BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

TO: Don Brown, Assistant Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO RESPONDENT'S OBJECTION AND APPEAL FROM HEARING OFFICER'S RULING TO EXCLUDE EXHIBIT 662**, copies of which are served on you along with this notice.

Respectfully submitted,

/s/ Greg Wannier

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

Dated: April 4, 2018

Attorney for Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **COMPLAINANTS' RESPONSE TO RESPONDENT'S OBJECTION AND APPEAL FROM HEARING OFFICER'S RULING TO EXCLUDE EXHIBIT 662** was served electronically to all parties of record listed below on April 4, 2018.

Respectfully submitted,

/s/ Akriti Bhargava

Akriti Bhargava
Litigation Assistant
Sierra Club Environmental Law Program
2101 Webster St., Ste. 1300
Oakland, CA – 94703
(415) 977-5629
akriti.bhargava@sierraclub.org

PCB 2013-015 SERVICE LIST:

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

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)

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

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COMPLAINANTS' RESPONSE TO RESPONDENT'S OBJECTION AND APPEAL FROM HEARING OFFICER'S RULING TO EXCLUDE 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 Response ("Response") to Respondent Midwest Generation, LLC's ("Midwest Generation's" or "MWG's" or "Respondent's") Objection and Appeal from Hearing Officer Halloran's decision to exclude Exhibit 662 ("Appeal").

MWG's Appeal failed to identify any reasonable basis for including Exhibit 662, which is an internal Sierra Club document that has no bearing on Complainants' legal claims in this case. The Illinois Pollution Control Board ("Board) should not let Respondent distract it from adjudicating the facts here. As Hearing Officer Halloran properly held, Exhibit 662 is irrelevant to the case at hand because "it does not tend to make the existence of any consequential fact in this case more or less probable." PCB 13-15, Hearing Officer Order at 2 (Mar. 1, 2018) ("Order").

Exhibit 662 is inadmissible for two key reasons. First, Sierra Club's motives are not pertinent to the truth of Complainants' claims,[1] and therefore Exhibit 662 is irrelevant. *See* Order at 3. Respondent's only possible use of this exhibit is to cast aspersions on Sierra Club's motives, presumably to argue that the present case is frivolous. However, as Complainants said previously, Respondent has already tried to argue that Complainant's claims are frivolous, in its Motion to Dismiss, and the Board has already determined that the claims are not frivolous. Moreover, no Sierra Club employees gave testimony in the context of this proceeding, making any evidence as to possible bias irrelevant as well. Respondent's objective with Exhibit 662 appears to be to color the Board's consideration of the claims in this matter, which is both prejudicial and improper.

Second, Exhibit 662 is not admissible because it contains inadvertently released internal communications that are shielded from disclosure by the First Amendment. For these reasons, the Board should uphold the Hearing Officer's well-reasoned decision to exclude Exhibit 662 and strike all testimony relating to the exhibit.

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 in 2014.[2] In this testimony, Ms. Race never claimed that the document is currently available online.

[1] Further, Sierra Club is 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

In post-hearing briefing requested by Hearing Officer Halloran, on February 5, 2018, Complainants renewed their objection to the inclusion of Exhibit 662 as irrelevant and shielded by the First Amendment, and moved to exclude the exhibit and strike all related testimony.

On March 1, 2018, the Hearing Officer agreed with Complainants that Exhibit 662 is entirely irrelevant to the case because "Sierra Club's motives are irrelevant." Order at 3. As the Hearing Officer explained:

> Exhibit 662 is not relevant: it does not tend to make the existence of any consequential fact in this case more or less probable. Here, facts concerning the existence or absence of water pollution and open dumping at the power plants are the only consequential facts. Exhibit 662 does not offer insight on these questions.

Order at 2-3. In so ruling, the Hearing Officer properly declined to resolve Complainants' additional argument that the document is protected under Sierra Club's First Amendment rights against inadvertent disclosure.

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

The rules of the Board establish the standard for the admissibility of evidence, which state that 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). Although this standard is permissive, it does not allow the Board to completely ignore the requirement that evidence be relevant to the issues in a case before it is considered.

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references to the exhibit be marked confidential until the question of First Amendment Privilege is resolved by the Board.

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:

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.

A. Respondent Failed to Offer Any Basis to Overturn the Hearing Officer's Well-Reasoned Decision

Although Respondent titled its filing an "Appeal," virtually nothing in the Appeal focuses on the Hearing Officer's March 1, 2018 Order. The Appeal certainly does not offer any basis for the Board to overturn Hearing Officer Halloran's thorough conclusion that Exhibit 662 is irrelevant to the issues in this case. The closest Respondent gets to actually addressing the

Hearing Officer's March 1, 2018 Order is when it challenges his reliance on *Ashland Chemical Co. v. EPA*, PCB 76-186. (Feb. 17, 1977).

Respondent's challenge, however, is in error. In *Ashland Chemical*, the Board determined that Illinois EPA's ("IEPA") motives were irrelevant in its enforcement proceeding. *Id*. at 5. Respondent claims the basis for the Board's holding was a lack of information about IEPA's motives. *See* Appeal at 8. But the Board Order in that case never says that there was insufficient evidence of Illinois EPA's motives; instead, it says those motives are irrelevant. *Ashland Chemical* at 5. And the only discussion of failing to meet a burden of proof has to do with substantive issues in the case. *Id.* As the Board has held, all motivations are irrelevant "when there is a clear and justifiable basis in law for the party's actions," such as in the present case. Order at 3 (citing *Ashland Chemical* at 4).

In the remainder of its Appeal, MWG raises several arguments that demonstrate its apparent confusion about what information is relevant to the case. For instance, in the Appeal, MWG states that Ms. Race "relied upon" Exhibit 662 to determine "whether MWG could have a productive meeting with Sierra Club and other groups" to discuss the Waukegan coal-burning power plant, and then points out that Hearing Officer Halloran "consider[s] Ms. Race a reasonable and prudent person." Appeal at 5. With due respect to Ms. Race, the prudency of her relying on Exhibit 662 to determine whether to meet with Sierra Club representatives in 2014 has no bearing on the relevance of the exhibit to the claims in the present proceeding. This case is about the existence, cause, and responsibility for groundwater contamination at four power plants, three of which are not located in Waukegan; it is not about whether MWG should have had a conversation with the Sierra Club in 2014. Additionally, the abstract claim by Respondent that Ms. Race is a reasonable and prudent person (and may have relied on the document for a

completely separate purpose) does not establish that Exhibit 662 is relevant and admissible evidence in this proceeding.

MWG also tries to attach relevance to Exhibit 662 by arguing that it somehow "explains the basis for this citizen enforcement action." Appeal 6. However, as the Board and Hearing Officer have already recognized, the basis for this citizen enforcement action is years of groundwater data indicating that state Class I groundwater standards are regularly exceeded at each of the four sites in this case. Order at 2-3. MWG claims that Exhibit 662 explains the motivation for this citizen enforcement action, but such speculation is simply irrelevant to the claims in this case.

Respondent's remaining arguments are similarly unpersuasive. MWG argues that Ms. Race "had a personal stake in understanding Sierra Club's motives," Appeal at 6, but fails to explain how that is pertinent to determining whether Respondent is at fault for groundwater contamination at its facilities. Respondent argues that Exhibit 662 is important because it "explains MWG's presence at the hearing," Appeal at 7, even though MWG is actually present at this hearing because they were sued for groundwater contamination.

Finally,[3] Respondent focuses on Complainants' other post-hearing briefing, arguing that it is frivolous and intended to waste time. It then argues, yet again completely devoid of any factual support, legal argument, or recognition of the Hearing Officer's previous ruling, that "Complainants' motive to pursue this case and cause . . . expense and wasted time is clearly relevant" apparently because Respondent believes its own exaggerated evidence for this motive. Appeal at 7. At the risk of being repetitive, Complainants object to MWG's mischaracterization

[3] Respondent also includes several substantive claims as to the resolution of relevant questions in this case, including the presence and cause of groundwater contamination and resulting risk to human health and the environment. Complainants decline to respond to those arguments because they do not have any bearing on the admissibility of Exhibit 662.

of their motives, but decline to respond substantively to its allegations because, as the Hearing Officer and Board have previously determined, motives are completely irrelevant to the resolution of this case.

III. Exhibit 662 Contains First Amendment-Protected Internal Communications

The Hearing Officer's decision to exclude Exhibit 662 is also proper because it would prevent the disclosure of inadvertently released internal Sierra Club communications whose publication could chill Sierra Club's First Amendment rights.[4] 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,

[4] As explained previously, the Hearing Officer properly declined to resolve these questions because he determined the Exhibit was irrelevant. Order at 3.

> 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. 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."[5] 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

[5] Complainants were not able to find an exact analogy to this type of disclosure, thus turn to inadvertent disclosure in other contexts.

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" to resolve this case, 35 Ill. Adm. Code § 101.626(a), there is no basis to admit it in this case. Furthermore, Exhibit 662 contains confidential First Amendment-privileged information that was inadvertently disclosed, providing the Board with an additional basis to exclude admission. Pursuant to the applicable rules of evidence, and despite Respondent's misguided efforts to distract from the relevant facts and testimony in this case, the Board should affirm the hearing Officer's well-reasoned decision to exclude Exhibit 662, and strike all testimony relating to the exhibit.

Respectfully submitted,

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

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

Attorneys for Sierra Club

Jeffrey Hammons
Environmental Law & Policy Center
35 E. Wacker Dr., Suite 1600

Chicago, IL 60601
JHammons@elpc.org
(312) 795-3717

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)
312-726 -5206 (fax)

Attorney for CARE

Dated: April 4, 2018