

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, Clerk	Attached Service List
Illinois Pollution Control Board	
60 E. Van Buren St., Ste. 630	
Chicago, Illinois 60605	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Midwest Generation, LLC's Objection and Appeal from the Hearing Officer's Ruling to Admit Complainants' Exhibit 1408 as Evidence, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 26, 2023

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation, LLC's Objection and Appeal from the Hearing Officer's Ruling to Admit Complainants' Exhibit 1408 as Evidence was filed electronically on July 26, 2023 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

and that true copies of the pleading were emailed on July 26, 2023 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC’S OBJECTION AND APPEAL FROM THE HEARING OFFICER’S RULING TO ADMIT COMPLAINANTS’ EXHIBIT 1408 AS EVIDENCE

Pursuant to 35 Ill. Adm. Code 101.502(b), 101.518 and 101.626, Respondent Midwest Generation, LLC (“MWG”), submits its Objection and Appeal from the Hearing Officer’s Ruling to Admit Exhibit 1408. In support of its Objection and Appeal, MWG submits its Memorandum in Support and states as follows:

1. On May 19, 2023, the Complainants moved to admit into evidence Exhibit 1408, the Illinois Environmental Protection Agency (“Illinois EPA”) Recommendation in *In the Matter of: Petition of Midwest Generation, LLC for an Adjusted Standard from 845.740(a) and Finding of Inapplicability of Part 845 for the Waukegan Station, PCB AS21-03* (“Illinois EPA Recommendation”). At the hearing, Complainants asked Ms. Shealey about a single sentence on one page in the entire document. 5/19/23 Tr. p. 8:3-9. Ms. Shealey disputed the Illinois EPA’s contention in the single sentence. *Id.*, p. 8:10-11.
2. On May 19, 2023, over the objection of MWG, the Hearing Officer issued a ruling to admit Exhibit 1408 as evidence.

3. MWG appeals the Hearing Officer's decision to admit Exhibit 1408 because it is not relevant to this matter. The issues in Exhibit 1408 have nothing to do with the issues here. Exhibit 1408 is related to MWG's request for an adjusted standard from Part 845 of the Board rules, which was promulgated under Section 22.59 of the Act. This case before the Board here concerns alleged violations of Sections 12 and 21 of the Act, and Part 620 of the Board's rules. Moreover, Complainants made no effort to demonstrate how Exhibit 1408 is relevant to this matter. Instead, Complainants asked Ms. Shealey about a single sentence on a single page of the approximately 1,300 page document.

4. Exhibit 1408 is also not relevant because it is not reliable. Illinois EPA did not verify or otherwise attest to the information and claims in Exhibit 1408. It also contains numerous inaccuracies, including the single sentence Complainants asked Ms. Shealey about. Accordingly, Exhibit 1408 is also not relevant evidence upon which a prudent person would rely because it is uncertain, speculative and not reliable. 5 ILCS 100/10-40, 35 Ill. Adm. Code 101.626(a); *People v. Morgan*, 197 Ill. 2d 404, 455-56, 259 Ill. Dec. 405, 435, 758 N.E.2d 813, 843 (2001).

5. Admitting Exhibit 1408 is prejudicial to MWG because MWG has not had the opportunity to respond (in the Part 845 proceeding) so the document is entirely one-sided. Moreover, admitting an entire document when only one question about one sentence was raised at the hearing results in the potential for other portions of the document to be used by Complainants, or the Board, without context and without the opportunity for MWG to respond.

6. As a procedural matter, because Exhibit 1408 is a document from another Board proceeding, Complainants should have moved to incorporate it. Pursuant to Section 101.306 of the Board Rules, a party may incorporate documents from other Board proceedings that are credible, authentic and relevant. 35 Ill. Adm. Code 101.306. However, Complainants chose not to use this

procedure, no doubt because Illinois EPA did not include an affidavit to verify the information rendering it not credible, authentic, nor relevant.

WHEREFORE, for the reasons stated above, MWG requests that the Board reverse the Hearing Officer's ruling, exclude Exhibit 1408 and strike all testimony related to the Exhibit.

Respectfully submitted,
Midwest Generation, LLC

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

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**MIDWEST GENERATION, LLC’S MEMORANDUM IN SUPPORT OF ITS
OBJECTION AND APPEAL FROM THE HEARING OFFICER’S RULING TO
ADMIT COMPLAINANTS’ EXHIBIT 1408 AS EVIDENCE**

Exhibit 1408 must be excluded because it is neither reliable nor relevant. It is an unverified document filed by the Illinois Environmental Protection Agency (“Illinois EPA”) in an open proceeding before the Board. Illinois EPA did not attach an affidavit verifying the information in Exhibit 1408, or verifying the documents in the exhibit. Due to timing, Midwest Generation, LLC (“MWG”) has not had the opportunity to respond to Exhibit 1408, making admission in this proceeding one-sided and prejudicial.

I. Background

On May 19, 2023, while Complainants were questioning Ms. Sharene Shealey, Complainants moved to admit as Exhibit 1408, the Illinois Environmental Protection Agency (“Illinois EPA”) Recommendation in *In the Matter of: Petition of Midwest Generation, LLC for an Adjusted Standard from 845.740(a) and Finding of Inapplicability of Part 845 for the Waukegan Station, PCB AS21-03* (“Illinois EPA Recommendation”). The document contains Illinois EPA’s

recommendation to the Board regarding whether an area of the Waukegan Station should be identified as a surface impoundment (the grassy field), which is a strongly contested issue in that proceeding, and the manner in which the West Pond will be used in the future. Despite the document being over 1,300 pages, Illinois EPA did not include an affidavit or any other verification of the statements and attachments in the Illinois EPA Recommendation. Illinois EPA also did not identify any witness who would testify to the contentions it made or verify the documents attached. MWG's response to the Illinois EPA Recommendation is scheduled to be filed on July 28, 2023. In its response, MWG will specifically dispute Illinois EPA's unverified statements related to the grassy field, and will include an expert report in support. MWG will also amend its petition for an adjusted standard relating to the West Pond because it no longer requires an adjusted standard for that pond.¹

At the May 2023 hearing in this matter, Complainants asked Ms. Shealey about a single sentence on one page in the entire document. 5/19/23 Tr. p. 8:3-9. Ms. Shealey disputed the Illinois EPA's contention in that single sentence. *Id.*, p. 8:10-11. Complainants then moved to admit Exhibit 1408 and MWG objected because it is not relevant evidence, and not a document a prudent person would rely on. *Id.*, p. 12:17-.21 Overruling MWG's objection, the Hearing Officer admitted Exhibit 1408 into evidence. *Id.* p. 12:22-13:2.

II. Complainants Made No Effort to Demonstrate that Exhibit 1408 was Relevant

There is nothing in the record to establish that Exhibit 1408 is relevant to this proceeding. Evidence is only relevant "if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence." *People v. Morgan*, 197 Ill. 2d 404, 455-56, 259 Ill. Dec. 405, 435, 758 N.E.2d 813,

¹ If the Board requests, MWG can update this Appeal with the amended petition, once filed, and future plans for the West Pond.

843 (2001), *citing People v. Illgen*, 145 Ill. 2d 353, 364, 164 Ill. Dec. 599, 583 N.E.2d 515 (1991). Here, Complainants made no effort to demonstrate that Exhibit 1408 is of any consequence to the determination of this matter.

Exhibit 1408 is 1,394 pages, containing Illinois EPA's 35-page written recommendation and approximately 1,300 pages of attachments. It addresses MWG's requests for an adjusted standard from Part 845 of the Board Rules at the Waukegan Station, including MWG's intention for the future use of the West Pond. The issues in this matter have nothing to do with Part 845, a regulation enacted pursuant to Section 22.59 of the Act. 415 ILCS 5/22.59; 35 Ill. Adm. Code 845. Instead, the issues here relate to Part 620 of the Board Rules and Sections 12 and 21 of the Act. 415 ILCS 5/12, 21; 35 Ill. Adm. Code 620.

Moreover, Complainants asked Ms. Shealey about a single sentence on one page in the entire document. 5/19/23 Tr. p. 8:3-9. That single sentence was not even correct, as Ms. Shealey pointed out. *Id.* p. 8:10-11. And that single sentence did not establish relevancy of a 1,300 page unverified document. Because Complainants did nothing to demonstrate that Exhibit 1408, which concerns Part 845, is relevant to this matter, which concerns Part 620, it should have been excluded. Complainants are not prejudiced if Exhibit 1408 is excluded because their question, and Ms. Shealey's response, remains in the record.

III. Only Relevant Evidence That is Reliable May Be Admitted into Evidence

Exhibit 1408 should also be excluded because it does not meet the standard required by the Illinois Pollution Control Board ("Board") – that it *would be relied upon by prudent persons*. At this point, before MWG has had the opportunity to respond to Illinois EPA's Recommendation in the Part 845 proceeding, Exhibit 1408 is nothing but an unverified advocacy piece. To call Exhibit

1408 “evidence” in this proceeding would be like calling the parties’ briefs in support of their motions evidence – an action that is both impermissible and unprecedented.²

Board rules provide that, under Section 10-40 of the Illinois Administrative Procedures Act (“Illinois APA”), the Hearing Officer “will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part.” 35 Ill. Adm. Code 101.626. Section 10-40 of the Illinois APA states that, “irrelevant, immaterial, or unduly repetitious evidence shall be excluded,” ...and the rules of evidence as applied in civil cases shall be followed. 5 ILCS 100/10-40.

As stated above, relevant evidence is information that could make the existence of any fact important to the matter more or less true. *Morgan*, 197 Ill. 2d at 455-56. However, evidence is not relevant if it is “remote, uncertain or speculative.” *Morgan*, 197 Ill.2d at 456, *citing People v. Cloutier*, 156 Ill. 2d 483, 501, 190 Ill. Dec. 744, 622 N.E.2d 774 (1993). A “court may reject evidence which it determines to be of little probative value because of its uncertainty or conjectural nature.” *People v. Bouska*, 118 Ill. App. 3d 595, 601, 74 Ill. Dec. 227, 231-32, 455 N.E.2d 257, 261-62 (1st Dist. 1983), *citing People v. Yuknis*, 79 Ill. App. 3d 243, 249, 398 N.E.2d 258 (1st Distr. 1979).

The Illinois APA allows for the admission of otherwise non-admissible evidence “if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.” 5 ILCS 100/10-40. The Board’s rules contain a similar exception in Part 101.626(a), which states that only evidence that is material, relevant *and would be relied upon by prudent persons*, may be admitted.

² Complainants also moved to enter as an exhibit MWG’s Waukegan Petition for Adjusted Standard (Ex. 1406), which formed the basis for IEPA’s Recommendation in Ex 1408. MWG similarly objected to the admission of Ex. 1406 because it was not relevant – Complainants discussed only two pages of the voluminous exhibit, and it had been amended. 5/18/2023 Tr., p. 303:17-304:2. MWG’s Amended Petition was also admitted Ex. 1407 to at least clarify MWG’s submissions in the Part 845 proceeding. 5/18/2023 Tr., p. 317. Regardless, MWG has not had the opportunity to respond to the IEPA Recommendation (Exhibit 1408). MWG would have no objection to excluding Exhibits 1406, 1407 and 1408 for consistency.

35 Ill. Adm. Code 101.626(a) (emphasis added). Courts have interpreted this to mean that, while hearsay evidence is generally inadmissible in an administrative hearing, the administrative procedure rules create an exception to the rule, but only when the hearsay is reliable. *Metro Utility v. Illinois Commerce Comm'n*, 193 Ill. App. 3d 178, 185, 549 N.E.2d 1327, 1331, 140 Ill. Dec. 455 (1990) (emphasis added).

Exhibit 1408 must be excluded because it is not reliable nor relevant. It is an unverified document filed in an open proceeding before the Board. Illinois EPA did not attach an affidavit verifying the information in Exhibit 1408, and did not verify the documents in the exhibit. Illinois EPA did not even identify any witness that would testify to the information. The Illinois EPA Recommendation also has many inaccuracies that MWG will address in its response to be filed on July 28, 2023, and MWG will challenge Illinois EPA's positions at the Part 845 adjusted standard hearing. Ms. Shealey specifically disputed the single sentence Complainants identified in Exhibit 1408, stating "... I don't agree with the statement." 5/19/23 Tr., p. 8:10-11. MWG's response will include expert data and witnesses to show that the area of the Waukegan Station at issue never accumulated liquid and, as a result, Illinois EPA's conclusions (finding the area to be a surface impoundment) were incorrect. In fact, U.S. EPA agrees with MWG's position and specifically identified the area as a historic fill unit, *not* a surface impoundment.³ As to Illinois EPA's recommendations concerning MWG's West Pond, MWG's response will include an amended petition to modify its request related to the West Pond, further making Illinois EPA's

³ U.S.EPA clearly came to the same conclusion, identifying the area at issue, the "Grassy Field" as a coal combustion residual management unit ("CCRMU") in its proposed rule for Legacy CCR surface impoundments. *See* Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy Surface Impoundments, "Potential CCR Management Unit Universes" Docket No. EPA-HQ-OLEM-2020-0107-0155. A CCRMU is "any area of land on which any non-containerized accumulation of CCR is received, placed, or otherwise managed at any time, that is not a CCR unit." 88 Fed. Reg. 31982 (May 18, 2023) at 32034.

Recommendation irrelevant and unreliable. A reasonably prudent person simply would not rely on only one side of such a contested issue.

MWG is unfairly prejudiced by the admission of Exhibit 1408. In addition to being one-sided and disputed, without any ability to challenge, it is an unverified document that contains errors and is impossible to vet. Moreover, admitting an entire document when only one question about one sentence was raised at the hearing results in the potential for other portions of the document to be used by Complainants, or the Board, without context and without the opportunity for MWG to respond.

Because it is unverified, Exhibit 1408 is speculative and not reliable, with little probative value. Accordingly, Exhibit 1408 is not relevant evidence and thus should have been excluded. *Morgan*, 197 Ill.2d at 456, *People v. Bouska*, 118 Ill. App. 3d at 601. Even under the more permissive rules of the Board and the Illinois APA, Exhibit 1408, which is hearsay, should have been excluded because it is uncertain and speculative, would not be relied on by a prudent person, and thus is not reliable. *Metro Utility v. Illinois Commerce Comm'n*, 193 Ill. App. 3d at 185. It was for these reasons that MWG objected to the admission of the exhibit before the hearing. *See* Complainants' Individual Exhibit List, May 3, 2023, No. 33 ("Subject to Objection: Foundation, authenticity, hearsay, and relevance").

By comparison, the parties did not object to the admission of similar, but verified and completed, documents from MWG's Petition for Adjusted Standard for the Joliet 29 Station (PCB 21-1), which were admitted as: MWG Ex. 1501 - MWG's Petition for an Adjusted Standard and Finding of Inapplicability for Joliet 29, Comp. Ex. 1409 - Illinois EPA's Feb. 4, 2022 Recommendation for Joliet 29, MWG 1603 - Illinois EPA's Sept. 21, 2021 Recommendation for Joliet 29, and MWG Ex. 1605 - MWG's Response in Support of its Joliet 29 Petition for Adjusted

Standard. For the Joliet adjusted standard, Illinois EPA's Recommendation contained three affidavits supporting the information in the Recommendation and the documents attached, (Comp. Ex. 1409 (Illinois EPA Es. A, B, & H) & MWG Ex. 1603 (Illinois EPA Ex. E & H). Moreover, MWG had filed a response (MWG Ex. 1605) and the parties participated in a hearing with the Board on June 28 and 29, 2022. Thus, unlike Exhibit 1408, the Joliet 29 petition briefs and attachments are reliable because the information was verified, responded to, and subject to cross-examination. It was for these very reasons that the Parties stipulated to the admission of the Joliet 29 Adjusted Standard Petition Exhibits *See* Complainants' Individual Exhibit List, May 3, 2023, Nos. 26, 27, and 28 (stipulating the admission of Comp. Ex. 1409, MWG Ex. 1501 and 1603) and MWG's List of Exhibits, May 3, 2023, No 21 (stipulating the admission of MWG Ex. 1605).

IV. Complainants Implicitly Concede that Exhibit 1408 could not be Incorporated under Section 101.306 Because it is Not Credible, Authentic, and Relevant.

Procedurally, Complainants should have moved to incorporate Exhibit 1408 pursuant to section 101.306 of the Board Rules. 35 Ill. Adm. Code 101.306. A document from the record of another Board proceeding may be incorporated if the person seeking incorporation demonstrates to the Board or hearing officer "that the material to be incorporated is authentic, credible, and relevant to the proceeding." 35 Ill. Adm. Code 101.306.⁴ Complainants are familiar with the section, having relied upon it to incorporate documents from the Illinois CCR Rulemaking Docket, which the Hearing Officer granted. *See* "Complainants' Motion to Incorporate Certain Documents into the PCB 13-15 docket", Feb. 4, 2022; Hearing Officer Order, July 13, 2022. In fact, when MWG proposed as an exhibit for admission a document from a different proceeding, Complainants insisted that MWG file a motion to incorporate under Rule 101.306. *See* MWG's "Motion to

⁴ Because the Joliet 29 Petition, Recommendations, and Response (MWG Ex. 1502, 1603, & 1605 and Comp. Ex. 1409) were verified and subject to cross-examination, the Parties could have simply filed a motion to incorporate the Joliet 29 petition briefs and the attachments, but there was no need because the documents were stipulated.

Incorporate the Pre-filed Testimony of G. Allen Burton into the PCB13-15 Docket”, FN 1, and “Complainants’ Response to Midwest Generation, LLC’s Motion to Incorporate the Pre-filed Testimony of G. Allen Burton in the PCB13-15 Docket”, ¶3.

Here, despite Exhibit 1408 being a document from another Board proceeding, Complainants elected not to request its incorporation under Section 101.306. Complainants must have concluded that they could not demonstrate Exhibit 1408 was credible, authentic, and relevant, because Illinois EPA did not include any verification of the information, and because MWG had no opportunity to respond.

MWG requests that the Board reverse the Hearing Officer’s Decision, exclude Exhibit 1408, and strike all testimony related to the excluded Exhibit.

Respectfully submitted,
Midwest Generation, LLC

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

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