

ILLINOIS POLLUTION CONTROL BOARD
February 5, 2024

IN THE MATTER OF:)
)
PETITION OF MIDWEST GENERATION,)
LLC FOR AN ADJUSTED STANDARD)
FROM 35 ILL. ADM. CODE 845.740(a) AND) AS 21-3
FINDING OF INAPPLICABILITY OF 35) (Adjusted Standard – Land)
ILL. ADM. CODE 845)

HEARING OFFICER ORDER

On November 16, 2023, Midwest Generation LLC (Midwest) filed a motion *in limine* to exclude and strike from the record certain Agency exhibits (Exhibits 37, 40, 42, 43, 44, 50), or at a minimum give the exhibits little weight (Mot. 1.) Also on November 16, 2024, Midwest filed a motion *in limine* to exclude and strike from the record Agency exhibits 1-5, 13-26 and 50. (Mot. 2). On November 30, 2023, the Illinois Environmental Protection Agency (IEPA) filed its respective responses. (Resp. to Mot. 1 and Resp. to Mot. 2). A hearing in the above-captioned adjusted standard is scheduled for February 13, 2024, and if necessary, continue February 14, 2024.

Midwest’s Motion in Limine to Exclude and Strike from the Record Certain IEPA Exhibits or at a Minimum Give the Exhibits Little Weight

Specifically, Midwest requests exclusion and striking from the record Agency Exhibits 37, 40, 42, 43, 44 and 50. Mot. 1 at 1. At a minimum, Midwest requests that the Board give these Exhibits little weight. Mot.1 at 7.

Midwest argues that these Exhibits are not relevant because the IEPA did not rely on these Exhibits arriving at their Recommendation and no witnesses will be presented at the hearing to explain them, thus rendering them inadmissible. Mot.1 at 3. Midwest also argues that Exhibit 47 is an exhibit pertaining to Midwest’s request to reuse the liner in the West Pond that has been withdrawn and therefore irrelevant. Mot.1 at 4. Finally, Midwest argues that Exhibits 43 and 44 do not qualify as public records and therefore not admissible. Mot.1 at 5.

In the alternative, Midwest requests that if admissible, the Exhibits should be given little, or no weight. Mot.1 at 6.

IEPA’s Response

The IEPA agrees with Midwest that, although Exhibits 37, 40, 42, 43, 44 and 50, were not relied upon the IEPA in its Recommendation, the IEPA will have “staff at the hearing and will be available to answer any question from the Board or others who may have questions for the Agency [regarding these Exhibits].” Resp. to Mot. 1 at 2. The IEPA agrees with Midwest that Exhibit 47 is not relevant because

it pertains to the West Pond- reuse of the liner- that was withdrawn from consideration in the amended petition. *Id.*

Decision

Midwest's motion in *limine* to exclude Exhibits 37, 40, 42, 43, 44 and 50 is denied. The IEPA will have staff at the hearing that will be available for questions and explanations. The Board may want to peruse the Exhibits to provide background and will give due weight to the Exhibits.

The IEPA agrees with Midwest that Exhibit 47 is not relevant as it concerns the reuse of a liner at the West Pond that has been withdrawn from consideration. Exhibit 47 is excluded.

Midwest's Motion in Limine to Exclude and Strike from the Record IEPA Exhibits 1-5, 13- 26 and 50

Midwest requests that the aerial Exhibits 1-5, 13-26 and 50 found in the IEPA's record be stricken because 1) they lack foundation; and 2) they cannot be allowed under the public records exception because they are inadmissible hearsay. Mot. 2 at 1-9. In the alternative, Midwest argues that at the very least, the Board be directed to give them little weight. Mot. 2 at 9. Midwest also argues that because the IEPA will not have any staff at the hearing to question or give an explanation, they will lack foundation.

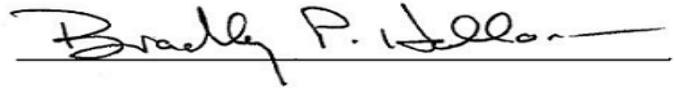
IEPA'S Response

The IEPA reminds the petitioner that the petitioner has the burden of proof in these proceedings. Resp. to Mot. 2 at 4. "The recommendation must cite to supporting documents or legal authorities whenever they are used as a basis for the Agency's conclusion. 35 Ill. Adm. Code 104.416(c). The Agency has met the requirements of Section 104.416 and the exhibits relied upon by the Agency should therefore not be excluded or stricken." *Id.* The IEPA reiterates that "Agency staff will attend the hearing and will be available to answer any question from the Board or others who may have questions for the Agency. *Id.*

Decision

Midwest's motion in *limine* to exclude Exhibits 1-5, 13-26 and 50 is denied. The IEPA will have staff attending the hearing and available for questions and explanations. The Board may want to peruse the Exhibits to provide background and will give due weight to the Exhibits.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "Bradley P. Halloran", is written over a solid horizontal line.

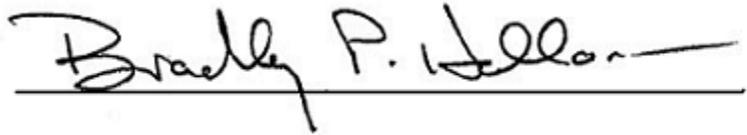
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on February 5, 2024, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on February 5, 2024:

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