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 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

COMPLAINANTS' RENEWED MOTION TO EXCLUDE AND STRIKE TESTIMONY REGARDING RESPONDENT'S EXHIBIT 662

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 Motion to exclude Respondent Midwest Generation, LLC's ("Midwest Generation's" or "Respondent's") Exhibit 662, titled in their pre-hearing exhibit list as "Beyond coal campaign." (hereinafter cited as "Motion").

Exhibit 662 is plainly irrelevant to the case at hand. Respondent appears to be trying to use this exhibit to cast aspersions on Sierra Club's motives, and presumably to argue that the present case is frivolous. However, Respondent has already tried to argue that Complainant's claims are frivolous, in its Motion to Dismiss, and the Board has determined that the claims are not frivolous. Even if the Sierra Club were motivated entirely by a desire to close coal plants, which it is not, it has independently demonstrated that it is litigating legitimate water pollution and open dumping claims, rendering any other alleged evidence as to Sierra Club's motives

irrelevant.[1] Moreover, no Sierra Club employees gave testimony in the context of this proceeding, making any evidence as to possible bias irrelevant as well. As such, the only possible use of Exhibit 662 would be to color the Board's consideration of the claims in this matter, which is both prejudicial and improper. Simply put, the motivations of the Complainants have nothing to do with the validity or strength of their claims, and so Exhibit 662 is inadmissible on this basis alone.

Additionally, Exhibit 662 is not admissible because the information it contains includes inadvertently released internal communications that are shielded from disclosure by Sierra Club's First Amendment's protection.

I. Background

On January 30, 2018, while Respondent was questioning Ms. Maria Race, Respondent moved to admit as Exhibit 662, an internal Sierra Club communication related to its Beyond Coal Campaign dating back to 2014. Ms. Race testified under oath that she found this document accidentally, and upon further questioning on January 31, 2018 by Complainants, confirmed that the document was discovered on an Australian website back in 2014.[2] In this testimony, Ms. Race never claimed that the document is currently available online.

Complainants objected to the admission of Exhibit 662 because it is not relevant evidence. Specifically, Complainants argued that the exhibit offers no facts relevant to the resolution of this case; that its inclusion would be unduly prejudicial; and that any discussion on the exhibit should be stricken because it is an inadvertently disclosed First Amendment-protected internal communication at Sierra Club. Taken together, it does not meet the Board's standard of

[1] Sierra Club is also just one of four Complainants in this case.
[2] Complainants decline to provide a copy of Exhibit 662 as an attachment to this memorandum because it is protected by Sierra Club's First Amendment Privilege; as such, Complainants ask that all specific references to the exhibit be marked confidential until the question of First Amendment Privilege is resolved by the Board.

a document a prudent person would rely upon. 35 Ill. Adm. Code 101.626(a). The Hearing Officer did not allow admission of Exhibit 662 at the hearing, instead taking the exhibit and all related testimony as an offer of proof, and asked for additional briefing on the question of admissibility of Exhibit 662.[3]

II. Exhibit 662 is Immaterial, Irrelevant and Cannot Prudently Be Relied Upon

The rules of the Illinois Pollution Control Board ("Board") establish the standard for the admissibility of evidence: 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 Administrative Procedures Act ("Illinois APA") states that, "irrelevant, immaterial, or unduly repetitious evidence shall be excluded." 5 ILCS 100/10- 40. And the Board's own evidentiary rules state that the hearing officer may only "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) (emphasis added).

Under Illinois law, Evidence is only relevant "if it has any 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). Here, the case at issue hinges on Sections 12(a) and 21(a) of the Illinois Environmental Protection Act ("Act"). These sections state that no person shall:

[3] Citations to the transcript are impossible because this briefing schedule precedes the publication of the hearing transcripts.

1. "[c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other source" 415 ILCS 5/12(a); or
2. "[c]ause or allow the open dumping of any waste." 415 ILCS 5/21(a).

Thus, the relevant evidence in this proceeding necessarily relates to the existence of water pollution and open dumping at the four sites at issue in this proceeding; the impact of Respondent's facilities on that water pollution and open dumping; and the degree to which Respondent has caused, threatened, or allowed that contribution to occur. Again, no Sierra Club employees gave any testimony as to any material fact here, and nothing in Exhibit 662 offers any insight on any of the facts related to either water pollution or open dumping, nor on any other facts that could help the Board resolve the relevant issues in this case. It would therefore be imprudent for the Board to rely on this information when determining the outcome of this case.

III. Exhibit 662 Contains First Amendment-Protected Internal Communications

The Hearing Officer's initial decision to exclude Exhibit 662 is also proper because it would prevent the disclosure of inadvertently released internal Sierra Club communications whose publication could improperly chill Sierra Club's First Amendment rights. The Supreme Court has long held that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association," as well as "the vital relationship between freedom to association and privacy in one's associations." *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 460, 462 (1958). This protection exists no less strongly in Illinois, and by extension at the Illinois Pollution Control Board. *People v. White*, 116 Ill. 2d 171, 177 (1987). State actions, including the admission of evidence, which have the effect of

curtailing these freedoms, are "subject to the closest scrutiny." *See Patterson*, 357 U.S. at 460-61.

Furthermore, as numerous courts have confirmed, this right to associate includes the right to communicate: "[i]mplicit in the right to associate with others . . . is the right to exchange ideas and formulate strategy and messages, and to do so in private." *Perry v. Schwarzenegger*, 591 F.3d 1147, 1162 (9th Cir. 2010); *confirmed by Nat. Resources Defense Council, et al. v. Illinois Power Resources, LLC, et al.*, No. CV 13-1181-JBM-TSH, 2015 WL 4910204, at *4 (C.D. Ill. Aug. 17, 2015). Thus, after determining that private communications are the type of organizational speech protected under this doctrine, Courts must apply a two-part framework to evaluate whether disclosure of such communications would chill First Amendment rights. First,

> The party asserting the privilege must demonstrate . . . a *prima facie* showing of arguable first amendment infringement. This *prima facie* showing requires appellants to demonstrate that enforcement of the discovery requests will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or "chilling" of, the members' associational rights.

Perry, 591 F.3d at 1160 (citations and internal quotations omitted). Second, after the party asserting a First Amendment privilege makes this *prima facie* showing of infringement, the burden shifts to the party that has requested admission of such evidence to "demonstrate the information is necessary to their case and cannot be secured by other means that are less likely to affect First Amendment rights." *City of Greenville v. Syngenta Crop Protection, Inc.*, 2011 WL 5118601, at *6 (C.D. Ill. Oct. 27, 2011). To make this showing, the party seeking to include evidence must demonstrate that the information is "*highly relevant* to the claims or defenses in the litigation." *Perry*, 591 F.3d at 1161 (emphasis added).

In this case, the internal communications contained in Exhibit 662 are exactly the type of organizational communication the First Amendment protects. And the chilling impact of its

admission in this forum would be similarly clear: disclosure of Sierra club internal campaign documents would significantly affect Sierra Club staff members' long-term ability to communicate openly and frankly about priority campaigns. This inability to communicate openly could in turn lead to the withdrawal of members from Sierra Club, and might discourage others from joining or working with Sierra Club. MWG cannot, and did not in its questioning of Ms. Race on January 30, meet its heightened burden of establishing that these internal communications—which are entirely unrelated to the groundwater pollution and open dumping at issue in this case, or to the sufficiency of MWG's actions in responding to that pollution—are "highly relevant" to the claims or defenses in this litigation.

A. Sierra Club's Inadvertent Disclosure of Exhibit 662 Does Not Waive Its First Amendment Privilege

Although Ms. Race has testified that she found this document online, the mere accidental release of the document to the internet does not waive Sierra Club's right to First Amendment privilege over its additional disclosure. Although Complainants were not able to find an exact analogy to this type of disclosure, it is well established in Illinois law that inadvertent disclosure during the discovery process does not constitute a waiver of attorney privileges if "the disclosure is inadvertent; the holder of the privilege or protection took reasonable steps to prevent disclosure; and the holder promptly took reasonable steps to rectify the error." Ill. Sup. Ct. Rule of Evidence 502(b). Courts across the U.S. have demonstrated that this principle can apply also to inadvertent disclosures in other contexts. *See, e.g., United States v. Smith*, 123 F.3d 140, 154 (3d Cir. 1997) ("A court is simply not powerless, in the face of an unlawful disclosure of . . . secrets, to prevent all further disclosures by the government of those same . . . secrets."); *Avaya Inc. v. Telecom Labs, Inc.*, No. 3:06-CV-02490 (JEI), 2012 WL 13035098, at *2 (D.N.J. Apr. 27,

2012) (noting that *U.S. v. Smith* "illustrates that information that would otherwise be protectable should be afforded some protection from further publication, even after inadvertent public disclosure").

With this context, it becomes clear that Sierra Club is entitled to its First Amendment Protections against further disclosure of this document, even though it was apparently (according to Ms. Race's testimony) inadvertently released four years ago. Applying the standards used in Illinois evidentiary law, the disclosure was inadvertent; Sierra Club has a general practice of avoiding public disclosure of its internal strategic documents; and Sierra Club has taken reasonable steps to rectify the original disclosure by removing the document so that it is no longer available online (notably, under both direct and cross examination, Ms. Race never testified, nor could she have testified, that the information contained in Exhibit 662 is still available online). There is therefore no basis for the state of Illinois, through the Board, to allow this disclosure to continue.

IV. Conclusion

Since Exhibit 662 is immaterial and irrelevant, and no prudent person would rely upon it "in the conduct of serious affairs," 35 Ill. Adm. Code 101.626(a), there is no possible basis to admit it in this case. Furthermore, Exhibit 662 contains confidential First Amendment-privileged information that was inadvertently disclosed, providing the Hearing Officer with an additional basis to exclude admission. Pursuant to the applicable rules of evidence, the Hearing Officer should confirm, and the Board should uphold, the Hearing officer's original decision to exclude Exhibit 662, and to strike all testimony relating to the exhibit.

Respectfully submitted,

/s/ Faith Bugel

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

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

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)

Attorney for CARE

Dated: February 5, 2018

SERVICE LIST

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

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606

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