

**BEFORE THE POLLUTION CONTROL BOARD
OF THE STATE OF ILLINOIS**

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

NOTICE OF FILING

To: Don Brown, Clerk
Illinois Pollution Control Board
100 West Randolph
Suite 11-500
Chicago, IL 60601

And Attached Service List

Please take note that on December 1, 2017, I filed electronically with the Office of the Clerk of the Illinois Pollution Control Board the attached Complainants' Response to Midwest Generation, LLC's Objection and Appeal from Hearing Officer's Ruling to Admit Complainants' Exhibit 16, a copy of which is attached and served upon you.

Respectfully submitted,

/s/ Gregory E. Wannier
Gregory E. Wannier
Staff Attorney
Sierra Club Environmental Law Program
2101 Webster St., Ste 1300
Oakland, CA – 94612
(415) 977-546 | greg.wannier@sierraclub.org

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)	

**COMPLAINANTS’ RESPONSE TO MIDWEST GENERATION, LLC’S
OBJECTION AND APPEAL FROM HEARING OFFICER’S RULING
TO ADMIT COMPLAINANTS’ EXHIBIT 16**

Complainants Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (“Complainants”), by their undersigned counsel, hereby submit this Response to Respondent Midwest Generation, LLC’s (“Midwest Generation’s” or “Respondent’s”) Objection and Appeal from Hearing Officer’s Ruling to Admit Complainants’ Exhibit 16 as Evidence (hereinafter cited as “Appeal”).

The Hearing Officer’s decision to admit Exhibit 16 was clearly the correct decision: Exhibit 16 is reliable, relevant, and material, and therefore easily meets the Pollution Control Board’s relaxed standard of admissibility. Moreover, Exhibit 16 falls squarely within the business records exception to the definition of hearsay.

I. Legal standard

The rules of Illinois Pollution Control Board (“Board”) set out a simple standard for the admissibility of evidence: “The 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). In addition, “[w]hen the admissibility of evidence depends upon a good faith argument as to the interpretation of substantive law, the hearing officer will admit the evidence.” 35 Ill. Adm. Code 101.626(b). As the Board has noted, this is a “relaxed” standard. *People v. Atkinson Landfill Co.*, PCB 13-28, Order of the Board, slip op. at *9 (Jan. 9, 2014). In addition, “the Board favors a liberal construction of admissible evidence,” and “[o]nly rarely will the Board find the acceptance of evidence to be reversible error.” *McHenry County Landfill, Inc. v. County Board of McHenry County* PCB 85-56, 85-61 through 85-66 (consolidated), Opinion and Order of the Board, slip op. at *6 (Sept. 20, 1985).

II. Exhibit 16 is Relevant and Material

As Respondent acknowledges, both the Illinois Administrative Procedure Act and Board rules allow for the admission of hearsay evidence if that evidence is reliable, material and relevant.¹ Exhibit 16 meets this test. The Exhibit is an email from one of Midwest Generation’s consulting engineers – Richard Frendt, employed by Patrick Engineering – to Midwest Generation, attaching “brief summaries of the data for each of the five ash pond sites.” Exhibit 16, attached hereto as Attachment A, at *1. These summaries include Patrick Engineering’s analysis of one year’s worth of groundwater monitoring data, including groundwater elevation data and other related information, to “explain, on a high-level, the overall situation at each site.” *Id.* When Midwest Generation received this email, it became aware of Patrick Engineering’s conclusions, including:

- Well MW-9 at Joliet 29 contained “the highest number of exceedances” at the site, but it was “not clear whether the source of the contaminants found in this well is due to the ash ponds, or some other industrial source or process.” *Id.* at *3.

¹ Respondent’s Memorandum in Support of Midwest Generation, LLC’s Objection and Appeal from Hearing Officer’s Ruling to Admit Complainants’ Exhibit 16 as Evidence (Nov. 14, 2017), hereinafter cited as “Appeal Memo.,” at 2 – 3.

- Well MW-5 at Waukegan showed “elevated concentrations of compounds of interest,” which the engineer attributed to the fact that the well was “installed in a former ash disposal area.” *Id.* at *11.
- At Will County, “there [were] exceedances of the Class I groundwater quality standards for compounds that can be associated with coal ash, most notably boron. Boron and sulfate concentrations are higher in nearly all of the downgradient wells, when compared to MW-1, indicating that the ash ponds are potentially impacting downgradient groundwater.” *Id.* at *16.

Exhibit 16 is material in two ways. First, it provides information about Patrick Engineering’s analysis and conclusions as of January, 2012. Second it shows what Midwest Generation learned from its consultant, and when. If, for example, the Board wanted to know whether Midwest Generation had any reason to investigate the possibility that the former ash disposal area at Waukegan was contaminating the groundwater, Exhibit 16 would provide an answer to that question. This goes to the heart of the case, and is exactly the kind of information that “would be relied upon by prudent persons in the conduct of serious affairs.” 35 Ill. Adm. Code 101.626(a).

III. Exhibit 16 is Reliable

Exhibit 16, as a communication between Respondent and its consulting engineer, is reliable. Respondent itself relied on Patrick Engineering for a number of professional services over several years. Patrick was responsible for the installation of groundwater monitoring wells at all four sites. PCB 13-15 Hearing Transcript, Oct. 23, 2017, p.75 (excerpts attached hereto as Attachment B). Patrick prepared “hydrogeologic assessment reports,” at the request of Illinois EPA, at all four sites at issue in this case. *Id.* at pp. 71-74, 87. As part of preparing the hydrogeologic assessment reports, Patrick assessed the initial groundwater monitoring results, assessed whether or not there were potable wells in the area, and characterized the hydrology in the area. *Id.* at p. 74. Until the “second or third quarter” of 2012, Patrick was responsible for groundwater monitoring and the generation of groundwater monitoring reports. *Id.* at p. 149. In

short, Respondent Midwest Generation relied heavily on Patrick Engineering's services and professional opinions in order to, among other things, work with Illinois EPA to assess groundwater quality at all four sites. Exhibit 16 is therefore reliable in large part because it is exactly the kind of information upon which Respondent itself relied.

Exhibit 16 is not unreliable simply because it includes a draft document. To begin with, although this document was marked "draft," it was in effect a final document, and the last version produced by Patrick:

"I don't believe final versions of these were ultimately ever created. I believe these were the final – well, they were the most recent and last versions of these documents." Attachment C, Excerpt of Richard Frendt Dec. 11, 2014 Deposition, pp. 56:15-56:18.

Regardless, draft documents are not inherently unreliable. In this particular case, the fact that these documents were marked "draft" does not diminish the level of analysis that the author was providing to its client, Midwest Generation. In Exhibit 16 Patrick Engineering was providing its analysis of one year of quarterly groundwater monitoring data,² using professional experience and making use of multiple pieces of information. The document therefore contains facts (e.g., "Monitoring well MW-9 contains the largest number of exceedances [at Joliet 29]," Attachment A at *3), professional opinions (e.g., chloride is "often associated with runoff," *Id.*), and interpretations and conclusions (e.g., "there is a strong correlation between Lake Michigan elevations and the groundwater levels in the monitoring wells [at Waukegan]," *Id.* at *11).

Respondent suggests that Exhibit 16 is unreliable because it contains a conclusion that was later changed, and because errors have been discovered in other, separate documents prepared by Patrick. Yet Respondent has not established that there are any errors in Exhibit 16

² Although Patrick did not attach the groundwater monitoring data to the email, the data can be found in Exhibits 24E through 30.5E (Patrick Engineering's groundwater monitoring reports for the four sites). These are voluminous exhibits and have not been attached, but can be provided at the Board's request.

itself. Instead, Respondent argues that Frendt would likely have modified his interpretation of hydrology at Powerton in light of subsequently discovered information. *Appeal Memo.* at 4. It is important to note that this is not an “error,” but rather a conclusion that, like all conclusions, may have changed with new information. There is no suggestion that Frendt misinterpreted the information he had before him when he prepared the documents in Exhibit 16. A party always has the opportunity to introduce exhibits to support an argument that conclusions have evolved or changed. Any demonstrable evolution, however, goes toward the weight of an exhibit rather than its admissibility. Respondent also incorrectly states that “the parties are well aware that the attached draft document concerning the Powerton Station is clearly incorrect.” *Appeal Memo.* at 5. In fact, there are many statements about Powerton in Exhibit 16 that are not affected by Frendt’s interpretation of hydrology at the site. Moreover, Frendt’s conclusions about Powerton have no bearing on his conclusions about the other three sites.

Respondent also points to separate documents where Patrick (a) made transcription errors in groundwater monitoring data summary tables and (b) depicted incorrect elevations for the bottoms of the Waukegan ash ponds. *Appeal Memo.* at 4 – 5. Errors in documents distinct and separate from Exhibit 16 do not support Respondent’s statement that “it is equally likely that Exhibit 16 contains other errors.” *Id.* at 5. Here Respondent is merely speculating, and there is in fact no evidence that Exhibit 16 contains any additional “errors” at all. In any event, the possibility of errors in Exhibit 16 – a possibility inherent in any document – would at most affect the weight given to the exhibit, and not its admissibility.³

³ Respondent also argues that “the draft documents do not include any of the supporting materials related to the Stations, including boring logs, groundwater monitoring results, or the groundwater elevations, making the validity of the draft statements impossible to assess,” and that they are therefore “incomplete.” *Appeal Memo.* at 3. None of these documents were attached to the email in Exhibit 16 – and the exhibit is therefore not “incomplete” – but even putting this aside, Respondent, as Patrick’s client, had virtually all of the information upon which Patrick would have relied in forming its opinions, and in fact most of this information is now in the record in this case. *See, e.g., supra* fn 2, and Exhibits 12C through 15C, which are Patrick Engineering’s hydrogeologic assessments for the four

Respondent cites *Metro Utility v. Illinois Commerce Comm'n* for the proposition that Exhibit 16 should be excluded as unreliable because it is uncertain and speculative. Appeal Memo. at 5. The *Metro Utility* decision – in which hearsay evidence was found to be admissible – does nothing to advance Respondent's position. In *Metro Utility*, an Illinois Commerce Commission employee relied on a letter from the Illinois Environmental Protection Agency to support his opinion. *Metro Utility v. Illinois Commerce Comm'n*, 193 Ill. App. 3d 178, 184-186 (1990). The letter was hearsay (“the rankest form of hearsay,” according to *Metro Utility*, *Id.* at 185). Yet the court decided that the letter was reliable and admissible:

We believe the Commission accurately stated the pertinent question in determining the letter's admissibility as “whether a reasonably prudent person would rely on the written assurances of sewer connection costs put forward by a staff member of the [Illinois Environmental Protection Agency].” We believe that it was reasonable for King, in forming his opinion, to rely upon the information provided by the Agency. Thus, we find that the Commission was correct in admitting Fellman's letter into evidence. *Id.* at 185-186.

Similarly, here the question of reliability can be framed as “whether a reasonably prudent person would rely on” draft reports from Respondent's consulting engineer, which provide the consultant's analysis of groundwater data, to inform opinions about the sites themselves, and also to inform opinions about what Respondent was aware of, and when. Exhibit 16 is reliable because it contains information upon which a “reasonably prudent person” would rely.

IV. Exhibit 16 is Also Admissible as a Business Record

According to 35 Ill. Adm. Code 101.626, hearsay evidence may be admitted as a business record:

Admission of Business Records. A writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act,

sites and include boring logs. Exhibits 12C through 15C are voluminous and are not attached, but can be provided at the Board's request.

transaction, occurrence, or event, may be admissible as evidence of the act, transaction, occurrence, or event. To be admissible, the writing or record must have been made in the regular course of business, provided it was the regular course of business to make the memorandum or record at the time of the act, transaction, occurrence, or event, or within a reasonable time afterwards. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be admitted to affect the weight of the evidence, but will not affect admissibility. The term "business," as used in this subsection (e), includes businesses, professions, occupations, and callings of every kind. 35 Ill. Adm. Code 101.626(e).

Here, Exhibit 16 was a "writing or record" made "in the regular course of business" by Midwest Generation's consulting engineer and is therefore admissible as a business record. As described above, Patrick Engineering regularly worked with Midwest Generation to, among other things, install groundwater monitoring wells, prepare hydrogeologic assessments, and assess groundwater quality data. The email and attachments in Exhibit 16 were exactly the kind of "writing or record" that Patrick regularly provided to Midwest Generation.

People v. Poland provides remarkably analogous Board precedent on this point. In that case, the two documents at issue were communications to a landfill owner from its consulting engineer; one was a "two-page letter ... providing advice regarding [a landfill]," and the other was "a four-page facsimile ... forwarding findings and leachate test results." *People v. Poland*, PCB 98-148, Order of the Board, slip op. at *2 (May 3, 2001). The Board, citing 35 Ill. Adm. Code 101.626(e), affirmed the hearing officer's decision to admit the documents:

These documents [were] of the type typically generated by an environmental engineering firm in the course of its investigations of a site such as a landfill, and the documents were developed within a reasonable time of the event. *People v. Poland*, PCB 98-148, slip op. at *3 (May 3, 2001).

Board precedent also establishes that any uncertainty surrounding a business record may affect the weight given to the document, but not its admissibility. In *People v. State Oil*, respondents objected to the admission of three documents containing travel vouchers and invoice vouchers, arguing that they "were not approved by a receiving officer, there was no evidence that

the amounts on the documents were ever paid, and [the testifying witness] was not even sure what amounts were unreimbursed expenses.” *People v. State Oil*, PCB 97-103, Opinion and Order of the Board, slip op. at *9 (Mar. 20, 2003). The Board affirmed the hearing officer’s decision to admit the exhibits, stating that “the circumstances and argument the respondents raise do not affect the admissibility of [the exhibits], but rather, go to the weight the evidence is entitled.” *Id.*

V. Conclusion

Since Exhibit 16 is “material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs,” 35 Ill. Adm. Code 101.626(a), and is also a “business record,” 35 Ill. Adm. Code 101.626(e), the hearing officer’s decision to admit the exhibit was proper and should be affirmed.

Respectfully submitted,



Lindsay Dubin
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600
Chicago, IL 60601
ldubin@elpc.org
(312) 795-3726

*Attorney for ELPC, Sierra Club and Prairie
Rivers Network*

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
fbugel@gmail.com

Gregory E. Wannier
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5646
Greg.wannier@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org
802-482-5379

Attorney for Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
kharley@kentlaw.iit.edu
312-726 -2938 (phone)
312-726 -5206 (fax)

Attorney for CARE

Dated: December 1, 2017

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ELECTRONIC FILING** and **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S OBJECTION AND APPEAL FROM HEARING OFFICER'S RULING TO ADMIT COMPLAINANTS' EXHIBIT 16** were electronically filed on December 1, 2017 and copies were served on all parties of record listed below by email on December 1, 2017.

/s/ Lauren Hogrewe _____
Lauren Hogrewe
Legal Assistant
Sierra Club Environmental Law Program
2101 Webster St., Ste 1300
Oakland, CA – 94612
(415) 977-5789 |
lauren.hogrewe@sierraclub.org

SERVICE LIST
PCB No-2013-015

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org
(802) 662-7800 (phone)
(202) 296-8822 (fax)

Bradley P. Halloran,
Hearing Officer
Illinois Pollution Control Board
100 West Randolph St., Suite 11-500
Chicago, IL 60601

Faith E. Bugel
1004 Mohawk Wilmette, IL 60091
fbugel@gmail.com
(312) 282-9119 (phone)

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
kharley@kentlaw.iit.edu
312-726-2938 (phone)
312-726-5206 (fax)

Gregory E. Wannier
2101 Webster St., Ste. 1300
Oakland, CA 94612 (415) 977-5646
Greg.wannier@sierraclub.org