

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
) AS 2021-003
PETITION OF MIDWEST)
GENERATION, LLC FOR AN)
ADJUSTED STANDARD FROM) (Adjusted Standard)
845.740(a) AND FINDING OF)
INAPPLICABILITY OF PART 845 FOR)
THE WAUKEGAN STATION)

NOTICE OF FILING

To: See attached Service List

PLEASE TAKE NOTICE that I have today electronically filed with the Office of the Clerk of the Pollution Control Board Midwest Generation, LLC's Motion in Limine to Exclude and Strike From the Record Agency Exhibits 1-5, 13-26 and 50, a copy of which are herewith served upon you.

Dated: November 16, 2023

MIDWEST GENERATION, LLC

By: /s/Kristen L. Gale

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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 in Limine to Exclude and Strike From the Record Agency Exhibits 1-5, 13-26 and 50 was electronically filed on November 16, 2023 with the following:

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and that copies were sent via e-mail on November 16, 2023 to the parties on the service list.

Dated: November 16, 2023

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**MIDWEST GENERATION LLC’S MOTION IN LIMINE TO EXCLUDE AND STRIKE
FROM THE RECORD AGENCY EXHIBITS 1-5, 13-26 AND 50**

Pursuant to 35 Ill. Adm. Code 101.500 and 101.502, Petitioner, Midwest Generation, LLC (“MWG”), submits its Motion *In Limine* requesting that the Hearing Officer exclude and strike from the record Illinois Environmental Protection Agency (“Illinois EPA” or “Agency”) Recommendation Exhibits 1-5, 13-26, and 50, which use historic aerial photographs to present the Agency’s descriptions and captions containing factual and legal conclusions. Because the Agency will not present a witness at the hearing, there is no witness who will testify as to the basis or foundation for admission of the information that has been added to these photographs and who can be cross-examined by MWG.

In addition to the lack of any evidentiary foundation, the Agency Exhibits 1-5, 13-26, and 50 constitute inadmissible hearsay. They are not admissible under the “public record” hearsay exception because they are not records that are required by law, nor are they required by the nature of the Agency’s office to be created or maintained.¹ Should the Hearing Officer decide to admit

¹ The Agency’s Recommendation was admitted as one of Complainants’ Exhibits in *Sierra Club et al v. Midwest Generation, LLC*, PCB13-15. MWG objected to the admission of the exhibit because the information in the Recommendation was unverified and unreliable. MWG appealed the Hearing Officer’s admission of the Recommendation to the Board, but the Board found, for the first time, that the entire document was a public record. *Sierra Club et al v. Midwest Generation, LLC*, Board Order, PCB13-15 (Oct. 5, 2023). MWG filed a motion to reconsider the opinion because the Board erred in the application of law for admission of public records. In a civil case, only factual findings are admissible as public records, “not findings containing expressions of opinions or the drawing of conclusions.” Il. R. Evid. R. 803(8); *Bloomgren v. Fire Ins. Exchange*, 162 Ill. App. 3d 594, 599 (3rd Dist. 1987). Because the Recommendation contains the Agency’s opinions and conclusions on MWG’s petition, it is not covered by the public record exception to the hearsay rule.

these exhibits over MWG's objection, then at the least they should be afforded little weight given the lack of any witness testimony to provide a foundation for their admission.

In support of its Motion, MWG states as follows:

I. BACKGROUND

1. On October 31, 2022, the Agency filed its Recommendation on MWG's Petition for an Adjusted Standard to reuse the liner in the West Pond and for a finding that Part 845 is inapplicable to the area west of the West Pond (the "Grassy Field"). The Agency attached 38 exhibits to its Recommendation.²

2. The Agency describes Agency Exhibits 1-5 and 13-26 as aerial photographs of the Waukegan Station (the "Station") that purportedly show it at various points in time from 1939 to 2021. Agency Rec., p. 38. There are conclusory statements added throughout these photographs with no description of the source or basis for these statements. For example, Agency Exhibits 1 and 2 contain a digitally added pin labeled "Old Pond/Slag Field" with the caption declaring that this includes the "Old Pond Location, Encompasses East Pond and West Pond as well." There is no factual basis provided for these findings. Similarly, Agency Exhibit 3 has a digitally added pin labeled "Old Pond" with the same conclusory statement that it is the "Old Pond Location" including the East and West Pond. All but one of the remaining aerial photographs exhibits include a statement that the Grassy Field is a "Pond Location."³ Clearly, these findings and conclusions are intended to convey to the Board the Agency's position that the Grassy Field is a CCR impoundment. However, Agency Exhibits 1 through 5 contain a "Disclaimer" that clarifies that each map "does not constitute a regulatory determination...."

² The Agency's exhibits are numbered 1 through 50. However, the Agency stated in its Exhibit List that there were no Exhibits 6 through 12 or Exhibits 27 through 31. *See* Agency's Recommendation, p. 38.

³ Agency Exhibit 17 does not have digitally added pins, and only includes a general title, rendering the exhibit meaningless and irrelevant.

3. Agency Exhibit 50 is a close-up photograph of what is purported to be (according to the title added to the photograph) “machinery use” at the Waukegan Station,” though the Agency provides no further explanation in the exhibit or elsewhere of what “machinery use” means or the significance of it, nor does it provide a date or any locational data (*i.e.* longitude and latitude) to confirm that the photo depicts the Waukegan Station.⁴

4. In Illinois EPA’s Response to Midwest Generation, LLC’s First Set of Interrogatories (Oct. 20, 2023), the Agency identifies the websites from which the aerial photographs were printed and admits that “the pins and descriptions were not on the original source photographs.” *See* Ex. A - Illinois EPA’s Resp. No. 3.a. and 3.b. Instead, the Agency states that it used computer software to insert the pins and descriptions and that the sources of this information are the aerial photographs themselves and the additional seventeen exhibits attached to the Agency’s Recommendation, without any further detail or explanation. *Id.*, Resp. No. 3.c. and 3.d.

5. The Agency also states in its Response that Lauren Hunt prepared Agency Exhibits 1-5, 13-26, and 50, but the Agency is not calling any witness at the hearing. *Id.*, Response Nos. 1 and 2. To the extent the Agency may be relying on either Ms. Hunt’s personal knowledge or her expert opinion for inserting the contested information in these exhibits, it has not disclosed what Ms. Hunt’s personal knowledge is or why she is qualified to render expert opinions on what the challenged aerial photos depict.

II. A PROPER FOUNDATION HAS NOT BEEN PRESENTED FOR THE ADMISSION OF THE AERIAL PHOTOS.

6. The aerial photographs in Agency Exhibits 1-5, 13-26, and 50 should be excluded and stricken from the record because there is no witness available to authenticate the photographs

⁴ MWG’s Motion *in Limine* to Exclude and Strike from the Record Certain Agency Exhibits or at a Minimum Give the Exhibits Little Weight, which has been filed concurrently with the present Motion, provides that Agency Exhibit 50, along with Exhibits 37, 40, 42, 43, and 44 50 should be excluded on the basis that no party, including the Agency, discuss, rely upon, or use it (nor will any witnesses potentially do so, as the Agency is not calling a witness at the hearing), and hence, it is irrelevant.

and to lay the proper foundation with respect to their source or the factual basis for the modifications to the photos including the inserted pins and descriptions.

7. The First District Court of Appeals of Illinois succinctly set forth the basic rules of evidence regarding the requirement to lay a foundation for the introduction of documents in *Anderson v. Human Rights Comm'n*:

In civil cases in Illinois, the basic rules of evidence require a proponent of documentary evidence to lay a foundation for the introduction of that document into evidence. Evidence must be presented to demonstrate that the document is what its proponent claims it to be. Without proper authentication and identification of the document, the proponent of the evidence has not provided a proper foundation and the document cannot be admitted into evidence. The purpose of requiring a foundation is to prevent 'inadmissible evidence from being suggested to the [trier of fact] by any means.' *Id.*, 314 Ill. App. 3d 35, 42, 246 Ill. Dec. 843, 849, 731 N.E.2d 371, 377 (2000) (citations omitted).

In *Anderson v. Human Rights Comm'n*, the petitioner attempted to introduce a document through a witness when that witness had not prepared the document. *Id.*, 314 Ill. App. 3d at 42-43. The Hearing Officer sustained the respondent's objection to admission of the document, admonishing petitioner: "You have to do certain foundational requirements as to authenticity and overcome hearsay objections, et cetera. You need a witness on the stand... who is competent to testify to that document." *Id.* at 43. The First District affirmed the Hearing Officer's decision, finding that the hearing officer properly required the petitioner to satisfy foundational requirements. *Id.* See also *Greaney v. Indus. Comm'n (Michel Masonry Co.)*, 358 Ill. App. 3d 1002, 1011, 295 Ill. Dec. 180, 190, 832 N.E.2d 331, 341 (2005) (Court found Commission abused its discretion by admitting documents without adequate foundation, even though they may have been admissible under a hearsay exception); *Sierra Club v. Midwest Generation, LLC*, PCB13-15 (Hearing Officer granted respondent's motion to exclude an exhibit because complainants did not present a witness to lay the foundation for the exhibit); Ill. R. Evid. 901(a) (Requirement of Authentication or Identification); *Castellari et al v. Prior*, PCB 86-79, Opinion and Order (May 28, 1987) at 30

(Finding it was error to admit a collection of observation logs because it, *inter alia*, included observations recorded by people who did not testify at hearing, so did not have adequate “indicia of reliability”).

8. Here, the Agency has said it will not present a witness to authenticate the aerial photographs and additional digital information in Agency Exhibits 1-5, 13-26, and 50 and to lay a proper foundation for their admission. Ex. A., Resp. No. 1. Without a proper foundation, the exhibits are unreliable, and certainly not the kind of evidence that would be “relied upon by prudent persons in the conduct of serious affairs,” as required by the Board’s rules (35 Ill. Adm. Code 101.626).⁵ Indeed, five of the aerial photos contain a disclaimer that states the map “does not constitute a regulatory determination,” seemingly disavowing any conclusions made in the maps by the Agency and rendering them unreliable. *See* Agency Exhibits 1-5.

9. Moreover, the Agency’s explanation for the foundation of the photographs in its responses to MWG’s interrogatory is unavailing. *See* Ex. A, Resp. No. 3.d. Agency Exhibits 1-5, 13-26 and 50 are simply historic aerial photographs with conclusions inserted by the Agency. The Agency states that the source of the information is the aerial photographs themselves. Ex. A, Resp. No. 3.d. There is no evidence in the photographs to support the conclusion that the area the Agency identified as an “Old Pond” or a “Pond” is either of those things. Rather, the Agency is engaging in circular reasoning: the altered photographs “depict” the alleged “alterations” because that is what the Agency says they depict.⁶ In essence, the Agency is attempting to present “testimony” in

⁵ In fact, all of the Agency’s exhibits technically should be excluded on these grounds. As the Agency will call no witnesses at the hearing, there will be no one to establish the veracity of any of its exhibits. However, MWG is not moving to exclude the Agency’s other exhibits, other than Exhibits 37, 40, 42, 43, 44, and 50 which are the subject of MWG’s Motion *in Limine* to Exclude and Strike from the Record Certain Agency Exhibits or at a Minimum Give the Exhibits Little Weight, being filed concurrently with this Motion. Instead, MWG is asking that because there will be no witness available at the hearing, the Board give the exhibits little weight.

⁶ Courts routinely reject this sort of circular reasoning fallacy. *Thorsen v. Cmty. Unit Sch. Dist. 300*, 2021 U.S. Dist. LEXIS 85530, *8 (Court found defendant engaged in circular reasoning by arguing that it was not liable for the allegedly discriminatory adverse employment action because the adverse employment action was evidence that the plaintiff was not performing well.).

these altered photographs without having to present a witness to testify to the conclusions the Agency has made on them. Whether the area south of the Station is an “Old Pond” or “Pond” is a disputed issue here.

10. The Agency also claims in its interrogatory response that its seventeen other exhibits, *en masse* and without specificity, are the source of the conclusions inserted on the aerial photographs. The Agency’s position does not satisfy the requirements for laying a proper foundation for the exhibits. Ex. A, Resp. No. 3.d. There is no identified, factual basis in any of the seventeen Agency exhibits that the area south of the Waukegan Station was called the “Old Pond,” or a “Pond.” It is prejudicial to MWG, and of no help to the Board, to sift through the pages of the other exhibits attached to try to identify the foundation for the Agency’s claims in the aerial photographs.⁷

11. MWG would be prejudiced by the admission of the photographs because it is precluded from cross-examining Ms. Hunt on the conclusions she inserted on them describing what she contends the photographs to depict. Because the altered aerial photographs lack an evidentiary foundation, they should be excluded and stricken from the record.

III. THE AERIAL PHOTOGRAPHS ARE NOT ADMISSIBLE PUBLIC RECORDS.

12. The aerial photographs are not admissible as a “public record.” To be admissible, a public record must be kept by a public office or agency pursuant to a duty imposed by law and concern matters for which there was a duty to report. It is not admissible if it contains expressions of opinions or the drawing of conclusions. Because the aerial photographs (Agency Exhibits 1-5, 13-26, and 50) are neither required by a statute nor maintained in connection with the Agency’s

⁷ Presumably, the Agency did not mean to include Exhibits 37, 40, 42, 43, and 44. *See* FN 4.

official duties, and contain the opinions and conclusions of the Agency, they are not admissible as a public record.

13. Illinois Rules of Evidence Rule 803(8) provides the public records hearsay exception:

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. *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).

14. Under Rule 803(8), in a civil case like 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 Pendergrass was not qualified as an expert witness, the Court ruled the report was not admissible. *Id. See also Barker v. Eagle Food Ctrs.*, 261 Ill. App. 3d 1068, 1074 (2nd Dist. 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.)

15. Here, the aerial photographs (Agency Ex. 1-5, 13-26, and 50) do not qualify under the public records hearsay exception. The “author,” Ms. Hunt, is not required by statute to modify aerial photographs from a non-Illinois EPA website by descriptions onto the photos. Her official duties do not include interpreting or drawing conclusions about what is depicted in historical, aerial photographs. Moreover, each aerial photograph contains Ms. Hunt’s opinions and conclusions that the area south of the Station is an “Old Pond” or “Pond,” without any other supporting facts. Ms. Hunt has not been qualified as an expert to provide these opinions, nor does the Agency’s interrogatory response show that she could be qualified, as it provides none of her alleged expert qualifications.

16. Even if the aerial photographs were somehow considered “public records,” which they are not, they should be given little weight. In cases where the Board has admitted a State agency document as a public record without a witness, the Board did not rely upon the documents for its final decision, demonstrating that it gave the records little weight. For example, in *Castellari, et al. v. John Prior*, PCB 86-79 (May 28, 1987), while the Board admitted Complainants’ exhibits 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 signaling 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.* Similarly, 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 because it was a public record even though no witness was available to testify. *Id.* slip op. at 4. However, in its decision, the Board did not rely on or cite to the document, suggesting that it gave it little weight. *Id.*, slip op. at 20-23. Finally, 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 in support of its finding. *Id.*, slip op. at 8. Instead, the Board relied upon other evidence in the record to show that leaf smoke was injurious to public health and merely referenced the study after stating its finding, indicating that it did not give it much weight. *Id.*

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order excluding and striking from the record Agency Exhibits 1-5, 13-26, and 50 because they lack any evidentiary foundation and the standards for admission cannot be met. In the alternative, MWG requests that the Hearing Officer find that Agency Exhibits 1-5, 13-26, and 50 are not admissible under the public records exception to hearsay, or at the very least, consistent with Board precedent, direct the Board to give them little weight.

Respectfully submitted,

MIDWEST GENERATION, LLC

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EXHIBIT A

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	PCB AS 2021-003
PETITION OF MIDWEST GENERATION)	
LLC, FOR AN ADJUSTED STANDARD FROM)	
35 ILL. ADM CODE 845.740 AND FINDING OF)	
INAPPLICABILITY OF PART 845 FOR THE)	
WAUKEGAN STATION)	

Illinois Environmental Protection Agency’s Response to Midwest Generation, LLC’s First Set of Interrogatories

1. Identify each person you intend to call or may call as a witness at the hearing in this matter, state the subject of each person’s expected testimony and set forth the subjects of any lay opinion testimony you may elicit from each lay witness identified.

RESPONSE: *At this time, the Illinois Environmental Protection Agency (Agency or Illinois EPA) does not plan to call any witness.*

2. Identify the person(s) who prepared Exhibits 1 through 26 and Exhibit 50 of the Illinois EPA Recommendation.

RESPONSE: *Exhibits 1-26 and 50 were prepared by Lauren Hunt.*

3. Describe how Exhibits 1 through 26 and Exhibit 50 of the Illinois EPA Recommendation were prepared, including but not limited to:

- a. the source of the aerial photographs in each exhibit;

RESPONSE:
*Exhibits 1-5 were from Lake County (<https://maps.lakecountyil.gov/historicaerials/>).
 Exhibits 6-26 were from Google Earth (The base photos can be found by zooming into the Waukegan Station area on Google Earth Pro, clicking the 1985 button and selecting from a series of available photos).
 Exhibit 50 was from Wikipedia Freebase ([Vexcel Imaging - Home of the UltraCam \(vexcel-imaging.com\)](http://vexcel-imaging.com) [Satellite Imagery | TomTom](http://www.tomtom.com)).*

- b. whether the pins and descriptions on each aerial photograph in each exhibit were located on the original source of the aerial photographs in each exhibit;

RESPONSE: *The pins and descriptions were not on the original source photographs.*

- c. If the pins and descriptions were not on the original aerial photographs, how the pins and descriptions located on each exhibit were inserted; and,

RESPONSE: *The Agency used a combination of Google Earth utilities and PDF Pro to insert pins and arrange them along with descriptions on the base photos.*

- d. The source of the information that was the basis for the insertion of the pins and descriptions on each exhibit.

RESPONSE: *The Agency used information in Exhibits 1-5, 13-26, and 32-49 of the Agency Recommendation as the basis to locate pins and write descriptions.*

4. Provide the Illinois EPA's final exhibit list for the hearing in this matter.

RESPONSE: *The Agency relied on the exhibits cited to in the Recommendation and the Agency's Response to Midwest Generation, LLC's Motion to Stay Proceedings.*

Dated: October 20, 2023

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Respondent,

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