

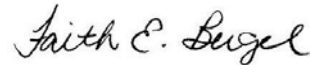
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
CITIZENS AGAINST RUINING THE)	
ENVIRONMENT)	
)	PCB No-2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S OBJECTION AND APPEAL FROM THE HEARING OFFICER'S RULING TO ADMIT COMPLAINANTS' EXHIBIT 1408 AS EVIDENCE**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



Faith E. Bugel
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Wilmette, IL 60091
(312) 282-9119
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Attorney for Sierra Club

Dated: August 16, 2023

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
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**COMPLAINANTS’ RESPONSE TO MIDWEST GENERATION, LLC’S
OBJECTION AND APPEAL FROM THE HEARING OFFICER’S RULING
TO ADMIT COMPLAINANTS’ EXHIBIT 1408 AS EVIDENCE**

Complainants Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) hereby respond to Midwest Generation, LLC’s (“MWG”) July 26, 2023 Objection and Appeal of the Hearing Officer’s Ruling admitting Complainants’ Exhibit 1408 as Evidence (“MWG Appeal” or “Appeal”). The Board should uphold the Hearing Officer’s admission of Exhibit 1408 because, contrary to MWG’s assertions, it is relevant and reliable.

Exhibit 1408 is a document filed by the Illinois Environmental Protection Agency (“IEPA”) in a proceeding before the Pollution Control Board (“Board” or “PCB”) responding to Midwest Generation, LLC’s (“MWG’s”) request for an adjusted standard and finding of inapplicability for two coal combustion residual (“CCR”) surface impoundments at the Waukegan site. The document sets forth detailed findings regarding the history and condition of the area known as the “Grassy Field” and assessing the plausibility of MWG’s claims with the

cost and protectiveness of MWG's proposal to retain the current liner at the West Pond at the same site. These findings, set forth over 35 pages and signed by a representative of the IEPA, are supported by 40 exhibits. It discusses issues of subsequent compliance and due diligence that are statutory factors in this remedy proceeding as well as issues of overlapping compliance obligations MWG put directly at issue in its pre-hearing memorandum. The document is exactly the sort of written, considered findings by the IEPA the Board has admitted in the past. MWG offers no on-point case law arguing for its exclusion, and so its Appeal should be denied.

I. Background

A. Relevant Law Governing Remedy Phase

Two provisions of Illinois law govern remedies and civil penalties where a respondent has been found liable under the Illinois Environmental Protection Act: Section 33(c) which describes five factors "the Board shall take into consideration" in assessing the "reasonableness of the emissions, discharges or deposits" for purposes of an order on remedy; and Section 42(h) which governs the assessment of civil penalties. 415 ILCS 5/33(c), 5/42(h). With respect to remedies, Section 33(c) directs the Board to consider:

- (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
- (ii) the social and economic value of the pollution source;
- (iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
- (iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
- (v) any subsequent compliance.

415 ILCS 3/33(c). With respect to penalties, Section 42(h) identifies eight mitigating or aggravating factors:

- (1) the duration and gravity of the violation;
- (2) the presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act;
- (3) any economic benefits accrued by the respondent because of delay in compliance with requirements, in which case the economic benefits shall be determined by the lowest cost alternative for achieving compliance;
- (4) the amount of monetary penalty which will serve to deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act;
- (5) the number, proximity in time, and gravity of previously adjudicated violations of this Act by the respondent;
- (6) whether the respondent voluntarily self-disclosed, in accordance with subsection (i) of this Section, the non-compliance to the Agency;
- (7) whether the respondent has agreed to undertake a “supplemental environmental project”, which means an environmentally beneficial project that a respondent agrees to undertake in settlement of an enforcement action brought under this Act, but which the respondent is not otherwise legally required to perform; and
- (8) whether the respondent has successfully completed a Compliance Commitment Agreement under subsection (a) of Section 31 of this Act to remedy the violations that are the subject of the complaint.

415 ILCS 5/42(h). Evidence going to each of these factors—or their absence—is therefore relevant to the Board’s remedy and penalty determinations.

B. Exhibit 1408

Exhibit 1408 was submitted by IEPA pursuant to 35 Ill. Adm. Code § 104.416, in response to MWG’s petition for an adjusted standard. (“IEPA Recommendation”) As described in Exhibit 1408 (as well as indicated in the docket for AS 2021-003), on May 11, 2021, almost two years after the Board issued its Order on Liability in this proceeding (on June 20, 2019), MWG filed a petition seeking an adjusted standard waiving the requirement, under 35 Ill. Adm. Code § 845.740(a), that an owner or operator who elects for closure by removal of an impoundment must also remove its existing liner and contaminated subsoils to complete the closure process. Ex. 1408 at ¶¶ 4, 6. MWG initially sought permission to re-use the liner of the

East Pond; in a subsequent filing MWG sought to re-use the liner of the West Pond instead. *Id.* at ¶¶ 4, 5. MWG also sought a determination that an area at Waukegan known as the “Grassy Field” did not meet the definition of a CCR surface impoundment under 35 Ill. Adm. Code Part 845. *Id.* at ¶6.

Under 415 ILCS 5/28.1, IEPA is required to participate in adjusted standard proceedings. Unless IEPA joins as a co-petitioner, it is required to submit a “recommendation” on the request to the Board. 35 Ill. Adm. Code § 104.416. IEPA recommended denying both of MWG’s requests. With respect to the Grassy Field, IEPA found that the Grassy Field was a subsection of the “Old Pond,” a CCR surface impoundment; and that although the Grassy Field had subsequently been covered with vegetation, it still contained CCR material. IEPA suggested that MWG’s argument to the contrary was “perhaps an attempt of a play on words.” *Id.* at ¶¶27-28. IEPA also pointed out that MWG’s claim—that the Grassy Field could not have been a surface impoundment because it discharged water under a NPDES permit—was “simply not true” and “[in]consistent with [MWG’s] own interpretation of a CCR surface impoundment.” *Id.* at ¶31.

With respect to the request to re-use the West Pond liner, IEPA’s recommendation called MWG’s cost estimates “misleading,” stating that MWG significantly understated the cost of removing all contaminated soils because it did not account for the “14-16 feet of CCR in the berms of West Pond that would have to be removed.” *Id.* at ¶¶ 69-70. IEPA stated that MWG equates two “very different” processes—the decontamination of a competent liner prior to retrofit, and closure by the removal of CCR materials. *Id.* at ¶74. According to IEPA, because the owner or operator must at some later point close the impoundment in a retrofit scenario, the pond will not be permanently left with a contaminated liner. *Id.* In contrast, allowing re-use as part of a closure, as MWG is requesting, would “circumvent[] environmentally protective measures.” *Id.*

at ¶75. IEPA went on, as part of Exhibit 1408, to find that it is likely the liner has been damaged and that there is contaminated subsoil beneath the liner, relying in significant part on the Board's finding in this case. *Id.* at ¶¶79-80. Exhibit 1408 includes numerous aerial photographs, permits and permit records, and documentary records of the Waukegan site prepared on behalf of MWG, as exhibits to the filing. *Id.* at ¶¶38-39.

II. Argument

MWG objects to the admissibility of Exhibit 1408 on relevance and reliability grounds, as well as on procedural grounds. None of these objections have merit. As explained more fully in the following sections, Exhibit 1408 is relevant because it addresses topics that are squarely at issue in this proceeding. It is reliable in its own right, and neither of the sources MWG claims undermine the reliability of Exhibit 1408 actually do so. The caselaw that MWG cites as to admissibility is inapposite. And MWG has had ample notice and opportunity to place on the record any evidence it believes is necessary to dispute assertions or conclusions contained in Exhibit 1408. For all these reasons, the Hearing Officer's ruling admitting Exhibit 1408 should stand.

A. Standard for Admissibility in Board Proceedings

In proceedings before the Board, “[t]he hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged.” 35 Ill. Adm. Code § 101.626. This is a “relaxed standard.” *People v. Atkinson Landfill Co.*, PCB No. 13-28, slip op. at 9 (Jan. 9, 2014). Further, the PCB has taken the approach that a very high bar must be met for it to find the admission of evidence to be reversible error. *McHenry County Landfill, Inc. v. County Board of McHenry County*, PCB Nos. 85-56; 85-61; 85-63; 85-64; 85-66 (consolidated) (Sept. 20, 1985) 1985 Ill. ENV LEXIS 255, *12 (discussing the County Board of McHenry County's refusal to allow testimony). “Only rarely will the Board find the acceptance

of evidence to be reversible error whereas the refusal will be closely scrutinized. Testimony which is accepted can be disregarded, and the Board favors a liberal construction of admissible evidence.” *Id.*

B. Exhibit 1408 is Both Relevant to the Appropriate Remedy in this Case and Reliable to the Board

As an initial matter, MWG mischaracterizes Complainants’ introduction of Exhibit 1408. In its Appeal, MWG states that Complainants “asked Ms. Shealey about a single sentence on one page in the entire document.” Midwest Generation, LLC’s Obj. and Appeal from the Hr’g Officer’s Ruling to Admit Comps.’ Ex. 1408 as Evid. at 2 (citing May 19, 2023 Hr’g Tr. at 8:3-9) (“MWG’s Objection”). In fact, Complainants asked Ms. Shealey about her familiarity with the document, the procedural context in which IEPA filed it, the purpose of the underlying request and amended request for an adjusted standard (which had already been introduced as Exhibits 1406 and 1407), and the nature of IEPA’s recommendation. May 19, 2023 Hr’g Tr. at 5:21-7:23.

MWG makes two arguments challenging the admissibility of Exhibit 1408, neither of which has merit. First, MWG claims Exhibit 1408 is irrelevant because “[t]his case before the Board here [sic] concerns alleged violations of Section 12 and 21 of the [Illinois Environmental Protection] Act, and Part 620 of the Board rules,” but “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.” Midwest Generation, LLC’s Mem. in Support of Its Obj. and Appeal from the Hr’g Officer’s Ruling to Admit Comps.’ Exhibit 1408 as Evid. at 2 (“MWG’s Mem.”). Second, MWG contends Exhibit 1408 is “remote, uncertain or speculative” because “Illinois EPA did not attach an affidavit verifying the information in Exhibit 1408.” MWG Mem. at 5. Complainants address MWG’s stated concerns about the document’s relevance and reliability in turn.

1. Relevance

Exhibit 1408 is relevant for the very simple reason that it addresses topics that are squarely at issue in this proceeding. Both this proceeding and the Part 845 rulemaking address what measures ought to and have been taken to reduce groundwater contamination from coal ash impoundments. Exhibit 1408 addresses a site, and areas within that site (the Grassy Field and West Pond at Waukegan), that are central to understanding the Waukegan site. That Exhibit 1408 was submitted in a proceeding addressing a *different* legal standard does not make either the fact of its filing or its contents somehow irrelevant to the Board's determination here. Tellingly, MWG does not cite any precedent or case law to support its claim as to lack of relevance.

In fact, Exhibit 1408 is relevant to “[T]he presence or absence of due diligence on the part of the respondent in attempting to comply with requirements of this Act and regulations thereunder or to secure relief therefrom as provided by this Act,” because it tends to show whether MWG’s attempts “to secure relief” from regulations under the Illinois Environmental Protection Act reflected good faith efforts, as evidenced by IEPA’s assessment of those requests. *See* 415 ILCS 5/42(h)(2). It is also relevant to “the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source,” because Exhibit 1408 discusses MWG’s claimed costs for certain remedial actions with respect to the West Pond and IEPA’s assessment of those cost estimates. *See* 415 ILCS 5/33(c). And the “single sentence” MWG claims Complainants asked about, whether MWG had “voluntarily initiated” any actions to “mitigate the release of contaminants” from the Grassy Field, goes directly to “[a]ny subsequent compliance,” another Section 33(c) factor. *Id.*

Moreover, MWG *put its compliance with Part 845 at issue* in this proceeding. Prior to the May 2023 Hearing in this matter, MWG filed a Pre-Hearing Memorandum setting forth its

positions with respect to remedy. Midwest Generation, LLC's Pre-Hr'g Mem. (Apr. 21, 2023) ("MWG Pre-Hr'g Mem."). In its memorandum, MWG argued with respect to the Section 33(c) "technical practicability and economic reasonableness of reducing or eliminating the emissions" factor that "the compliance actions MWG is taking and will take at its CCR surface impoundments to comply with the Illinois CCR Rule, including the closure method ultimately approved by Illinois EPA, is technically practicable and economically reasonable," and that the Board should defer to "the Agency's [*i.e.* IEPA's] technical expertise" in declining to craft a separate remedy. MWG Pre-Hr'g Mem. at 13-14. With respect to the "subsequent compliance," factor under Section 33(c), MWG argued that, "[u]pon the passing of the CCR Rules, MWG has conducted all that is required under both sets of rules." *Id.* at 15. In short, MWG stated before the hearing began that it would argue that its compliance with the closure requirements set forth by IEPA was a sufficient remedy and that the IEPA's technical expertise was relevant to assessing the adequacy of that remedy. IEPA's assessment of whether MWG's plans comport with Part 845 closure requirements is therefore directly relevant to MWG's own defense. Moreover, Complainants are entitled to test whether MWG has in fact "conducted all that is required under both sets of rules"—Illinois Part 845 and Resource Conservation and Recovery Act Part 257—including by proffering evidence that MWG engaged in efforts to avoid the stringent requirements of the rules by, e.g., filing unfounded petitions for adjusted standards.

As counsel for Complainants explained to the Hearing Officer:

We are looking at all of the regulatory and compliance actions that Midwest Generation has taken since the liability phase of this proceeding to understand and convey the degree to which they have actively complied with consistent plans for dealing with these facilities, and we think a historical record of changes to their plans is important for the Board to understand the need for additional relief beyond regulatory requirements.

May 18, 2023 Hr'g Tr. at 246:1-10. Complainants are entitled to introduce evidence tending to show that MWG has delayed mitigation measures that may be required under those other regulatory regimes, or that those regulations may be insufficient to address the water pollution for which MWG has been found liable in this proceeding. Exhibit 1408 is relevant evidence to both these issues.

2. Reliability

Perhaps in a nod toward its limited arguments challenging the relevance of Exhibit 1408, MWG focuses primarily on the document's "reliability." MWG Mem. at 3-7. Specifically, MWG argues that the document is so unreliable as to make it irrelevant, and that as a result it does not meet the standard for Board hearings that evidence, to be admissible, "*would be relied upon by prudent persons.*" MWG Mem. at 4 (citing 35 Ill. Adm. Code § 101.626). MWG claims Exhibit 1408 is unreliable because (a) Illinois EPA did not attach an affidavit verifying the information it contained; and (b) it contains "many" unspecified "inaccuracies," including the sentence Ms. Shealey disputed at the hearing itself. MWG Mem. at 5. But MWG does not identify any instances in which a document, filed by a state agency in a public proceeding, was excluded from an evidentiary record for lack of reliability. Indeed, in the primary case on which MWG relies, *Metro Util. v. Illinois Com. Comm'n*, the court admitted a letter from the IEPA estimating the costs of expanding a wastewater facility, concluding that "a reasonably prudent person would rely on the written assurances of sewer connection costs put forward by a staff member of the [IEPA]." *Metro Util. v. Illinois Com. Comm'n*, 193 Ill. App. 3d 178, 185, 549 N.E.2d 1327, 1331-1332 (Ill. App. Ct. 3rd Dist. 1990).

MWG challenges the reliability of IEPA's recommendation by referencing two sources that it claims disagree with IEPA's conclusions in Exhibit 1408: first, the testimony of Ms. Shealey, in which she disagreed with IEPA's conclusion that MWG had failed to conduct any

mitigation with respect to the Grassy Field; and second, a subsequent federal rulemaking that MWG claims undermines IEPA's findings. MWG Mem. at 5. But the fact that MWG disputes IEPA's conclusions does not make Exhibit 1408 unreliable. If the Board followed MWG's logic, it would exclude *any* evidence introduced by Complainants containing factual assertions with which MWG disagreed; this would be an absurd result.¹

Furthermore, neither of the two sources MWG claims undermine the reliability of Exhibit 1408 actually do so. First, although Ms. Shealey is lead for environmental compliance at MWG, she repeatedly failed to recollect MWG's past positions with respect to compliance with state and federal regulations governing CCR compliance. May 18, 2023 Hr'g Tr. at 153:21-154:4. For instance, Ms. Shealey stated that she failed to recall why MWG submitted an adjusted standard petition at the Powerton site, what the petition contained, or why it was withdrawn, stating instead that she would "literally have to read [the petition] to be able to convey to you the specific reason we thought that we needed an adjusted standard at that time," and suggesting that once a petition was withdrawn, she no longer maintained a working memory of its contents. *See* May 18, 2023 Hr'g Tr. at 252:19-24, 253:16-24, 257:6-7, 259:5-6, 268:9-10. A "prudent person," when confronted with a witness who relies almost entirely on documents to refresh her recollection with respect to relevant issues, would rely on those documents and not solely oral testimony, in deciding what MWG has and has not done with respect to coal ash at one of the sites at issue in this proceeding. 35 Ill. Adm. Code §101.626.

¹ MWG's statement that "[a] reasonably prudent person simply would not rely on only one side of such a contested issue" invites the same absurdity. MWG Mem. at 6. *All* evidence introduced at a hearing is one-sided; it is introduced by *one of the parties* to show their view of the facts is correct. By this standard MWG's own expert testimony would be excluded under §101.626(a).

And second, the U.S. EPA document MWG cites does not say what MWG claims it does. MWG states that “U.S. EPA agrees with MWG’s position and specifically identified the area as a historic fill unit, *not* a surface impoundment.” “Potential CCR Management Unit Universe,” Rulemaking Docket for Hazardous and Solid Waste Management System: Disposal of Coal Combustion Residuals from Electric Utilities; Legacy Surface Impoundments, Docket No. EPA-HQ-OLEM-2020-0107-0155, at row 25 (May 17, 2023). That is a blatant mischaracterization: the document describes the “Old Pond,” which comprises the Grassy Field, West Pond, and East Pond, as a “Closed CCR Surface Impoundment.”² It is the fact that the Old Pond was closed that made it fall outside the scope of the Federal CCR Rule.

MWG’s position is also contradicted by extensive case law. The Board has previously admitted, over hearsay objections, numerous documents authored by IEPA. *See Castellari v. Prior*, No. 1986-079, 1987 WL 56063 at *9 (Ill. Pol. Control. Bd. 1987) (admitting letters and inspection reports for landfills performed by the IEPA); *Sierra Club v. Ameren Energy Medina Valley Cogen, LLC*, No. 2014-134, 2014 WL 5834316, at *4 (Ill. Poll. Control. Bd. 2014) (admitting a Responsiveness Summary to comments on an air permit written by IEPA); *Thomas E. Greenland, v. City of Lake Forest*, No. 1984-155, 1985 WL 21374 at *1 (Ill. Pol. Control Bd. 1985) (admitting a “study by the then Illinois Institute of Natural Resources (IINR) [now Department of Energy and Natural Resources (DENR)] entitled ‘Advisory Report on the Potential Health Effects of Leaf Burning’”). The Board thus has a longstanding practice of admitting documents produced by the IEPA and other state agencies expressing the agencies’ legal and factual conclusions regarding a site, facility, or practice at issue. As the Board

² Even if the U.S. and Illinois EPA disagreed about the proper legal classification of the Grassy Field, the *fact* of that disagreement remains relevant to the proceeding, because (as discussed above), MWG has argued that its compliance with the U.S. and Illinois coal ash rules make any additional injunctive remedy here superfluous or counterproductive, as it would require MWG to meet conflicting standards.

explained with respect to the air permit Responsiveness Summary, admitting over—in that case—the Sierra Club’s objections:

The Board is unconvinced that the responsiveness summary meets the definition of hearsay in Illinois law. Further, the Board agrees that even if the document is hearsay, the document is exempt as a public record prepared in the course of IEPA required duties. Therefore, the motion to strike is denied.

Sierra Club v. Ameren Energy Medina Valley Cogen, LLC, No. 2014-134, 2014 WL 5834316 at *4 (Ill. Pol. Control Bd. 2014) (internal citations omitted). Exhibit 1408 was also “offered to provide the Board with procedural context” regarding MWG’s compliance efforts under Part 845 and IEPA’s response to MWG’s positions with respect to the Waukegan site. Moreover, IEPA had a “duty imposed by law” to file a recommendation on MWG’s variance petition under 415 ILCS 5/28.1 and 35 Ill. Adm. Code § 104.416. Exhibit 1408 is directly analogous to the Responsiveness Summary, and should therefore also be admitted.

Conversely, the cases on which MWG relies are non-administrative criminal cases where highly prejudicial evidence was excluded as insufficiently probative as to a defendant’s guilt. Both are inapposite. *People v. Morgan* involved a criminal case where the defendant claimed self-defense against the victim, his grandmother. *People v. Morgan*, 197 Ill. 2d 404, 457, 758 N.E.2d 813, 843–44 (Ill. Sup. Ct. 2001). The defendant attempted to introduce testimony from his mother as to his grandmother’s violence when the mother was a child. *Id.* The Court ultimately found no nexus between the mother’s testimony about her childhood and the defendant’s pursuit of the fleeing victim. *Id.* Here, there is a clear “nexus” between findings relating to what MWG has or has not done with respect to coal ash at the Waukegan site and what regulatory requirements it will be subject to (the ultimately outcome of the proceeding in which Exhibit 1408 was initially filed), and the issue in this case: namely, what remedies are appropriate to address water contamination from the coal ash at the Waukegan site. And in

People v. Bouska, the court of appeals upheld the trial court's exclusion, as unduly prejudicial, of testimony that the alleged victim continued in an intimate relationship with the defendant after the night on which he allegedly beat and kidnapped her. *People v. Bouska*, 118 Ill. App. 3d 595, 601, 455 N.E.2d 257 (Ill. App. Ct. 3rd Dist. 1983). Again, the admission or exclusion of the testimony in *Bouska* has no bearing on the admission of Exhibit 1408 in this matter:

Complainants are struggling to identify any way in which this case offers an analogous evidentiary context.

C. For all of the above reasons, MWG's arguments challenging the reliability of Exhibit 1408 fail. MWG Is Not Prejudiced by the Admission of Exhibit 1408

MWG also suggests that it would be unfairly prejudiced if Exhibit 1408; but this argument is without merit. MWG Mem. at 6. MWG's petition and amended petition for an adjusted standard with respect to the Waukegan site have already been admitted, as Exhibits 1406 and 1407. MWG had ample notice that Complainants planned to introduce Exhibit 1408 at the proceeding, and had the opportunity to ask redirect questions of Ms. Shealey regarding the contents of Exhibit 1408. *See* Comps.' Individual Ex. List (May 3, 2023). MWG argues that it is prejudiced because its response to the IEPA Recommendation was not scheduled to be filed until July 28, 2023. MWG Mem. at 2. But Exhibit 1408 was filed with the PCB on October 31, 2022, giving MWG ample opportunity to prepare exhibits and testimony disputing any of the material contained in the exhibit prior to the May 2023 hearing. MWG does not cite any law, regulation, or case law in support of its argument that introduction of a document six months after it was filed (and noticed), which itself relies exclusively on publicly available information and documents produced by the party alleging prejudice, gives rise to prejudice. *See* MWG Mem. at 6. MWG has had ample opportunity to place on the record any evidence it believes is necessary to dispute assertions or conclusions contained in Exhibit 1408, and will have opportunity to

explain to the Board, as part of its post-hearing briefing, why that evidence outweighs the contents of Exhibit 1408.³

III. In the Alternative, the PCB Should Admit Exhibit 1408 under 35 Ill. Adm. Code 101.306

Finally, MWG claims that Complainants have “implicitly concede[d]” Exhibit 1408 is not “credible, authentic, and relevant” because Complainants moved for its admission under the general standard for evidence rather than via incorporation of documents from other Board proceedings. MWG Mem. at 7-8. This argument strains credulity. Complainants’ decision to seek admission of Exhibit 1408 as an exhibit at the hearing pursuant to PCB Rule §101.626 is completely consistent with the purpose of seeking witness testimony on the exhibit and has no bearing whatsoever on any other grounds Complainants might have had for its admission.⁴

Neither MWG nor its witness contested the document’s authenticity, which is easy to verify through cross-referencing the exhibit and the docket in AS 2021-003. *See* May 19, 2023 Hr’g Tr. at 6:8-10. The document, a formal filing on behalf of the IEPA and signed by counsel for the agency, contains more than 1,300 pages of supporting exhibits, is credible, and is relevant for the reasons discussed above.⁵

³ Although Sierra Club does not believe MWG was prejudiced by the introduction of Exhibit 1408, to the extent the Board feels admission of MWG’s response in AS 2021-003 is “authentic, credible, and relevant” and would assist the Board in the resolution of this matter, Sierra Club would not object to a motion by MWG under 35 Ill. Adm. Code § 101.306 for admission of that response.

⁴ Notably, the Hearing Officer admitted Exhibit 1408 over MWG’s objection without even seeking any argument from Complainant’s counsel. *See* May 19, 2023 Hr’g Tr. at 12:7-13:2.

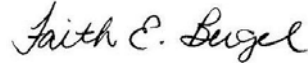
⁵ That said, if the Board views incorporation as the appropriate vehicle for admission of Exhibit 1408, Complainants will happily move under 35 Ill. Adm. Code § 101.306 for Exhibit 1408 to be incorporated into the PCB 13-15 docket. That provision allows for the incorporation of documents in other Board proceedings, upon written motion, where “the material to be incorporated is authentic, credible, and relevant to the proceeding.” 35 Ill. Adm. Code § 101.306(a).

A. Conclusion

For all of the above reasons, the Board should deny MWG's Appeal requesting that the Board reverse the Hearing Officer rulings admitting Exhibit 1408.

Dated: August 16, 2024

Respectfully submitted,



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Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned, Gregory E. Wannier, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S OBJECTION AND APPEAL FROM THE HEARING OFFICER'S RULING TO ADMIT COMPLAINANTS'S EXHIBIT 1408 AS EVIDENCE** before 5 p.m. Central Time on August 16, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 19 pages.

Respectfully submitted,



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