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
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

Attached Service List

PLEASE TAKE NOTICE that I have electronically filed today with the Illinois Pollution Control Board Petitioner Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Appeal of the Hearing Officer's Ruling to Admit Complainants' Exhibit 1408 and Midwest Generation, LLC's Reply in Support of Its Appeal of the Hearing Officer's Ruling to Admit Complainants' Exhibit 1408, copies of which are herewith served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: August 30, 2023

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing for Petitioner Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Appeal of the Hearing Officer's Ruling to Admit Complainants' Exhibit 1408 and Midwest Generation, LLC's Reply in Support of Its Appeal of the Hearing Officer's Ruling to Admit Complainants' Exhibit 1408 were filed electronically on August 30, 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 copies were sent via e-mail on August 30, 2023 to the parties on the service list.

/s/ Jennifer T. Nijman

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v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER RULING TO ADMIT COMPLAINANTS' EXHIBIT 1408

Respondent, Midwest Generation, LLC ("MWG"), requests that the Illinois Pollution Control Board ("Board") grant this Motion for Leave to File, *Instanter*, its Reply (to Complainants' Response) in support of its Appeal of the Hearing Officer's admission of Exhibit 1408, pursuant to Sections 101.500 and 101.514 of the Board's Procedural Rules. 35 Ill. Adm. Code 101.500(e), 101.514. A reply brief is warranted because Complainants, for the first time in their Response brief, disclosed how they plan to use portions of Exhibit 1408 that were never discussed by a witness at the hearing. By admitting a lengthy and multi-part document and only asking one witnesses about one item, Complainants then plan to use other information – never discussed -- from the exhibit to support their post-hearing brief positions. Complainants thus precluded MWG from providing a response to their incorrect conclusions. This is the type of "trial by ambush" that is specifically disallowed by courts and the Board. MWG will be materially prejudiced if it is not

allowed to reply to demonstrate that it is prejudiced by the admission of Exhibit 1408. In support of its motion seeking leave to file, *instanter*, MWG submits its Reply and states:

1. Exhibit 1408 is the Illinois Environmental Protection Agency's ("Illinois EPA") Recommendation in *Midwest Generation LLC Petition for an Adjusted Standard and Finding of Inapplicability at the Waukegan Station*, PCB AS21-2 ("Recommendation"). In its underlying Petition for an Adjusted Standard, MWG asks that the Board allow it to reuse the HDPE liner in the West Pond and find that the area identified as the "Grassy Field" is not a CCR surface impoundment. Exhibit 1408 is over 1,300 pages long, and merely an Illinois EPA pleading, containing no verification of the information, such as an affidavit or even identification of a witness that would support the claims.

2. During the hearing, Complainants asked MWG's Environmental Director, Sharene Shealey, about the existence of Exhibit 1408 and then asked her about a single sentence in the 1,300 page document, but nothing further. Yet despite only asking the witness about one sentence in Exhibit 1408, in their response to MWG's Appeal of the Hearing Officer's Admission of Exhibit 1408 ("Response"), Complainants for the first time identify fourteen paragraphs in Exhibit 1408 that they deem relevant to their arguments and three new arguments that were not even raised during the hearing.

3. Complainants' Response demonstrates that MWG is materially prejudiced by the admission of the 1,300 page document without any discussion of how the document was relevant to this proceeding. Had Complainants properly discussed the document with witnesses at the hearing, MWG would have had an opportunity to correct Complainants' incorrect conclusions, or to provide context and responses to Complainants' arguments. But Complainants do not want

that – they prefer to be allowed to present their assertions without any contrary evidence. This is an impermissible tactic and not consistent with Board rulings.

4. For example, Complainants claim that Exhibit 1408 is relevant to demonstrate that MWG allegedly filed "unfounded" petitions for an adjusted standard and was not diligently complying with the law. That is false. It is no secret that MWG objected to the Illinois EPA's last-minute change to the Part 845 rule for closure of impoundments that required removal of any liner from the impoundment. In fact, MWG filed an appeal in opposition to that section of the final rule, which is still pending.

5. As part of its legitimate claim that a competent HDPE liner can be reused, which MWG supported with detailed expert testimony, MWG filed its petition for adjusted standard to reuse the liner at the Waukegan impoundment. MWG's petition has not caused any delay or obstruction in closing its impoundments because Illinois EPA has not issued a single construction permit to close a CCR surface impoundment in Illinois.

6. Complainants could have asked their own expert consultant to discuss these newly identified 14 paragraphs of Exhibit 1408 at the hearing – but they did not. Complainants could have asked Ms. Shealey about the viability of the adjusted standard petition – but they did not. If they had asked, MWG could have answered, or presented its own experts to allow this Board to properly determine whether Complainants' argument of alleged "delay" or improper filing is, or is not, valid. But Complainants don't want that – they prefer to argue their case without MWG's response. This tactic results in material prejudice to MWG.

7. Similarly, in its Adjusted Standard Petition, MWG requested that the Board find that the Grassy Field area at the Waukegan Station is not a CCR surface impoundment because it does not, and had never, accumulated ash and liquid. Complainants' Response incorrectly

suggests that Exhibit 1408 could be used to show that MWG's request to the Board about the Grassy Field could be specious or somehow causing a "delay". Complainants did not want MWG to have the opportunity to point out that this Board in fact granted MWG's petitions at two of its other stations *on the very same grounds.* The Board granted two adjusted standard petitions filed by MWG in which the Board *agreed* that three areas at MWG's Stations were not CCR surface impoundments because they did not accumulate ash and liquid.

8. Had Complainants asked Ms. Shealey about their claim concerning the Grassy Field, Ms. Shealey could have testified about the validity of the argument; or MWG could have presented expert witnesses to address the issue directly. Without this opportunity, MWG suffers prejudice in that there is no witness testimony or other evidence contrary to Complainants' false conclusion.

9. Complainants are also wrong to claim that it was somehow MWG's burden to rebut Illinois EPA's pleading *in this proceeding*. That is absurd and a waste of the Board's time and resources to litigate the same issue in two different proceedings. The adjusted standard proceeding is where the testimony and evidence exists for MWG to support its claims, for IEPA to respond, and for the Board to make a determination on that petition. If Complainants wanted to make the argument in this case that the mere filing of the adjusted standard was somehow specious, they should have done so through testimony to allow MWG's witnesses to respond.

10. Here, MWG timely notified Complainants that MWG objected to the admission of Exhibit 1408, a mere pleading by a party in a different proceeding, based on foundation, authenticity, hearsay, and relevance. *See* Complainants' Individual Exhibit List, May 3, 2023, No. 33. Because Complainants were seeking to introduce the document, it is their duty to

demonstrate exactly how the document they sought to rely on is relevant and reliable. They did not.

11. While MWG maintains that Exhibit 1408 should have been excluded in its entirety, in the alternative, the Board could limit the parties' use of the exhibit to the parts that were discussed at the hearing. That type of limitation is consistent with the Hearing Officer's orders on other large exhibits (*e.g.* Comp. Exhibits 17D, 18D, 19D, 20D, 1331, and 1332), and reduces the material prejudice to MWG because MWG was given an opportunity to respond to and/or correct errors or misinterpretations on those sections.

12. MWG has prepared its Reply in support of its Appeal which is attached hereto.

13. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by allowing MWG to dispute the new arguments by Complainants.

14. This Motion is timely filed on August 30, 2023, within fourteen (14) days after service of Complainants' Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, MWG respectfully requests that the Board grant Respondent's Motion for Leave to File Instanter, its Reply (to Complainants' Response) in support of its Objection and Appeal from the Hearing Officer's Ruling to Admit Complainants' Exhibit 1408, and accept the attached Reply as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER'S RULING TO ADMIT COMPLAINANTS' EXHIBIT 1408

Complainants' Response demonstrates that Midwest Generation, LLC is materially prejudiced by the admission of Exhibit 1408, the Illinois Environmental Protection Agency's ("Illinois EPA") Recommendation in *Midwest Generation LLC Petition for an Adjusted Standard and Finding of Inapplicability at the Waukegan Station*, PCB AS21-2 ("Recommendation"). As MWG predicted, Complainants plan to use portions of Exhibit 1408 that were not discussed at the hearing, drawing incorrect conclusions that MWG has no opportunity to rebut. Very simply, Complainants cannot seek to admit a document by asking inconsequential questions on the existence of the document and one question about one sentence, when their real intent is to use the remainder of the document for other, undisclosed purposes. Because MWG is materially prejudiced by the admission of Exhibit 1408 without any opportunity to rebut Complainants' false conclusions, its admission must be reversed. In the alternative, the Board should limit the admission and discussion of Exhibit 1408 to the pages and topics discussed during the hearing.

A. Complainants Have Made and Will Make Incorrect Conclusions that MWG Had No Opportunity to Rebut

Complainants deliberately hid their true purpose for moving to admit Exhibit 1408 so that they could prevent MWG from responding to their false conclusions based on the exhibit. For the first time in their Response, Complainants point to at least fourteen paragraphs of Illinois EPA's Recommendation that they now state are relevant. Resp. p. 3-5. But at the hearing, Complainants only asked MWG's witness Sharene Shealey about the existence of the document and a single sentence in the document that she corrected. Complainants asked nothing further. 5/19/23 Tr., 5:21-8:9.

Complainants also provide new arguments for their reliance on Exhibit 1408 that were not raised at the hearing. Complainants for the first time state that they intend to use Exhibit 1408 to demonstrate that MWG did not diligently comply with the Act because they claim it shows that MWG filed "unfounded petitions for adjusted standard," and Illinois EPA's assessment of MWG's closure plan is not compliant with Part 845. *Id*. They also claim for the first time that they will use Exhibit 1408 to demonstrate economic reasonableness of reducing the emissions based upon MWG's estimation of costs to reuse the liner in the West Pond and their interpretation of Illinois EPA's assessment of those costs. *Id.*, at p. 7. But Complainants did not ask Ms. Shealey, or anyone else, about the 14 paragraphs of Exhibit 1408 Complainants now point to. And Complainants did not ask any witness about whether the adjusted standard petitions were allegedly unfounded – even though Complainants obviously knew exactly what they intended to argue. This type of hiding the ball is contrary to standard trial procedure and does not allow the Board to make a valid decision after hearing both parties' positions.

Had Complainants properly discussed all of the elements of Exhibit 1408 that they now describe in their response as "relevant" during the hearing, MWG would have had an opportunity

to rebut the baseless assertions and false conclusions. For example, MWG would have had an opportunity to rebut the claim that its Petition for an Adjusted Standard to reuse the liner in the West Pond somehow demonstrates an absence of due diligence to comply. Rather, it demonstrates the exact opposite. MWG has consistently objected to Illinois EPA's last minute change to the closure by removal requirements during the Part 845 rulemaking to include removal of a competent liner, including filing an appeal that is still pending with the Fourth Circuit. *See* Midwest Generation, LLC's Response to Post-Hearing Comments; P.C. # 136, pp. 2-5; *Midwest Generation, LLC v. Illinois Pollution Control Board*, Consolidated Case Nos. 4-21-0304, 4-21-0309, 4-21-0310, MWG's Brief, pp. 21-32. As MWG stated in its Response and its appeal, there was nothing in the rulemaking record to show that a liner associated with CCR is so contaminated that it may not be decontaminated. Because of the good faith basis, supported by expert opinions, that a competent HDPE liner and its equipment can be decontaminated and reused, MWG filed its Petition for an Adjusted Standard. Moreover, as Ms. Shealey testified, MWG cannot act to close any of its CCR surface impoundments without a permit issued by the Illinois EPA, and to date Illinois EPA has not issued a draft or final permit to any owner or operator. 5/18/2023 Tr., p. 209:1-5, 6/14/2023 Tr., p. 173:9 – 174:11. Because Illinois EPA has not taken action on any permit application, there is no basis to assert that MWG's petitions have resulted in any delay in construction at the Waukegan Station.

MWG had a similar good faith basis to petition the Board to find the area west of the West Pond (commonly called the "Grassy Field") is not a CCR surface impoundment. The Board has already found three areas at MWG's Stations are *not* CCR surface impoundments. For each, the Illinois EPA and Board agreed that the Illinois EPA was wrong in its initial assessment, and that none of the areas accumulated ash and liquid as required to fall within the definition of CCR

surface impoundment in Part 845 of the Board Rules. *See In the Matter of: Midwest Generation LLC's Petition for an Adjusted Standard and Finding of Inapplicability for the Powerton Station*, PCB AS21-2, Feb. 17, 2022 (Finding that the Service Water Basin is not a CCR surface impoundment); *In the Matter of: Midwest Generation LLC's Petition for Adjusted Standard (Joliet 29 Station)*, PCB AS21-1, May 18, 2023 (Finding Ponds 1 and 3 are not CCR surface impoundments). The same is true for the Grassy Field – it was never used to accumulate ash *and* liquid. MWG's request for adjusted standard fully demonstrates that it is diligently complying with the Act and the new Part 845.

B. Complainants Have the Duty to Demonstrate Relevance and Reliability

Complainants also present the ridiculous assertion that MWG should litigate its adjusted standard in this matter. Comp. Resp. 13. Complainants state that MWG should have prepared exhibits and testimony disputing any of the material contained in Exhibit 1408 at the hearing in this matter. *Id.* That is absurd, contrary to law, and a waste of the Board's time. Because Complainants sought to introduce the exhibit, it is their duty to establish that it is relevant and reliable. *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001). Without any testimony by Complainants, there is no way MWG could have attempted to rebut every assertion in the 1,300 page exhibit in advance, let alone try to anticipate and rebut Complainants' false assertions and conclusions that have only been made evident in their Response brief to MWG's appeal. Here, MWG timely notified Complainants that MWG objected to the admission of Exhibit 1408, a mere pleading by a party in a different proceeding, based on foundation, authenticity, hearsay, and relevance. *See* Complainants' Individual Exhibit List, May 3, 2023, No. 33. Despite that knowledge, Complainants made no effort to demonstrate that the document was relevant *to this* proceeding nor that it was authentic or reliable (*i.e.* - not hearsay).

C. Conclusion

The admission of Exhibit 1408 with little to no showing of relevance or reliability was incorrect and should be reversed. At the very least, the Board should limit the parties' reliance on the exhibit to the pages and information discussed during the hearing. This is the same limitation the Hearing Officer made for many other exhibits, including Comp. Exhibits 17D, 18D, 19D, 20D, 1331, and 1332. The limitation prevents material prejudice because MWG had an opportunity to respond to any information presented at the hearing, and correct any incorrect conclusions.

Respectfully submitted,

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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