

**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	)	
	)	
Complainants,	)	
	)	
v.	)	PCB No-2013-015
	)	(Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
	)	
Respondents	)	

---

**NOTICE OF FILING**

TO: John Therriault, 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 *Citizens Groups' Response to Respondent's Motion for Extension of Time to Respond to Citizens Groups' Motion for Partial Summary Judgment*, copies of which are herewith served upon you.



---

Jennifer L. Cassel  
Staff Attorney  
Environmental Law & Policy Center  
35 E. Wacker Dr., Ste. 1600  
Chicago, IL 60601  
(312) 795-3726  
jcassel@elpc.org

Dated: June 17, 2016

**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	)	
	)	
Complainants,	)	
	)	
v.	)	PCB No-2013-015
	)	(Enforcement – Water)
MIDWEST GENERATION, LLC,	)	
	)	
Respondents	)	

---

**CITIZENS GROUPS’ RESPONSE TO RESPONDENT’S MOTION TO FOR  
EXTENSION OF TIME TO RESPOND TO CITIZENS GROUPS’ MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network and Citizens Against Ruining the Environment (collectively, “Citizens Groups”) submit this Response to Respondent Midwest Generation’s (MWG) Motion to For an Extension of Time to Respond to Complainants’ Motion for Partial Summary Judgment (“Motion to Extend”). Citizens Groups’ Motion for Summary Judgment complied with all applicable rules and provides clear and comprehensive citations to the record, contrary to MWG’s inaccurate descriptions, and there is therefore no reason to depart from the long-established schedule. While the record supports a denial of the Motion to Extend, as a show of good faith, Citizens Groups will stand by their offer of a two-week extension.

**I. PROCEDURAL BACKGROUND**

On September 30, 2015, the Hearing Officer ordered that “dispositive motions must be filed on or before June 1, 2016.” *Sierra Club et al v. Midwest Generation*, No. 13-15, slip op. at

1 (Sep. 30, 2013). Citizens Groups filed their Motion for Summary Judgment (“Motion”), and their Memorandum in Support of that Motion (“Memorandum”), with the Board on June 1, 2016. Citizens Groups also provided counsel for MWG with copies of both the Motion and the Memorandum, by email, on June 1, 2016. The exhibits to the Memorandum were sent by U.S. mail, along with hard copies of the Motion and the Memorandum, on June 1, 2016. On June 7, 2016, counsel for MWG contacted counsel for Citizens Groups indicating that they had not yet received via U.S. mail the exhibits to the Memorandum and Motion. Counsel for Citizens Groups provided additional copies of the exhibits both through a document sharing website and by U.S. mail. Counsel for MWG indicated that they received the exhibits on June 7.<sup>1</sup>

According to Board Rule 101.500(d), MWG has until June 21 to file a response (based on the 14-day period starting on June 7). 35 Ill. Adm. Code 101.500(d). On June 9, 2016, counsel for MWG contacted counsel for Citizens Groups requesting an extension of time to respond to the Motion for Summary Judgment. Contrary to MWG’s representation in paragraph 7 of the Motion to Extend, the extension MWG proposed to counsel for Citizens Groups was not the same extension MWG requests in this Motion to Extend. On June 10, counsel for Citizens Groups offered an extension until July 5, 2016. On June 13, counsel for MWG indicated that the parties were not in agreement on the length of an extension. On June 14, 2016, MWG filed its Motion to Extend, asking for an extension until July 26, 2016.

## **II. DISCUSSION**

MWG’s justifications for its Motion to Extend do not withstand scrutiny. MWG raises several inaccurate justifications for its Motion to Extend. First, MWG begins its argument by claiming that Citizens Groups violated Board rules by submitting their Memorandum in 11.5

---

<sup>1</sup> MWG states that it was not served with the Motion and attached exhibits until June 7, 2016. Motion to Extend, p.2. In fact, as noted above, MWG received the Motion and the Memorandum via email service on June 1, 2016.

point font. Motion to Extend, p. 1. This is false. Counsel for Citizen Groups wrote the Memorandum in Microsoft Word, in 12 point font, and then converted it to an Adobe Acrobat pdf file for filing. The pdf version filed with the Board is identical to the 12-point font Microsoft Word version, *See* Memorandum, Microsoft Word version (redacted), attached as Exhibit A. In short, MWG's allegation is baseless and Citizens Groups have fully complied with 35 Ill. Adm. Code 101.302(g).

Next, MWG complains that part of the Memorandum is single-spaced. Motion to Extend, p. 1. However, MWG is unable cite any Board Rule prohibiting the use of single-spaced formatting, and Citizens Groups are not aware of any such rule. .

Third, MWG complains about the number and cumulative size of the attachments to the Memorandum, Motion to Extend, p. 1. Again, Citizens Groups are not aware of any Board Rule restricting attachments, and MWG does not cite any such Rule. The number and size of the attachments is consistent with the complexity of this case, which involves four unique coal plants and multiple coal ash disposal areas.

MWG goes on to complain that certain statements of undisputed fact "cite to numerous documents to allegedly establish them." Motion to Extend, p. 2. Yet again, this is not improper, nor does it justify an extension. In some cases the relevant facts must be drawn from multiple sources. MWG's related complaint that Citizens Groups cited "lengthy reports" is another red herring: many relevant documents are lengthy, which has to be expected in a case like this, but Citizens Groups provided narrow "pinpoint" citations to relevant pages within each document, making the length of the documents nearly irrelevant.

MWG next complains that citations Citizens Groups provided are "incomplete." Motion to Extend, p. 2. MWG, however, provides only two examples: Memorandum statement of fact

No. 4, ¶4, and statement of fact No. 10, ¶2. Memorandum statement of fact No. 4, ¶4, cites KPRG, Geologic Logs for MW-8 and MW-9, Bates MWG13-15\_45648-45649 (Apr. 2014) (Memorandum Ex. A4). Citizens Groups cited and attached these two pages as they were produced by MWG – as stand-alone pages. Memorandum statement of fact No. 4, ¶4 also cites ENSR, Waukegan Phase II ESA at Bates MWG13-15\_45817-45842 (Memorandum Ex. A2). This page range includes exactly what MWG claims to be looking for – soil borings at Bates MWG13-15\_45820-45842, and “a corresponding map” showing where the soil borings were located at Bates MWG13-15\_45817 (Motion to Extend, p. 2). Statement of fact No. 10, ¶2 describes coal ash buried across the site, outside of discrete disposal areas. The aerial extent of these extensive coal ash deposits has never been delineated, as far as Citizens Groups are aware, so there is nothing in the record to cite other than what Citizens Groups did cite – soil boring logs showing ash deposits. There is nothing incomplete about these citations except for MWG’s desire for a corresponding map every single time Citizens Groups cite to boring logs.<sup>2</sup>

In short, in the preceding points, MWG is complaining both that the citations in the memorandum are too numerous and too long, and simultaneously that they are too short. Neither of those arguments justifies the five week extension MWG here seeks.

MWG next complains that the delineation of the areas subject to Citizens Groups Motion is unclear and inconsistent. Motion to Extend, p. 2-3. The Motion involves extensive and

---

<sup>2</sup> Although not every one of Citizens Groups’ citations to boring logs includes a pinpoint citation to the corresponding map showing where those borings were taken, many do. Pinpoint citations to maps showing boring log locations at all four plants were included in the Memorandum at, *inter alia*, Statement of Facts paragraphs 4, 7, 8, 16-17, 20, 61-62, 72, 76, 83, 86, 88, 102, 103, and 115-16. Moreover, Citizens Groups included as exhibits maps showing the locations of all borings except for MWs 8 and 9 at Waukegan. MWG produced the site map showing the locations of those two monitoring wells as a separate stand-alone document at MWG13-15\_45511, which is attached hereto as Exhibit B. The fact that the geologic logs and the well map are not in the same document illustrates the problem that Citizens Groups attempted to solve by citing multiple documents. In a complex case with well over 50,000 pages of documents exchanged in discovery, Citizen Groups did their best to provide the Board with clear citation to all relevant maps. MWG’s desire for a single additional map does not justify a 5-week extension for MWG’s response.

variable coal ash deposits across four unique coal plant sites, and describing these areas is complicated. Citizens Groups described these areas as clearly as possible in two places, once by exclusion, and once with inclusive lists. Footnote 3 defines “Historic Coal Ash” by exclusion, as MWG suggests. (Memorandum at 2.) For example, “Historic Coal Ash at Waukegan means coal ash in or on the ground or in unlined repositories at Waukegan, but does not include... .”

Memorandum, p. 2, fn3. This was done in part to clearly identify areas about which Citizens Groups are not seeking Summary Judgment, and in part because MWG has coal combustion waste disposed of outside of ponds and scattered across these sites. The record does not contain a single map that precisely delineates the scope of each and every coal ash deposit. Paragraph 6 of footnote 3 does not require any “piecing together” of areas discussed in the prior paragraphs in the footnote but is simply a summary of those preceding paragraphs: all of the ponds and areas specifically listed in the footnote, which Citizens Groups clearly state are not considered “Historic Coal Ash” for purposes of the Motion and Memo, are the ponds covered in the CCAs and the three areas for which MWG’s expert cited leach test data.

Despite the complexity of identifying all “Historic Ash Areas” with precision, Citizens Groups also defined “Historic Coal Ash” with inclusive lists at Memorandum page 4, ¶4 (Waukegan); page 5, ¶5 (Will County); page 6, ¶7 (Joliet 29), and page 6, ¶10 (Powerton). The reader is not “forced to piece together the locations Citizens Groups are discussing,” Motion to Extend at 3, because these inclusive lists identify the locations at issue and are completely consistent with the areas excluded in footnote 3.

Finally, MWG argues that Citizens Groups’ descriptions are inconsistent, but fails to point to any actual inconsistencies in Citizens Groups’ Memorandum. MWG states that Citizens Groups “identify the boiler slag stockpile [at Will County] as ‘Historic Coal Ash,’” and cite

Statement of Fact No. 6. MWG is incorrect and has misread the Memorandum. The inclusive list of Historic Coal Ash at Will County is provided in Statement of Fact No. 5, which begins “Historic Coal Ash at Will County includes coal ash in the following repositories...” Statement of Fact No. 6 is distinct from Statement of Fact No. 5, and Statement of Fact No. 6 explicitly identifies areas containing just “coal ash,” not Historic Coal Ash.<sup>3</sup> Although these descriptions, like the facts of the case, are complicated, they are not “inconsistent.”

In short, MWG has blustered about the font size, spacing, and footnotes found in Citizens Groups’ Memorandum but these are all completely consistent with the Board rules. MWG has also invented “inconsistencies” in Citizens Groups’ Memorandum that simply do not exist. MWG has thus failed to identify any legitimate basis for an extension of any duration, much less the lengthy 5-week extension MWG seeks, which would be prejudicial to Citizens Groups because it would delay the resolution of this case.

The truth is that MWG would like an extension because the case is complex and the record is voluminous. Yet MWG has known about the complexity of the case, the deadline for dispositive motions, and the corresponding deadline for a response for over eight months. Although MWG has failed to provide a compelling justification for an extension, Citizens Groups stand by their offer of an extension until July 5, 2016. However, for the reasons stated above, Citizens Groups oppose any extension beyond that date.

Respectfully submitted,



---

---

<sup>3</sup> MWG similarly confuses Statement of Fact 11 regarding Powerton with the inclusive list of Historic Coal Ash at Powerton in Statement of Fact 10.

Jennifer L. Cassel  
Lindsay Dubin  
Environmental Law & Policy Center  
35 E. Wacker Dr., Suite 1600  
Chicago, IL 60601  
jcassel@elpc.org  
ldubin@elpc.org  
(312) 795-3726

Attorneys for ELPC, Sierra Club and Prairie Rivers  
Network

Faith E. Bugel  
1004 Mohawk  
Wilmette, IL 60091  
(312) 282-9119  
fbugel@gmail.com

Gregory E. Wannier  
2101 Webster St., Ste. 1300  
Oakland, CA 94612  
(415) 977-5646  
Greg.wannier@sierraclub.org

Attorneys for Sierra Club

Abel Russ  
Attorney  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Washington, DC 20005  
aruss@environmentalintegrity.org  
802-662-7800 (phone)  
202-296-8822 (fax)

Attorney for Prairie Rivers Network

Keith Harley  
Chicago Legal Clinic, Inc.  
211 W. Wacker, Suite 750  
Chicago, IL 60606  
kharley@kentlaw.iit.edu  
312-726-2938 (phone)  
312-726-5206 (fax)

Attorney for CARE



**CERTIFICATE OF SERVICE**

The undersigned certifies that on June 17, 2016 a true copy of the foregoing *Notice of Filing, Citizens Groups' Response to Respondent's Motion for Extension of Time to Respond to Citizens Groups' Motion for Partial Summary Judgment* with the Clerk of the Illinois Pollution Control Board:

John Therriault, Assistant Clerk  
Illinois Pollution Control Board  
100 West Randolph St  
Suite 11-500  
Chicago, IL 60601

And that a true copy of: *Notice of Filing, Citizens Groups' Response to Respondent's Motion for Extension of Time to Respond to Citizens Groups' Motion for Partial Summary Judgment* were served via electronic mail on June 17, 2016 on the parties listed on the following Service List.



---

Jennifer L. Cassel  
Staff Attorney  
Environmental Law & Policy Center  
35 E. Wacker Dr., Ste. 1600  
Chicago, IL 60601  
(312) 795-3726  
Dated: May 20,  
2016jcassel@elpc.org

**PCB 2013-015 SERVICE LIST:**

Jennifer T. Nijman  
Kristen L. Gale  
NIJMAN FRANZETTI LLP  
10 South LaSalle Street, Suite 3600  
Chicago, IL 60603  
[jn@nijmanfranzetti.com](mailto:jn@nijmanfranzetti.com)  
[kg@nijmanfranzetti.com](mailto:kg@nijmanfranzetti.com)

# **Exhibit A**

**Filed separately as a word doc**

# **Exhibit B**



NOTE:  
BACKGROUND MAP RETRIEVED FROM MAPQUEST 2012

LOCATION:  
SECTION 15, TOWNSHIP 45 N, RANGE 12 E

<p>ENVIRONMENTAL CONSULTATION &amp; REMEDIATION</p>	<p>MONITORING WELLS SITE MAP</p>	
<p><b>K P R G</b> KPRG and Associates, inc.</p>	<p>WAUKEGAN STATION WAUKEGAN, ILLINOIS</p>	
<p>14665 West Lisbon Road, Suite 2B Brookfield, Wisconsin 53005 Telephone 262-781-0475 Facsimile 262-781-0478</p>	<p>Scale: 1" = 550'</p>	<p>Date: July 3, 2014</p>
<p>414 Plaza Drive, Suite 106 Westmont, Illinois 60559 Telephone 630-325-1300 Facsimile 630-325-1593</p>	<p>KPRG Project No. 18311.31 <span style="float: right;">MW013-15-43311</span> <b>FIGURE 1</b></p>	

T:\C:\projects\midwest\_generation\waukegan\_station\waukegan\_station\_wells.dwg