

ILLINOIS POLLUTION CONTROL BOARD  
May 10, 2018

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

ORDER OF THE BOARD (by K. Papadimitriu):

The Board conducted ten days of hearing in this citizen’s water enforcement action brought by Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (Environmental Groups).<sup>1</sup> The Environmental Groups’ action alleges pollution from coal ash ponds at coal-fired power plants owned by Midwest Generation (Midwest Gen or MWG). In today’s order, the Board rules upon two motions, one to strike evidence and the other for sanctions.

First, the Environmental Groups move to strike parts of the expert report and related testimony and demonstrative exhibit of John Seymour, Midwest Gen’s expert. The Environmental Groups argue that Seymour’s methods are unreliable. The Board finds that the evidence is reliable, given Seymour’s professional qualifications, and therefore denies the motion to strike. The Board does not evaluate the merits of Seymour’s methods in this order.

Second, Midwest Gen moves to sanction the Environmental Groups, arguing that their motion to strike was untimely and their appeal of a hearing officer ruling was meritless. The Board denies the motion for sanctions because Midwest Gen has not demonstrated that the Environmental Groups unreasonably failed to comply with any Board procedural rule or hearing officer order.

In this order, the Board first provides procedural and legal background. The Board then addresses the motions.

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<sup>1</sup> Daniel Pauley, a Board attorney, previously worked at the Chicago Legal Clinic. He took no part in the Board’s drafting or deliberation of any order or issue in this matter.

## **BACKGROUND**

### **Procedural History**

The Environmental Groups filed a complaint against Midwest Gen on October 3, 2012 and amended it on January 14, 2015. The amended complaint alleges violations of water pollution provisions of the Environmental Protection Act (415 ILCS 5 (2016)) and Board regulations. The alleged violations relate to discharges from coal ash ponds at four power plants owned by Midwest Gen: Powerton Station in Pekin, Tazewell County; Joliet 29 Station in Will & Kendall Counties; Waukegan Station in Lake County; and Will County Station in Will County. The Board held two sets of hearings to develop a factual record on the issue of liability: one from October 23 through October 27, 2017 and another from January 29 through February 2, 2018.

On February 26, 2018, the Environmental Groups filed the motion to strike (Env. Mot.). Midwest Gen filed a response on March 20, 2018 (MWG Resp.). An amended motion to strike was filed on March 21, 2018. On April 3, 2018, the Environmental Groups filed a motion for permission to file a reply to Midwest Gen's response, attaching the reply. The Board grants permission and accepts the Environmental Groups' reply (Env. Reply).

Midwest Gen filed the motion for sanctions on March 20, 2018 (MWG Mot.). On March 27, 2018, Midwest Gen filed a motion for permission to file a supplement to its sanctions motion, attaching the supplement. The Board grants permission and accepts Midwest Gen's supplement to its motion for sanctions (MWG Supp. Mot.). On April 3, 2018, the Environmental Groups responded to the sanctions motion as supplemented (Env. Resp.).

### **Evidentiary Standard in Board Adjudicatory Hearings**

Board rules establish the evidentiary standard that applies in Board adjudicatory hearings. Generally, the "hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois . . . ." 35 Ill. Adm. Code 101.626. However, evidence not admissible in Illinois civil courts may be admitted in administrative hearings "if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs . . . ." 5 ILCS 100/10-40(a) (2016).

The Board's rules of evidence reiterate this principle. They state that, at an adjudicatory hearing, the hearing officer will admit evidence admissible under Illinois' code of civil procedure. 35 Ill. Adm. Code 101.626. The hearing officer also "may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs . . . ." 35 Ill. Adm. Code 101.626(a).

Therefore, evidence is generally admissible in Board adjudicatory hearings if (1) it is admissible under Illinois civil courts' rules of evidence; or (2) it is material, relevant, and reliable.

## **Board Authority to Order Sanctions**

The Board may order sanctions if “any person unreasonably fails to comply with any provision of 35 Ill. Adm. Code 101 through 130 or any order entered by the Board or the hearing officer . . . .” 35 Ill. Adm. Code 101.800(a). The Board has broad discretion in deciding whether to impose sanctions. Grigoleit Co. v. IPCB, 184 Ill. Dec. 344, 350, 613 N.E.2d 371, 377 (4th Dist. 1993).

## **DISCUSSION**

### **The Board Denies the Environmental Groups’ Motion to Strike**

#### **Motion Was Timely Filed**

Midwest Gen argues that the motion to strike should be denied on procedural grounds—the Environmental Groups waived their right to move to strike because they did not object at hearing to the admission of Seymour’s evidence. MWG Resp. at 7. Midwest Gen relies upon West Suburban Recycling and Energy Center v. IEPA, PCB 95-119 (Oct. 17, 1996). However, in that case, the party seeking to strike evidence failed to object on the ground at issue either when the evidence was introduced at hearing or “when given the opportunity by the Hearing Officer to file its objection in writing . . . .” Recycling, PCB 95-119, slip op. at 11. The objection came in a motion to strike filed four months after the evidence was entered into the record. *Id.* The Board found that the movant waived the right to object on that ground. *Id.*

Here, in contrast, the Environmental Groups’ motion to strike was filed within a week after the hearing transcript became available and did not run afoul of any hearing officer directive for filing objections. In addition, the Environmental Groups claim—and Midwest Gen has not sought to refute—that Seymour’s testimony during cross-examination included statements not in his deposition testimony. The Environmental Groups also do not oppose the hearing officer’s ruling to admit the Seymour report and testimony in their entirety but rather seek to strike only portions of them. The circumstances do not show that the Environmental Groups waived the right to request striking parts of the expert’s report and testimony. The Board finds that the Environmental Groups’ motion to strike was timely filed.

#### **Expert’s Report and Testimony Are Admissible**

The Environmental Groups argue that parts of Seymour’s report and testimony are inadmissible because his analysis is unreliable and his “novel and untested” methods are not accepted in his field. Env. Mot. at 17. The Environmental Groups argue that, when evaluating whether to admit expert evidence, the Board must apply Illinois Evidence Rule 702, which “establishes the Frye standard for the admission of scientific evidence.” *Id.* at 2–3, *citing* Ill. Rules of Evid. 702 and Donaldson v. Cent. Illinois Pub. Serv. Co., 199 Ill. 2d 63, 76–77 (2002).

However, the Board need not apply Rule 702 here. Under the Board’s procedural rules, evidence that is admissible under Illinois’ civil rules of evidence will be admitted, but the Board may also admit evidence that is inadmissible in Illinois’ civil courts when the evidence is material, relevant, and reliable. 35 Ill. Adm. Code 101.626(a); *see also* 5 ILCS 100/10-40(a) (2016). This “relaxed standard” (*see* People v. Atkinson Landfill Co., PCB 13-28, slip op. at 9

(Jan. 9, 2014)) reflects the Board's ability to comprehend scientific issues in a way a general court or jury may not.

Seymour's report and testimony meet this relaxed standard of reliability. He is an engineer with academic credentials who was hired by Midwest Gen and other clients. He is relied upon by prudent persons. *See* Tr. at 213:18–215:18 (Feb. 1, 2018). The Board finds that his report and testimony are reliable and therefore admissible. The Board denies the Environmental Groups' motion to strike.

The Board does not now evaluate the merits of Seymour's methods, opinions, or conclusions. The Board will consider these substantive aspects of Seymour's report and testimony when the question of Midwest Gen's liability is properly before the Board.

### **The Board Denies Midwest Gen's Motion for Sanctions**

Midwest Gen argues that the Board should sanction the Environmental Groups for allegedly failing to follow Board procedural rules and hearing officer orders. Mot. for Sanctions at 1. According to Midwest Gen, the Environmental Groups' motion to strike should be characterized as an untimely interlocutory appeal of the hearing officer's ruling to admit Seymore's evidence, part of an "ongoing pattern of causing undue delays and cost to MWG." *Id.* at 14. Midwest Gen also argues that the Environmental Groups' "meritless appeal" of the hearing officer's decision to admit Exhibit 649 warrants sanctions. MWG Supp. Mot. at 1.<sup>2</sup>

The Board finds, however, that Midwest Gen has not demonstrated any noncompliance with a Board procedural rule or hearing officer order. Midwest Gen claims but never explains how the Environmental Groups' motion or appeal fails to comply—let alone *unreasonably* fails to comply—with any Board procedural rule or hearing officer order. *See* 35 Ill. Adm. Code 101.800(a). Midwest Gen's motion for sanctions is therefore denied.

### **CONCLUSION**

The Board denies the Environmental Groups' motion to strike and Midwest Gen's motion for sanctions.

IT IS SO ORDERED.

Board Members B.K. Carter.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on May 10, 2018, by a vote of 5-0.



Don A. Brown, Clerk  
Illinois Pollution Control Board

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<sup>2</sup> In its April 26 order, the Board affirmed the hearing officer's admission of Exhibit 649.