

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.)	

NOTICE OF FILING

TO: Don Brown, Clerk	Attached Service List
Illinois Pollution Control Board	
60 E. Van Buren St., Ste. 630	
Chicago, Illinois 60605	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Midwest Generation, LLC’s Motion to Reconsider and Clarify the Board’s Order Regarding Complainants’ Exhibit 1408, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: November 9, 2023

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation, LLC's Motion to Reconsider and Clarify the Board's Order Regarding Complainants' Exhibit 1408 was filed electronically on November 9, 2023 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

and that true copies of the pleading were emailed on November 9, 2023 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC’S MOTION TO RECONSIDER AND CLARIFY THE BOARD’S ORDER REGARDING COMPLAINANTS’ EXHIBIT 1408

Pursuant to 35 Ill. Adm. Code 101.520, Respondent, Midwest Generation, LLC (“MWG”), respectfully requests that the Illinois Pollution Control Board (“Board”) reconsider and clarify its decision to allow the admission of Exhibit 1408, the Illinois Environmental Protection Agency Recommendation in *In the Matter of: Petition of Midwest Generation, LLC for an Adjusted Standard from 845.740(a) and Finding of Inapplicability of Part 845 for the Waukegan Station*, PCB AS21-03. The Board erred in its October 5, 2023 Order by finding that Exhibit 1408 could be admitted as a public record. Exhibit 1408 is a pleading in another Board matter that contains recommendations and conclusions and, as such, does not fall under the public records exception. Even assuming Exhibit 1408 (or portions thereof) could be deemed a public record, the Board should clarify that the use of Exhibit 1408 is limited to testimony presented at the hearing. Exhibit 1408 lacks foundation, no witness testified as to its specific contents, and MWG was thus unable to challenge or respond to it. Consistent with the Hearing Officer’s rulings with respect to similar

documents in this case, the parties' use of Exhibit 1408 should be limited to the testimony presented at the hearing concerning the Exhibit. In fact, two of the attachments to Exhibit 1408 are already subject to such a direction from the Hearing Officer. Allowing Exhibit 1408 to be admitted without the same limitation results in an end-run around the existing rulings concerning the two attachments. Finally, if the Board upholds its Order that Exhibit 1408 is admitted as a public record, the Board should give Exhibit 1408 little, if any, weight. In support of its Motion, MWG states as follows:

1. In a motion to reconsider, the Board may consider new evidence, a change in the law, or errors in the Board's application of the law. 35 Ill. Adm. Code 101.520, 101.902. Here, the Board erred in its application of law regarding the public records exception to hearsay. The Board also overlooked facts related to Exhibit 1408, which require clarification on how the exhibit may be used and the weight it should be given.

I. BACKGROUND

2. Exhibit 1408 is the Illinois Environmental Protection Agency's ("Illinois EPA" or "Agency") Recommendation submitted in *In the Matter of: Petition of Midwest Generation, LLC for an Adjusted Standard from 845.740(a) and Finding of Inapplicability of Part 845 for the Waukegan Station, PCB21-3*. It is Illinois EPA's recommendation to the Board in response to MWG's request for an adjusted standard, submitted in a civil adjudicatory proceeding pursuant to the Board's rules for regulatory relief mechanisms. By its very nature it contains Illinois EPA's opinions and expresses the Agency's conclusions as to two areas at the Waukegan Station: the Grassy Field and the West Pond. In that separate proceeding, Illinois EPA has not identified any witness to testify as to the document and MWG has not had the opportunity to challenge it on the record.

3. Exhibit 1408 lacks foundation or any evidentiary value. It is over 1,300 pages long, and Illinois EPA did not include an affidavit or any other verification of the statements and attachments in the Exhibit. Two of the attachments to Exhibit 1408 (exhibits 43 and 44) are copies of Exhibits 19D and 38 in this matter. The Hearing Officer in this case previously ruled that the use of Exhibits 19D and 38 must be limited to “the specific questions asked and the responses elicited regarding” both exhibits. Hearing Officer Order, January 11, 2018, 2. Other attachments to Exhibit 1408 consist of aerial photographs that have been modified without any explanation or basis, and six exhibits that the Agency did not rely on or reference in support of its recommendation.

4. At the hearing in this matter, Complainants sought to admit Exhibit 1408 through Ms. Shealey, Director of Environmental at MWG. After identifying the document, Complainants asked Ms. Shealey only two brief questions about Illinois EPA’s conclusions. 5/19/23 Tr. pp. 6:8-8:11. Complainants did not ask Ms. Shealey, or any other witness, about any other aspect of Exhibit 1408, or about any of the exhibits. Complainants then requested that the entire document with attachments be admitted into the record. The Hearing Officer admitted the exhibit, over MWG’s objection, stating only that he thought it was relevant. 5/19/23 Tr. pp. 12:7-13:2.

5. On July 26, 2023, MWG timely filed its appeal of the Hearing Officer’s decision to admit Exhibit 1408 based on lack of reliability and lack of relevance to this proceeding. Complainants responded claiming, in part, that Exhibit 1408 was reliable because it was issued by an agency.¹ In its Order denying MWG’s appeal, the Board found that Exhibit 1408 was

¹ MWG timely filed a motion to file its Reply to Complainants’ response, which was denied by the Board. Order, p. 4.

admissible, calling it for the first time a “public record.” Order, p. 17. The Board’s finding was in error.

II. THE AGENCY RECOMMENDATION AND ITS EXHIBITS ARE NOT ADMISSIBLE AS A PUBLIC RECORD

6. The Board erred in finding that Exhibit 1408 should be admitted as a public record.

While it is generally true that public records may be admissible as an exception to the hearsay rule, a public record is not admissible if it contains expressions of opinions or the drawing of conclusions. By its very title (“Recommendation”) and contents, Exhibit 1408 is not a public record.

7. Illinois Rule of Evidence Rule 803(8) states:

Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and matters observed by police officers and other law enforcement personnel, or (C) in a civil case or against the State in a criminal case, factual findings from a legally authorized investigation, but not findings containing expressions of opinions or the drawing of conclusions. This rule applies unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness.

Ill. R. Evid. R. 803(8). Rule 803(8) articulates the common law rule for public records. *Castellari, et al. v. John Prior*, PCB 86-79 (May 28, 1987), quoting *People ex rel. Wenzel v. Chicago and North Western Railway*, 28 Ill. 2d 205, 190 N.E.2d 780 (1963).

8. Under Rule 803(8), in a civil case such as this one, only factual findings in a public record are admissible and “not findings containing expressions of opinions or the drawing of conclusions.” Ill. R. Evid. R. 803(8)(emphasis added). This exclusion codifies the common law rule that “records which concern causes and effects, involving the exercise of judgment and discretion, expressions of opinion, or the drawing of conclusions are generally not admissible under the public records exception unless they concern matters to which the official would be

qualified to testify about at trial.” *Bloomgren v. Fire Ins. Exchange*, 162 Ill. App. 3d 594, 599 (3rd Dist. 1987). In *Bloomgren*, the Court held that the admission of a fire incident report as a public record was in error because the report,

“clearly contains an opinion as to the cause of the fire and, as such, was not admissible under the public records exception to the hearsay rule unless the author of the report, Leland Pendergrass, was qualified as an expert to give such an opinion.”

Id., at 599. Because Mr. Pendergrass was not qualified as an expert witness, the Court held that the record was not admissible as an exception to the hearsay rule. *Id.* See also *Barker v. Eagle Food Ctrs.*, 261 Ill. App. 3d 1068, 1074 (2nd 1994) (Court held fire department record was not admissible as a public record because it contained a statement concerning the cause of the injury, and the authors of the record were not qualified to testify on the actual cause.)

9. Here, Exhibit 1408 contains the Illinois EPA’s *opinions and conclusions* in a separate civil case about specific areas within the Waukegan Station (the Grassy Field and West Pond). The Agency’s opinions and conclusions are part of a distinct adjudicatory proceeding that involves a different set of applicable regulations. That separate proceeding has not concluded, and Illinois EPA’s recommendation (Exhibit 1408) remains subject to cross-examination and rebuttal. Additionally, the only signatory to the Illinois EPA’s opinions in Exhibit 1408, Ms. Sarah Terranova, has not been qualified as an expert to testify as to the conclusions and opinions in the recommendation for the adjusted standard proceeding, and certainly was not presented as a witness in this case.² There is no other verification or affidavit to support Exhibit 1408. Accordingly, the Board erred in its application of the law regarding public records and should exclude Exhibit 1408.

² In fact, Illinois EPA has informed MWG counsel (and stated in its discovery response) that Illinois EPA will not present any witness to testify concerning the Agency’s recommendation (Exhibit 1408) in the adjusted standard proceeding.

10. At the very least, the Board should reconsider its admission of the exhibits attached to Exhibit 1408. Attachments 43 and 44 to Exhibit 1408, which have been separately admitted (with limitations) as Exhibits 19D and 38 in this matter, are certainly not public records. They are two reports created by a private consultant for a private entity that is not a party to this matter, and they are not maintained by the Illinois EPA. Rather, in an entirely circular reference in the adjusted standard matter, Illinois EPA describes these two attachments by noting that they are Exhibits 19D and 38 *from this lawsuit*. Similarly, the aerial photographs attached to Exhibit 1408 are reportedly copied from a public website, not maintained or developed by Illinois EPA, and include pins and descriptions inserted by an unnamed person. The photographs are not the type of information required by statute or created pursuant to the Illinois EPA's duties, as is necessary to be considered a public record under Rule 803(8). *See also Castellari*, PCB 86-79 (May 28, 1987), p. 13 (Board found that for a document to be a public record it must be "required either by statute or the nature of their office to maintain in connection with the performance of their official duties...").

III. AT A MINIMUM, THE BOARD SHOULD CLARIFY ITS ORDER TO LIMIT THE USE OF EXHIBIT 1408 AND GIVE IT LITTLE, IF ANY, WEIGHT

11. In support of MWG's appeal of the Hearing Officer's decision to admit Ex. 1408, MWG asked the Board to strike, or at a minimum, limit the parties' reliance on the Exhibit to the pages and information discussed during the hearing. *See MWG's Reply in Support of its Appeal*, p. 14. This is the same limitation the Hearing Officer placed on other voluminous exhibits that were minimally discussed. The Board did not address this request in its Order. If the Board upholds its prior decision that Exhibit 1408 may be admitted as a public record, the Board should clarify its Order to limit the use of Exhibit 1408 to the testimony presented.

12. During the hearing in this matter, the Hearing Officer often limited the use and reliance on voluminous exhibits to the specific questions asked and the responses elicited from a testifying witness. *See* Hearing Officer Order, January 11, 2018 (Hearing Officer limited the use and reliance on Exhibits 17D, 18D, 19D, 20D, 21, and 38); 5/18/2023 Hr. Tr., p. 67:5- 68:2, pp. 106:10-107:6 (Hearing Officer limited the use and reliance on Exhibits 1331 and 1332). The Board upheld the Hearing Officer's decision to limit the use of exhibits. October 5, 2023 Order, p. 10.

13. Due to the voluminous nature of Exhibit 1408 and the minimal discussion of Exhibit 1408 at the hearing, the Board should treat Exhibit 1408 in the same manner as Exhibits 17D, 18D, 19D, 20D, 21, 38, 1331, and 1332. As noted above, this is particularly true for the attachments to Exhibit 1408 (exhibits 43 and 44, which are entered as Exhibits 19D and 38 in this matter). Without the limitation on Exhibit 1408, the Hearing Officer's and Board's decisions are internally inconsistent and would grant Complainants an end-run around the Hearing Officer's limitation on Exhibits 19D and 38.

14. MWG is materially prejudiced by the admission of Exhibit 1408 without the same limitation as applied to Exhibits 17D, 18D, 19D, 20D, 21, 38, 1331 and 1332 because it had no opportunity to rebut or correct wrong conclusions made about the contents of the document. Without testimony on the record, MWG has no ability to determine how an exhibit or its contents might be used – and taken out of context – until after the hearing. Complainants' incorrect assumptions and conclusions about a different exhibit (Exhibit 1331) demonstrate why a similar limitation on Exhibit 1408 is important and prevents material prejudice. When discussing Exhibit 1331, Complainants' attorney, Mr. Russ, incorrectly assumed that "Well 2," an offsite well listed in the Local Well Stratigraphy Information, was the same as MWG Groundwater Monitoring Well No. 2, an onsite well. 5/18/2023 Hr. Tr., pp. 46:2-48:4, Exhibit 1331, MWG 13-15_110855-MWG

13-15_110860. Fortunately, because a witness was on the stand, the witness (Mr. Gnat) immediately corrected Mr. Russ, stating “No, no. This is Well 2 from this larger survey that we did. Clearly, this goes to the 60-69 wells that we looked at from around the area...But if you go further down in the table ... that starts with MW-01...that’s one of our wells.” 5/18/2023 Hr. Tr., p. 48:7-23. Without Mr. Gnat’s correction, Complainants would have assumed, incorrectly, that CCR that was found in the off-site well could be attributed to a well on MWG’s property. Mr. Gnat corrected similar misunderstandings by Mr. Russ about Exhibit 1331 during the hearing, which were critical to rebut mistaken assumptions and conclusions. *See* MWG’s Response to Complainants’ Motion for Interlocutory Appeal Regarding Exhibit 1331 and 1332 (Aug. 16, 2023), pp. 5-8. In his decisions to limit the use of documents to the testimony presented, the Hearing Officer recognized that unless a witness is available to respond to specific questions about an exhibit, there is no ability to challenge its contents or conclusions, which is inherently prejudicial.

15. Moreover, because certain of the attachments to Exhibit 1408 lack foundation or authenticity and others are irrelevant, and because of the absence of the ability to cross examine the persons that prepared the exhibit, the Board should give Exhibit 1408 little weight. This is consistent with the Board’s previous decisions concerning the application of the public records exception when there is no witness.

16. As the Board stated in its October 5, 2023 Order, the Board has previously admitted a State agency document as a public record. October 5, 2023 Order, pp. 16-17, *citing Castellari, et al. v. John Prior*, PCB 86-79 (May 28, 1987), *Sierra Club v. Ameren Energy Medina Valley Cogen, LLC*, PCB 14-134 (Nov. 6, 2014), *Greenland v. City of Lake Forest*, PCB 84-155, (June

13, 1985). However, in each of those cases, after admitting the State agency documents the Board did not rely upon the documents for its final decision, giving them little, or no, weight.

- a. In *Castellari, et al. v. John Prior*, PCB 86-79 (May 28, 1987), while the Board admitted Complainants' exhibits 5, 6, and 7 as public records, the Board stated that "the lack of opportunity to examine the persons who prepared the exhibits affects the weight the Board places on them." *Id slip op.* at 15-16. Clearly noting that it assigned little weight to the exhibits, the Board stated that the "exhibits did not determine the outcome of this case," and were "not used in finding any violation." *Id slip op.* at 15-16.
- b. In *Sierra Club v. Ameren Energy Medina Valley Cogen, LLC*, PCB 14-134 (Nov. 6, 2014), the Board denied a motion to strike an Agency document ("MSJ Exh. 3") from the respondent's motion because it was a public record even though no witness was available to testify on it. *Id.* slip op. at 4. However, in its decision and reasons for granting the summary judgment, the Board did not rely on or cite MSJ Exh. 3, suggesting that it gave it little weight. *Id.* slip op. at 20-23.
- c. In *Greenland v. City of Lake Forest*, PCB 84-155, (June 13, 1985), the Board admitted a State agency study as a public record despite the absence of a witness but did not rely upon it to support its finding. *Id.*, slip op. at 8. Instead, the Board relied upon other evidence in the record to show an injury to public health, and merely referenced the study after its finding, indicating that it did not give much weight to the study. *Id.*

17. Here, if the Board elects to uphold Exhibit 1408 as a public record, for the same reasons and consistent with its prior opinions, the Board should give Exhibit 1408 little weight. *See also* October 5, 2023 Order, p. 15 (denying MWG's objection to the admission of Mr. Quarles testimony and reports but determining "that little weight will be given to his opinions and reports.")

WHEREFORE, MWG respectfully requests that the Board reconsider and reverse its Order concerning Exhibit 1408 and hold that it is not a public document because it consists of the Agency's opinions, conclusions and recommendations. Alternatively, the Board should at the very least clarify its Order, finding that only the pages discussed may be relied upon, and finding that the document should be given little, if any, weight.

Respectfully submitted,

MIDWEST GENERATION, LLC.

By /s/ Jennifer T. Nijman
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