

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter of:</b>	)	
	)	
<b>SIERRA CLUB, ENVIRONMENTAL</b>	)	
<b>LAW AND POLICY CENTER,</b>	)	
<b>PRAIRIE RIVERS NETWORK, and</b>	)	
<b>CITIZENS AGAINST RUINING THE</b>	)	
<b>ENVIRONMENT</b>	)	
	)	<b>PCB 2013-015</b>
<b>Complainants,</b>	)	<b>(Enforcement – Water)</b>
	)	
<b>v.</b>	)	
	)	
<b>MIDWEST GENERATION, LLC,</b>	)	
	)	
<b>Respondent.</b>	)	

**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 Response to Complainants' Motion for Interlocutory Appeal of the Hearing Officer's Order on Exhibits 1331 and 1332, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By:           /s/ Jennifer T. Nijman          

Dated: August 16, 2023

Jennifer T. Nijman  
Susan M. Franzetti  
Kristen L. Gale  
NIJMAN FRANZETTI LLP  
10 South LaSalle Street, Suite 3400  
Chicago, IL 60603  
(312) 251-5255  
[jn@nijmanfranzetti.com](mailto:jn@nijmanfranzetti.com)  
[sf@nijmanfranzetti.com](mailto:sf@nijmanfranzetti.com)  
[kg@nijmanfranzetti.com](mailto:kg@nijmanfranzetti.com)

**SERVICE LIST**

Bradley P. Halloran, Hearing Officer  
Illinois Pollution Control Board  
60 E. Van Buren St., Ste. 630  
Chicago, Illinois 60605  
[Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

Albert Ettinger  
7100 N. Greenview  
Chicago, IL 60626  
[Ettinger.Albert@gmail.com](mailto:Ettinger.Albert@gmail.com)

Keith Harley  
Chicago Legal Clinic, Inc.  
211 West Wacker Drive, Suite 750  
Chicago, IL 60606  
[Kharley@kentlaw.edu](mailto:Kharley@kentlaw.edu)

Abel Russ  
For Prairie Rivers Network  
Environmental Integrity Project  
1000 Vermont Avenue, Suite 1100  
Washington, DC 20005  
[aruss@environmentalintegrity.org](mailto:aruss@environmentalintegrity.org)

Faith E. Bugel  
Attorney at Law  
Sierra Club  
1004 Mohawk  
Wilmette, IL 60091  
[fbugel@gmail.com](mailto:fbugel@gmail.com)

Greg Wannier, Associate Attorney  
Sierra Club  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
[Greg.wannier@sierraclub.org](mailto:Greg.wannier@sierraclub.org)

Megan Wachspress  
Sierra Club  
2101 Webster Street, Suite 1300  
Oakland, CA 94612  
[Megan.wachspress@sierraclub.org](mailto:Megan.wachspress@sierraclub.org)

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation, LLC's Response to Complainants' Motion for Interlocutory Appeal of the Hearing Officer's Order on Exhibits 1331 and 1332 was filed electronically on August 16, 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 August 16, 2023 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>In the Matter of:</b>	)	
	)	
<b>SIERRA CLUB, ENVIRONMENTAL LAW</b>	)	
<b>AND POLICY CENTER, PRAIRIE RIVERS</b>	)	
<b>NETWORK, and CITIZENS AGAINST</b>	)	
<b>RUINING THE ENVIRONMENT,</b>	)	
	)	<b>PCB 2013-015</b>
<b>Complainants,</b>	)	<b>(Enforcement – Water)</b>
	)	
<b>v.</b>	)	
	)	
<b>MIDWEST GENERATION, LLC.,</b>	)	
	)	
<b>Respondent.</b>	)	

**MIDWEST GENERATION, LLC'S RESPONSE TO COMPLAINANTS' MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S ORDER ON EXHIBITS 1331 AND 1332**

The Hearing Officer was correct to limit the admission of Exhibits 1331 and 1332 to the testimony provided at the hearing, stating that the exhibits were allowed only as to “Mr. Gnat’s testimony and what he has knowledge of and what he can speak to and disregard the remainder of the exhibit.” 5/18/2023 Hr. Tr., p. 67:5-8. Admitting the entire voluminous Exhibits, which include multiple sections drafted by different professional engineers, without the clarification or explanation by the witness, is not helpful to the Board and would unfairly prejudice Midwest Generation, LLC (“MWG”). Without witness testimony about a document, the Board cannot fully understand the purpose of the document or its contents, and MWG has no opportunity to clarify what portions of the Exhibits are relevant and reliable nor to correct errors made by Complainants. 5 ILCS 100/10-40, 35 Ill. Adm. Code 101.626(a). The Board should uphold the Hearing Officer’s decision and deny Complainants’ appeal.

**I. Background**

On May 17, 2023, while Complainants were questioning MWG's consultant Mr. Gnat, Complainants moved to admit Exhibit 1331 – MWG's application for an initial operating permit for the Waukegan Generating Station. (Attached to Complainants' Motion as Ex. 1331). 5/17/2023 Hr. Tr., p. 132:20-21. MWG objected to the admission of the Exhibit because only a few pages were discussed with Mr. Gnat and if "the whole thing is admitted, Complainants [can] look on a different page and pull something out and we've not had an opportunity with the witness to have a description...." 5/17/2023 Hr. Tr., p. 132:3-137:23. Over MWG's objection, the Hearing Officer initially admitted Exhibit 1331. 5/17/2023 Hr. Tr., p. 137:2-3. However, after listening to objections, he made clear he may (and subsequently did) revise his ruling. 5/17/2023 Hr. Tr., p. 191:18-19; 5/18/2023 Hr. Tr., p. 8:5-8.

Complainants proceeded to question Mr. Gnat about specific portions of the Exhibit, referencing specific attachments and bates pages. 5/18/23 Hr. Tr., pp. 9:11-66:11 (Exhibit 1331), 69:5-106:9 (Exhibit 1332). Complainants then moved to admit Exhibit 1331. 5/18/2023 Hr. Tr., pp. 66:14-67:1. The Hearing Officer revised his previous ruling and limited the admission of Exhibit 1331 to "Mr. Gnat's testimony and what he has knowledge of and what he can speak to" and directed the Board to "disregard the remainder of this exhibit." 5/18/2023 Hr. Tr., p. 67:5-8. The Hearing Officer clarified that he chose this limitation because he wanted to make the admission of the Exhibit "cleaner and quicker" rather than submitting Bates page numbers. 5/18/2023 Hr. Tr., p. 67:2-5. The Hearing Officer also directed the Board to "disregard any kind of duplicative or cumulative information in Exhibit 1331." 5/18/2023 Hr. Tr., pp. 67:23-68:2.

Similarly, Complainants moved to admit Exhibit 1332 – MWG's application for an initial operating permit for ponds one north and one south for the Will County Generating Station

(Attached to Complainants' Motion as Ex. 1332). 5/17/2023 Hr. Tr., p. 150:20-21.<sup>1</sup> MWG objected because "of relevancy ... our concern is that this is a voluminous document and we've talked about maybe 10 pages and that if it gets admitted into evidence and then a page that was undiscussed is taken out of context and there's no witness here to describe it." 5/17/2023 Hr. Tr., p. 151:1-7. The Hearing Officer agreed and initially set Exhibit 1332 aside because the exhibit is "voluminous" and "[i]t hasn't been talked about." 5/17/2023 Hr. Tr., p. 151:8-13. The Hearing Officer also noted that "I just don't think it's fair maybe to the Board or to Midwest just to give this ... to sort through. And some of them weren't even written by Mr. Gnat." 5/17/2023 Hr. Tr., p. 189:2-9. Both Exhibits 1331 and 1332 are hundreds of pages long and include multiple technical documents drafted by qualified professional engineers from a variety of different consulting/technical companies. As he did with Exhibit 1331, the Hearing Officer subsequently admitted Exhibit 1332 as limited to Mr. Gnat's testimony and what he has knowledge of and what he can speak to. 5/18/2023 Hr. Tr., pp. 106:10-107:6.

## **II. Applicable Law**

Business records may be admitted if it is demonstrated that the records are relevant and reliable. The Board's rules provide that, in accordance with 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. Evidence is only relevant "if it has any

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<sup>1</sup> The Transcript appears to state that Complainants moved to admit Exhibit 1331. Based upon the context, Complainants were talking about Exhibit 1332 at this point in the transcript. 5/17/2023 Hr. Tr., p. 150:20-21-151:8-13.

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, 843 (2001), citing *People v. Illgen*, 145 Ill. 2d 353, 364, 164 Ill. Dec. 599, 583 N.E.2d 515 (1991).

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. 35 Ill. Adm. Code 101.626(a). 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).

**III. Limiting Exhibits 1331 and 1332 to Relevant and Reliable Portions Is Correct under Section 101.626(e).**

Complainants improperly attempt to broaden the application of the “business” records exception of hearsay beyond reason. 35 Ill. Admin. Code § 101.626(e). Under Complainants’ description of a business record, any document prepared by a party would be admissible without a demonstration of relevance of the entire document. By that interpretation, if there is a 10,000-page business record presented for admission, but only 100 pages are discussed as relevant and the remaining 9,900 pages are not discussed, Complainants would argue that the entire exhibit should be admitted. That does not meet the requirement of relevance and is fraught with problems. A party could ask a few questions about select pages of a document, get the entire document into evidence, and then point to other parts of the document that were not discussed as “proof” of a

fact. That is contrary to applicable law, not helpful to the trier of fact (in this case the Board), and constitutes “trial by surprise” that is prejudicial. The fact that Complainants object to a ruling that requires them to ask questions about a document, simply to establish the relevant information contained in that document, speaks volumes about their ultimate intent – which can only be to later cite to portions of an admitted document that are never discussed to support Complainants’ final arguments.

In this case, because Exhibits 1331 and 1332 are so large and contain so many subparts, the Hearing Officer correctly concluded that it was not fair to the Board to admit them in their entirety, without testimony or explanation. In fact, Mr. Gnat’s responses to Complainants’ questions about a few sections of the Exhibits demonstrates that admitting the Exhibits without explanation is of no use to the Board and prejudicial to MWG. In his testimony, Mr. Gnat specifically corrected the Complainants’ counsel on their misinterpretation of the data and information in the Exhibits. Had Complainants not been required (by the Hearing Officer’s ruling) to ask Mr. Gnat about the Exhibits, Complainants could have presented their own view of the data, without challenge.

**a. The Hearing Officer’s Limitation on Exhibits 1331 and 1332 Prevents Unfair Prejudice to MWG and Ensures the Evidence Admitted is Relevant and Reliable.**

The Hearing Officer limited the use and reliance of Exhibits 1331 and 1332 to testimony about those Exhibits because that information was only relevant and reliable once the witness was questioned. Adequate testimony is critical to assist the Board in understanding complex technical data and information. It also prevents unfair prejudice, because it provides the opportunity for witnesses to elaborate on the accuracy of the information and whether the interpretation of the information is correct. Without limiting the Exhibits to the portions addressed during testimony, the Board would be provided with little understanding of the documents which could lead to inadvertent errors, and MWG would be prejudiced by the incorrect conclusions.



In this case, the value of the Hearing Officer's limitation is demonstrated by Mr. Gnat's testimony regarding Exhibits 1331 and 1332. In reviewing locations where coal combustion residuals (CCR) are found, Complainants incorrectly assumed that "Well 2," an offsite well listed in the Local Well Stratigraphy Information in Exhibit 1331, was the same as MWG Groundwater Monitoring Well No. 2, an onsite well. 5/18/2023 Hr. Tr., pp. 46:2-48:4, Exhibit 1331, Bates pp. MWG 13-15\_110855-MWG 13-15\_110860. Pointing to a well described as "Well\_Count 2," Complainants asked, "this is not MW-2 as depicted--..." 5/18/2023 Hr. Tr., p. 48:5-6. Mr. Gnat immediately corrected him, stating "No, no. This is Well 2 from this larger survey that we did. Clearly, this goes to the 60-69 wells that we looked at from around the area...But if you go further down in the table ... that starts with MW-01...that's one of our wells." 5/18/2023 Hr. Tr., p. 48:7-23. Complainants agreed it "makes it much clearer." 5/18/2023 Hr. Tr., p. 49:1-4. Complainants' confusion about whether an offsite well was an MWG onsite well without a correction by MWG would have unfairly prejudiced MWG. In the post-hearing briefs, without Mr. Gnat's correction, Complainants would likely wrongfully assign the CCR that is present in that offsite well as being on MWG's property. Mr. Gnat's testimony ensured the information used in Exhibit 1331 was reliable and relevant.

Mr. Gnat's testimony was also critical to correct a typographic error for wells MW-01 through MW-15 in Table 9-2 of Exhibit 1332. See Ex. 1332 Table 9-2, MWG13-15\_125646-125649, 5/18/2023 Hr. Tr., p. 84:9-85:20. Table 9-2 is the CCR Groundwater Elevations All Wells - Midwest Generation, LLC, Will County Station, Romeoville, IL, and includes a column for Groundwater Elevation and a column for Depth to Groundwater. For MW-1 through MW-10 the groundwater elevation is approximately 580-584 feet above mean sea level and the Depth to Groundwater is about 9-12 feet below top of casing. MWG13-15\_125646-125649. At the Hearing, Complainants' counsel asked Mr. Gnat if the depth to groundwater "results for MW-11 seem to

be in excess of 500 feet; is that accurate?”, seeming to imply that the depth to groundwater was over 500 feet. 5/18/2023 Hr. Tr., p. 85:6-7. Mr. Gnat identified the typographic error stating, “No. Those columns are switched around. So the 5 -- for example, let's take MW-13, May 24th, 2021. The second, the 10.92, should be in the third column depth to groundwater, and the 581.88 should be in the groundwater elevation column. There is a flip-flop on this table.” 5/18/2023 Hr. Tr., p. 85:8-20, Ex. 1332 Table 9-2, Bates p. MWG13-15\_1256499. Complainants’ counsel recognized his misunderstanding by stating “Okay. And thanks for pointing that out.” 5/18/23 Hr. Tr., p. 85:15-16. Without that correction and explanation, the Board would have been misled about the accurate depth to groundwater, or there would simply be a misunderstanding, both of which would prejudice MWG because MWG would not have an opportunity to correct the errors.

Mr. Gnat also corrected Complainants’ mistaken belief that two different cross sections of the ponds at the Will County Station in Exhibit 1332 were identical. At the Hearing, Complainants’ counsel asked Mr. Gnat about the contents of Figure 9-2 in Exhibit 1332. 5/18/2023 Hr. Tr., pp. 91:19-92:3. Suggesting that it might be more helpful, Complainants’ counsel asked Mr. Gnat to turn to Figure 9-4 in Exhibit 1332, and stated, “[s]o Figure 9-4, which is Bates page 125663, it shows the same information, but it's zoomed in to focus on Pond 1N, correct?” 5/18/2023 Hr. Tr., p. 92:7-11. Mr. Gnat disagreed and corrected Complainants’ counsel stating, “it's a different cross section, and the other cross sections were going north-south. I believe this is an east-west cross section that goes beneath Pond 1N and actually goes northwest -- northwest to southeast through that pond, which is -- one of the requirements under the state rule is to have cross sections that go -- transect the pond as well.” 5/18/2023 Hr. Tr., p. 92:12-19. Again, without Mr. Gnat’s testimony, Complainants would have proceeded to make assumptions about these figures – and presented such assumptions to the Board – without any degree of reliability.

The Hearing Officer's limitation on Exhibits 1331 and 1332 ensures that the information presented to the Board is correct, reliable and relevant. Mr. Gnat's corrections of Complainants' counsel's errors demonstrate that allowing hundreds of pages into the record without establishing the reliability of the Exhibits would be of no help to the Board. Allowing the information without discussion also unfairly prejudices MWG because there is no opportunity to correct a mistake or misinterpretation by the Complainants on material issues.

**b. The Record is Clear as to What Portions of the Exhibits May Be Relied Upon.**

Complainants' claim - that the Hearing Officer's Ruling is confusing - is not supported by the record nor even Complainants' memorandum. On pages 4 through 5 of Complainants' memorandum in support of their Appeal, Complainants provide a succinct and thorough description of the pages in Exhibits 1331 and 1332 about which Mr. Gnat testified. By the very fact that Complainants could easily identify the pages and information Mr. Gnat testified to demonstrates that the Hearing Officer's limitation on the two documents is easily understood – simply read the testimony that is in the record.

In an attempt to support their claims of confusion, Complainants provide a partial quote from Mr. Gnat's testimony to suggest that Mr. Gnat could not identify which sections of the lengthy Exhibit his firm handled. In particular, referring to Exhibit 1331's Table of Contents, Complainants' claim, "Mr. Gnat testified that KPRG wrote, for example, '[p]arts of Section 1,' 'parts of Section 10 and 11,' 'some involvement on that closure priority characterization,' and the list goes on and on." Comp. Memo., p. 9. Complainants patently misrepresent Mr. Gnat's testimony. Mr. Gnat clearly explains that the parts of section 1 of Exhibit 1331 that KPRG was not involved with include "[t]he area capacity curve, spillway diversion capacities and calculations, surveillance maintenance repair construction specifications, record of structural," 5/17/23 Tr., p. 178:20-179:15. He also clearly testified about which parts of Exhibit 1331 on "closure priority

characterization” that he worked on and did not work on. 5/17/2023 Hr. Tr., pp. 124:7-15, 129:21-130:18. He also stated that he could not speak to Sections 10 and 11 of Ex. 1331 and Ex. 1332 because he was not part of the development of that information. 5/18/2023 Hr. Tr., pp. 16:21-17:18, 63:8-65:2. In a deficient attempt to suggest some sort of relevancy to Exhibit 1331, Complainants simply asked Mr. Gnat to identify, by reviewing the Table of Contents, portions of Exhibit 1331 he had worked on. Complainants did not question Mr. Gnat on any substantive issues relating to those identified sections. Just because Mr. Gnat was involved in a section of the report did not make it relevant or reliable. In fact, MWG objected to this line of questioning because it did not assist in determining relevancy, stating: “Mr. Gnat has fully admitted that he wrote Attachment 9 and he was fully involved. They haven't asked a single question about that attachment....And our concern is, which we've said repeatedly, is surprise. And that this whole document gets in and then it's used in some manner that we cannot counter later”. 5/17/2023, Hr. Tr., p. 183:7-23.

Complainants’ similarly claim that the numerous cross-references on pages 70 and 71 of the May 18, 2023 hearing transcript concerning Exhibit 1332 add to the confusion. This is misleading, at best. 5/18/2023 Hr. Tr., pp. 70:21-71:19. The “cross-references” Complainants refer to consist of their own request for Mr. Gnat to recite the Table of Contents from Exhibit 1332. 5/18/2023 Hr. Tr., pp. 69:8-71:19. MWG made the same objections to Complainants’ recitation of the Table of Contents in Exhibit 1332 with Mr. Gnat as it did for the Table of Contents in Exhibit 1331, stating: “If we are just going to go through the table of contents and identify the things that they looked at, again, I would object to relevancy. What we’re interested in is, is the content .” 5/18/23 Tr., p. 70:23-71:2. While there is no question that Complainants created confusion in the transcript by asking Mr. Gnat to recite the Table of Contents, that does not make the Hearing Officer’s Ruling less clear; the Board can look at the testimony in the record and determine what Mr. Gnat had

knowledge of and what is therefore relevant in the document. More importantly, the Board can simply refer to the hearing testimony to assess whether any portion of the Exhibits, as testified to by Mr. Gnat, are relevant and reliable.

Complainants' next claim – that that the Hearing Officer's limitation is confusing because of potential overlap with information developed by another engineer, Mr. Davenport – is equally unpersuasive. Complainants' Memorandum in Support, p. 9. The record is clear as to what information Mr. Gnat "has knowledge of and what he can speak to" pursuant to the Hearing Officer Ruling. *See* Comp. Memo., pp. 4-5. MWG should not be unfairly prejudiced because Complainants did not call the proper witnesses to present their case. The Waukegan permit application (Ex. 1331) was prepared in 2021, and the Will County permit application was prepared in 2022 (Ex. 1332). Complainants could have deposed or subpoenaed Mr. Davenport (or any of the other professional engineers that contributed to the Exhibits) if they wanted to use and rely upon portions of the Exhibits that other engineers were responsible for preparing.

Finally, Complainants' claim of confusion in their footnote No. 5 (regarding the wording of the Hearing Officer's ruling) is disingenuous given the lengthy discussions and objections about both Exhibits 1331 and 1332 in the record. The Hearing Officer stated: "I'm going to admit Exhibit – Exhibit 1332 and request the Board not to consider parts of the exhibit Mr. Gnat through his testimony cannot speak to or has no knowledge, and disregard the remainder." 5/18/23 Tr., p. 106:21-107:1 (emphasis added). Clearly, in context, the Hearing Officer's statement was consistent with his prior rulings on these documents. An imperfect word choice in an extensive and technical hearing does not require reversal. As noted above, the Hearing Officer previously and clearly stated that the exhibits were allowed only as to "Mr. Gnat's testimony and what he has knowledge of and what he can speak to and disregard the remainder of the exhibit." 5/18/2023 Hr. Tr., p. 67:5-8.

**c. Hearing Officer's Order is Consistent with His Prior Orders and 101.626**

The Hearing Officer's limitation is not unprecedented and is consistent with his prior rulings. Complainants' assertion that the Hearing Officer previously admitted Exhibits 17D, 18D, 19D, 20D, and 21 in their entirety without limitation is a blatant misrepresentation of the Hearing Officer's decision on those exhibits. At the first hearing, the Hearing Officer initially excluded Exhibits 17D, 18D, 19D, 20D, and 21, and only allowed testimony about the Exhibits as an offer of proof. 10/23/17 Hr. Tr., pp. 112:4:10 (17D and 18D), 113:11-17 (19D), 119:5:9 (20D), 124:21:23 (21). Following a break, the Hearing Officer revised his decision and allowed the exhibits based on section 101.626, the business records exception. 10/23/17 Hr. Tr., p. 126:6:14. MWG's counsel objected stating, "we would ask that the ruling be limited then to – for the purpose of relevancy the questions that are actually asked from that document. In other words, the concern is that there is a discussion with Ms. Race on one issue and then the closing brief comes around and something is pulled out of the back of that report that has nothing to do with the testimony." 10/23/17 Hr. Tr., p. 126:15:22. The Hearing Officer agreed, and granted the limitation stating, "I grant that. Ms. Bugel, do you understand in your – in your hearing brief, your -- your briefing is limited to the questions you have asked of Ms. Race regarding these exhibits?" 10/23/17 Hr. Tr., pp. 126:23-127:9. Ms. Bugel did not object to the Hearing Officer and "asked for the opportunity to go back and ask additional questions." 10/23/17 Hr. Tr., p. 127:4-6. Granting her request, Ms. Bugel returned to the exhibits for additional examination. See e.g., 10/23/17 Hr. Tr., pp. 127:8-6-232:12.

The Hearing Officer affirmed his decision to limit the admission of Exhibits 17D, 18D, 19D, 20D, and 21 to the testimony provided in a written order stating that "My ruling at the October 23, 2017, hearing stands. The parties may only use and rely on the specific questions asked and the responses elicited regarding complainants Exhibits 17D, 18D, 19D, 20D, 21, and 38. Any attempt

by complainants to enlarge my ruling is denied.” Hearing Officer Order, January 11, 2018, p. 2.  
(Attached as Ex. 1).

Despite this prior ruling limiting the admission of lengthy documents to the testimony provided, Complainants attempted to take the same approach with Exhibits 1331 and 1332. Consistent with his previous order, the Hearing Officer placed essentially the same limitation on Exhibits 1331 and 1332 that he had applied in the past. The Hearing Officer specifically recognized the inherent prejudice that would result in allowing entire documents to be admitted without testimony or explanation and limited the Exhibits to the relevant and reliable pages established by testimony.

**IV. Conclusion**

For the foregoing reasons, MWG requests the Board affirm the Hearing Officer’s ruling to allow Exhibits 1331 and 1332 only as to “Mr. Gnat’s testimony and what he has knowledge of and what he can speak to and disregard the remainder of the exhibit(s)” to ensure that evidence from those Exhibits in the hearing is relevant and reliable.

Respectfully submitted,  
MIDWEST GENERATION, LLC

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

Jennifer T. Nijman  
Kristen L. Gale  
Drew Nishioka  
Nijman Franzetti, LLP  
10 S. LaSalle Street, Suite 3400  
Chicago, IL 60603  
312-251-5255

# **EXHIBIT 1**



ILLINOIS POLLUTION CONTROL BOARD

January 11, 2018

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

**HEARING OFFICER ORDER**

Hearings were held on October 23, 24, 25, 26 and 27, 2017 in this enforcement case. On November 13, 2017, the respondent filed a “Motion to Clarify and Confirm the Hearing Officer’s Limitation on the use of the Historic Phase I and Phase II Reports.” (Mot.). On December 1, 2017, the complainants filed its response (Resp.). On December 15, 2017, respondent filed a motion for leave to file a reply with the reply attached (Reply). Also on December 15, 2017, the complainants filed its opposition to respondent’s motion to file a reply. On December 29, 2017, complainants filed a motion for leave to file a sur-reply and response (Sur-reply).

In respondent’s motion, it requests that I clarify a ruling I made at the hearing on October 23, 2017. Mot. at 1-3. Specifically, the motion seeks to clarify my ruling pertaining to complainants Exhibits 17D (1998 Phase II report for the Powerton Station); Exhibit 18D (1998 Phase II report for the Will County Station); Exhibit 19D (1998 Phase II report for the Waukegan Station; Exhibit 20D (1998 Phase II report for the Joliet Station); Exhibit 21 (1998 Phase I report for the Joliet 29 Station). *Id.* Reversing my earlier ruling based on Section 101.626 of the Board’s procedural rules, I allowed these exhibits to be received in evidence over objection but limited the use of these exhibits to the questions asked and the responses elicited from the witness about these exhibits. Complainants did not object. *Id.*; Attachment A, Transcript at 126-127.

Subsequent my ruling regarding complainants Exhibits 17D, 18D, 19D, 20D and 21, complainants moved its Exhibit 38 into evidence that was a 1998 Phase I report for the Waukegan Station. *Id.*; Attachment A, Transcript at 138. I allowed Exhibit 38 in evidence over objection based on my prior rulings pertaining to Exhibits 17D, 18D, 19D, 20D and 21. Respondent’s objections were the same. *Id.* at 2-3, Attachment A, Transcript at 138. Complainants did not object. *Id.*

Respondent requests that I “confirm that the parties’ use of or reliance on each Phase I and Phase II Reports identified as Exhibits 17D, 18D, 19D, 20D 21 and 38, is limited to the

information discussed at the hearing.” Mot. at 3.

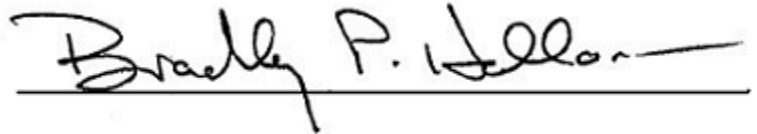
In complainants’ response, they apparently agree with respondent that the use and reliance of the exhibits in question is limited to the specific questions asked and responses elicited. Resp. at 1-2. It appears that complainants then attempt to enlarge my ruling regarding the exhibits and request that I specifically find that the complainants can in general use and rely on the content of specific pages of the various exhibits. Resp. at 2-3.

My ruling at the October 23, 2017, hearing stands. The parties may only use and rely on the specific questions asked and the responses elicited regarding complainants Exhibits 17D, 18D, 19D, 20D, 21, and 38. Any attempt by complainants to enlarge my ruling is denied.

Respondent’s motion to file a reply and complainants motion to file a sur-reply are denied. Denial of the motions do not materially prejudice either party nor do the motions aid in the resolution of respondent’s motion to clarify. Both parties have adequately stated their respective positions without need for additional argument. 35 Ill. Adm. Code 101.500(e); People v. Peabody Coal Company, PCB 99-1340, slip. at 3 (April 18, 2002).

The parties or their legal representatives are directed to participate in a telephonic status conference with the hearing officer on January 16, 2018, at 11:30 a.m. The telephonic status conference must be initiated by the complainants but each party is nonetheless responsible for its own appearance.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

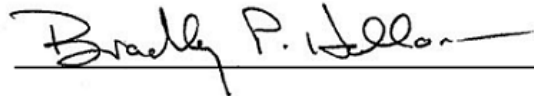
Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center, Suite 11-500  
100 W. Randolph Street  
Chicago, Illinois 60601  
312.814.8917  
[Brad.Halloran@illinois.gov](mailto:Brad.Halloran@illinois.gov)

CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on January 11, 2018, 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 January 11, 2018:

Don Brown  
Illinois Pollution Control Board  
James R. Thompson Center  
100 W. Randolph St., Ste. 11-500  
Chicago, Illinois 60601

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

Bradley P. Halloran  
Hearing Officer  
Illinois Pollution Control Board  
James R. Thompson Center  
100 West Randolph Street, Suite 11-500  
Chicago, Illinois 60601  
312.814.8917

@ Consents to electronic service

SERVICE LIST

PCB 2013-015@  
Jennifer T. Nijman  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3600  
Chicago, IL 60603

PCB 2013-015@  
Jennifer Dexter  
Environmental Law & Policy Center  
35 E. Wacker Drive  
Suite 1600  
Chicago, IL 60601

PCB 2013-015@  
Keith I. Harley  
Chicago Legal Clinic, Inc.  
211 W. Wacker Drive  
Suite 750  
Chicago, IL 60606

PCB 2013-015@  
Abel Russ  
Environmental Integrity Project  
1000 Vermont Avenue NW  
Suite 1100  
Washington, DC 20005

PCB 2013-015@  
Susan M. Franzetti  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3600  
Chicago, IL 60603

PCB 2013-015@  
Kristen L. Gale  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3600  
Chicago, IL 60603

PCB 2013-015@  
Greg Wannier  
Sierra Club  
85 Second Street  
Second Floor  
San Francisco, CA 94105

PCB 2013-015@  
Kelly Emerson  
Nijman Franzetti LLP  
10 S. LaSalle Street  
Suite 3600  
Chicago, IL 60603

PCB 2013-015@  
Lindsay Dubin  
Environmental Law & Policy Center  
35 E. Wacker Drive  
Suite 1600  
Chicago, IL 60601

PCB 2013-015@  
Faith Bugel  
1004 Mohawk  
Wilmette, IL 60091