion that all ash be removed, this update does not necessitate a change in expert or opinion.

[5] As established at the hearing, Joliet 29 does not burn coal and does not generate coal ash, thus the ponds are no longer used to collect ash. 1/29/18 Tr. p. 186:12-15

of the ash ponds and the groundwater at MWG's stations has not impacted offsite drinking water. 10/27/18 Tr. p. 182:3-7. Similarly, the numerous actions MWG took related to its CCR surface impoundments, including lining its ponds long before there were any regulations requiring liners, relining the ponds despite no regulatory requirement to do so, and voluntarily installing groundwater monitoring wells, remain relevant and applicable to the next phase of the litigation. Also, as established at the hearing, MWG took corrective actions in response to the constituents in the groundwater including relining additional ponds and monitored natural attenuation, which is a long process by its nature. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15 (Feb. 6, 2020), slip op. p. 13. Finally, a risk assessment of the constituents in the groundwater showed that there is no threat of harm to the public health or the environment. MWG Exs. 903, Appen. B, and 907, 2/1/18 Tr. p. 279-281; 2/2/18 Tr. pp. 43, 78, 105, 124.

The discovery information MWG recently provided to Complainants is substantially the same as the information previously provided during discovery. In particular, the updated information simply includes more recent groundwater monitoring reports, more recent weekly inspection reports, and more recent analysis of the CCR. MWG established at the hearing that it was complying with the requirements of the Federal CCR rule and MWG has now produced reports of that compliance. 1/30/18 Tr. p. 48:5-12, 102:13-104:13, 181:2-13, 227:11-16. Unless Complainants are conceding that MWG's compliance with the Federal CCR rule means that no additional remedy is needed, the CCR information does not justify a new expert or new expert opinion. The existing facts in the record are simply being updated.

## VII. Allowing New and Different Opinions at this Late Stage Would be Prejudicial to MWG

By naming a substitute expert whose opinions may or may not be consistent with those of Kunkel, MWG will be forced, for no reason, to redo the discovery it has already conducted in this

matter and to conduct unnecessary work to ensure Complainants' claims of consistency – or lack thereof – are true. MWG will be forced to assess the new expert report, evaluate the new opinions, redo its expert deposition, and potentially retain its own new experts in response. By comparison, MWG has already conducted its examination of Kunkel, including a thorough examination of his education, experience and background. Any new deposition of Kunkel would be limited and focused on whether the updated information modified any of his prior opinions. A substitute expert starts the expert discovery process from the beginning.

MWG will have to comb through a substitute expert's new opinions to evaluate whether the opinions are consistent with Kunkel's opinion. If there are any inconsistencies, MWG will be forced to file motions *in limine* pursuant to Illinois Supreme Court Rule 213 to exclude the contradicting opinions. In short, MWG would be highly prejudiced and its litigation strategy unfairly harmed if Complainants were suddenly allowed to name new experts with presumably new opinions after eight years of litigation and a 10-day hearing on liability. *See Smith v. Murphy*, 994 N.E.2d 617, 622 (1st Dist. 2013) (Court found that allowing the new expert would be prejudicial to the non-moving party because it "would require starting expert discovery all over again for a case that was filed" five years ago).

The record for the remedy hearing will be adversely affected because many of the elements to be addressed have already been established in the liability hearing. Allowing substitution now will likely result in numerous inconsistencies in the record. Much of the record in the liability phase of this matter will be relied upon for the remedy phase, including Kunkel's testimony identified in Section III. However, if a new expert with a new opinion is allowed, many portions of that record will no longer be applicable, including Kunkel's Rebuttal opinion (Ex. 407) that provided his opinion on a remedy for the stations and Kunkel's specific rebuttal opinion regarding the analysis

of the effectiveness of MWG's remedy at the stations (Hearing Ex. 408). Moreover, it is possible that a new expert will contradict Kunkel's testimony related to the issues for remedy that have been identified herein, creating additional confusion for the record. In short, allowing a new expert with a new opinion at this late stage would only increase the time, expense, and drain on resources for MWG and the Board, and create a confusing and complicated record.

## VIII. Conclusion

Complainants failed to answer the Hearing Officer's specific questions, and instead engaged in an *ex parte* communication for their own strategic gain in violation of due process and fairness. Complainants' request will foil the Hearing Officer's duty conduct a fair hearing and create a clear and concise record. For the foregoing reasons, Complainants' motion must be denied.

MWG also continues to object to Complainants' request to replace their other expert, David Schlissel, and maintains that if the Hearing Officer allows Complainants to replace him, the new expert's opinion must be the same.

The Board has ordered the Parties and the Hearing Officer to proceed to the remedy hearing. To accomplish that directive, all that is required is to allow the experts to update their opinions, if necessary, based on data collected since discovery closed, and nothing more.

Respectfully submitted,
Midwest Generation, LLC

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

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255