

**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,	)	
	)	
Respondents	)	

**NOTICE OF FILING**

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS’ OBJECTION TO AND APPEAL OF HEARING OFFICER’S RULING ON COMPLAINANTS’ EXHIBIT 37**, copies of which are served on you along with this notice.

Respectfully submitted,



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Dated: November 13, 2017

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MIDWEST GENERATION, LLC,	)	
	)	
Respondents	)	

**COMPLAINANTS’ OBJECTION TO AND APPEAL OF HEARING OFFICER’S  
RULING ON COMPLAINANTS’ EXHIBIT 37**

Pursuant to 35 Ill. Adm. Code 101.502, Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”) submit this Objection to one of the Hearing Officer’s evidentiary rulings made at the hearing in the above-captioned matter and appeal to the Illinois Pollution Control Board (the “PCB” or “Board”). In support of their Objection and Appeal, Complainants state as follows:

1. A hearing in the above-captioned matter was held beginning on October 23 and continuing through October 27, 2017. The hearing was not completed and additional dates remain to be scheduled.
2. The transcript for the first day of the hearing, October 23, 2017, was filed on October 30, 2017.
3. Pursuant to Section 101.502(b), “an objection to a hearing officer ruling made at hearing will be deemed waived if not filed within 14 days after the Board receives the hearing transcript.” 35 Ill. Adm. Code 101.502(b). This objection and appeal is thus timely filed.

4. At the hearing, during the Testimony of Maria Race, Complainants moved for Complainants' Exhibit 37, attached hereto as "Complainants' Exhibit 37," to be admitted into evidence. (Oct. 23, 2017 Hr'g Tr. 180: 13-15.)<sup>1</sup>
5. Respondent objected, (Oct. 23, 2017 Hr'g Tr. 180: 16-20), and the Hearing Officer sustained the objection and took the exhibit as an offer of proof. (Oct. 23, 2017 Hr'g Tr. 180: 21-23.)
6. Complainants object to the Hearing Officer's ruling on Exhibit 37 and appeal this ruling to the Board.

**Legal Standard**

7. The standard for admissibility of evidence at a PCB hearing is that, in accordance with Section 10-40 of the IAPA, "[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(a).
8. This is a "relaxed standard." People v. Atkinson Landfill Co., PCB No. 13-28, slip op. at 9 (Jan. 9, 2014).

The Board has previously found various kinds of out-of-court statements admissible under this provision. See, e.g., Boyer v. Harris, PCB 96-151, slip op. at 3 (Sept. 4, 1997) (letter from laboratory technician providing results of tests of paint chips); Village of Matteson v. World Music Theatre Jam Productions, Ltd., PCB 90-146, slip op. at 3-5 (Mar. 25, 1993) (compilation of noise complaints received by local police department); Ekco Glaco Corp. v. IEPA, PCB 87-41, slip op. at 4 (Dec. 17, 1987) (air quality monitoring results).

People v. Atkinson Landfill Co., PCB No. 13-28, slip op. at 9 (Jan. 9, 2014).

9. Although not at issue with respect to Complainants' Exhibit 37, even without applying the relaxed standard of Rule 101.626(a) Complainants' Exhibit 37 would be admissible in

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<sup>1</sup> Respondents' objection was that "There is no basis to establish that [Maria Race] wrote it. She doesn't remember it. It's not signed. It's not on letterhead. She has no recall of the contents other than what she is reading." (Oct. 23, 2017 Hr'g Tr. 180: 16-20.)

the face of a hearsay objection. A statement that “is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity, or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject” nonetheless meets this higher standard. Ill. S.Ct. R. Evid. 801(d)(2).

**Argument**

10. Complainants established that Complainants’ Ex 37 is material, relevant and would be relied upon by prudent persons in the conduct of serious affairs, as called for in Rule 101.626(a).
11. Ms. Race confirmed that the evidence, which was produced by Midwest Generation in the course of discovery, could be relied upon. First, she testified that her name appears on the document. (Oct. 23, 2017 Hr’g Tr. 178: 18-20).
12. Ms. Race also confirmed that she did correspond with the IEPA staff person whose name appears on the document, Lynn Dunaway. (Oct. 23, 2017 Hr’g Tr. 178:21-179:11.)
13. Ms. Race confirmed that she had no reason to think that the document was fraudulent. (Oct. 23, 2017 Hr’g Tr. 179: 12-16.)
14. Ms. Race also confirmed that the document was material and relevant in that it discussed “upgradient impacts to groundwater” and the installation of two additional monitoring wells at the Waukegan facility. (Oct. 23, 2017 Hr’g Tr. 180: 2-12.)
15. Ms. Race confirmed that her correspondence with Lynn Dunaway was generally about the “hydrogeologic investigations” at Midwest Generation facilities. (Oct. 23, 2017 Hr’g Tr. 178: 21-179:11.) As a result, Complainants established that the document is material and relevant.

16. In addition, by confirming Ms. Race's name on the document and that she did not think it was fraudulent, Complainants established that even if there were a hearsay objection, the document would nevertheless clear hearsay's higher bar for admissibility as a statement by a party opponent. (Ill. S.Ct. R. Evid. 801(d)(2)). It would be an incongruous result for a party to be able to prevent a statement against interest from being entered into evidence against themselves simply by alleging an inability to remember the exhibit. "Party admissions are treated generously by the Rules. They are a product of the adversary process and therefore do not require the usual safeguards of reliability reflected by the hearsay rules. It has always been considered fair to use whatever an opposing party says against him at trial." § 6.5. Admission by party-opponent (FRE 801(d)(2)), Mauet and Wolfson, Trial Evidence.
17. The fact that the witness does not remember the document or the fact that the document was a draft that never was sent does not make the document unreliable.
18. A witness's failure to remember a document only increases the importance of the document as a past recollection recorded.

The underlying rationale for this [past recollection recorded] hearsay exception relies on the fact that the proffered document contains sufficient circumstantial guarantees of trustworthiness and reliability because the recorded recollection was prepared at or near the time of the event while the witness had a clear and accurate memory of it. (McCormick on Evidence (2d Ed.1977) 299 at 712). Under these circumstances, the reliability of the evidence is perceived to outweigh the inherent testimonial infirmities of hearsay occasioned by the inability of the opposing party to effectively cross-examine.

Castellari v. Prior, 1987 WL 56063, at \*13 (quoting Dyan v. McDonald's Corp., 125 Ill. App. 3d 972, 466 N.E.2d 958, 970 (1st Dist. 1984)).

19. Aside from suggesting that the document may have been a draft that was never sent, Ms. Race did not establish that there was anything untrue or unreliable about the substance of

the document. Uncertainty does not equate to unreliability. Uncertainty about whether the document was finalized or sent may affect the weight that the Board gives to the document, but should not affect the admissibility of the exhibit.

WHEREFORE, for the reasons stated above, Complainants request that the Board reverse the Hearing Officer's ruling taking Complainants' Exhibit 37 as an offer of proof and request that the Board admit Complainants' Exhibit 37 into evidence.

Respectfully submitted,



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Dated: November 13, 2017

# **Complainants'**

# **Exhibit 37**



Lynn Dunaway  
Illinois Environmental Protection Agency  
1021 N. Grand Ave. East  
Springfield, IL 62702

RE: Waukegan Station Groundwater Samples

July 26, 2013

Dear Mr. Dunaway,

As you are aware, Midwest Generation Waukegan Station temporarily stores its coal ash within two high density polyethylene (HDPE) lined impoundments on the south side of the facility. Accumulated ash is routinely removed from the impoundments for subsequent beneficial reuse. Midwest Generation, in consultation with Illinois Environmental Protection Agency (IEPA), voluntarily installed five groundwater monitoring wells around the impoundments to assist in evaluating HDPE liner performance. Monitoring wells MW-1 through MW-4 were installed downgradient, relative to groundwater flow direction, of the impoundments and well MW-5 was installed upgradient of the impoundments. Groundwater monitoring consists of the collection of water levels and water samples on a quarterly basis from each well. The samples are analyzed for various inorganic and organic parameters to assist in evaluating whether the impoundment liners are performing in accordance with design and installation specifications. The water level and chemistry data from the initial six rounds of quarterly sampling indicated that the liners are performing properly and that there has been no release of ash constituents from the impoundments to groundwater. It was noted, however, that the upgradient monitoring well, MW-5, was detecting elevated levels of various ash constituents including, but not limited to, boron, manganese and sulfate.

To further investigate the noted upgradient impacts to groundwater, Midwest Generation, in consultation with IEPA, installed two additional monitoring wells, MW-6 and MW-7. Well MW-6 was installed upgradient of well MW-5 near the west property boundary, and well MW-7 was installed side-gradient of MW-5 near the south property boundary. These wells were added to the quarterly monitoring program. At the present time, three rounds of quarterly groundwater samples have been collected from the additional wells. This new data, in conjunction with the data from wells MW-1 through MW-5, is currently being analyzed by Midwest Generation and IEPA. The data verify previous conclusions that the lined ash impoundments are not leaking and indicate that the elevated impacts noted in upgradient well MW-5 are associated with a source other than the impoundments. Evaluating the chemical distribution of impacts within wells MW-5 through MW-7 suggest a potential historical/legacy source, some of which may be originating from off-site. Waukegan station is surrounded by historically industrial sites

COMP. Ex. 37

which are currently vacant, some of which are being remediated. It has been already established that there are impacts to Waukegan Station from these off-site properties.

At present, although the existing groundwater data from all of the monitoring wells is sufficient to rule out the existing ash impoundments as a source, Midwest Generation does not yet have sufficient groundwater and other data to determine the source of the elevated constituents detected in the initial sampling conducted from the two new groundwater wells. We have taken only three sets of samples from the new wells. Two out of the three sampling sets show elevated boron and manganese levels. There is not yet enough data to conduct a statistical analysis, but we intend to continue collecting quarterly samples in order to be able to do so. Also, Midwest Generation has initiated discussions with the property owner to the south to try to obtain additional information concerning groundwater conditions that will help in this investigation. It is Midwest Generation's intent to continue this investigation in order to determine the nature and extent of the groundwater impacts and to identify the source or sources. Once we have this information, we can determine how to address the groundwater impacts. Midwest Generation will continue to cooperate and work with IEPA on this issue, including providing future updates on the progress of the investigation.

Please don't hesitate to call with any questions.

Sincerely,

Maria L Race

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **COMPLAINANTS' OBJECTION TO AND APPEAL OF HEARING OFFICER'S RULING ON COMPLAINANTS' EXHIBIT 37** was served electronically to all parties of record listed below, on November 13, 2017.

Respectfully submitted,



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