

ILLINOIS POLLUTION CONTROL BOARD  
January 25, 2018

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

ORDER OF THE BOARD (by K. Papadimitriu):

The Board held five days of hearing—October 23 through October 27, 2017—in this citizen’s enforcement action brought by Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (Environmental Groups). The Environmental Groups’ action concerns alleged water pollution from coal ash ponds at coal-fired power plants that the respondent, Midwest Generation (Midwest Gen), owns. The hearing is currently incomplete; it is scheduled to resume on January 29, 2018. After the hearing’s initial five days, the Environmental Groups and Midwest Gen both objected to evidentiary rulings that the hearing officer made at the October hearing. They have appealed to the Board for review of the hearing officer’s decisions. To further the next session of the hearing, the Board addresses these appeals in this order, which affirms the hearing officer’s contested rulings.

The Environmental Groups appeal one of the hearing officer’s rulings. At hearing, the Environmental Groups offered into evidence a purported draft letter to the Illinois Environmental Protection Agency (Agency) from an employee of Midwest Gen. The hearing officer sustained Midwest Gen’s objection and did not allow the letter into evidence. The Environmental Groups appealed to the Board. The Board affirms the hearing officer’s ruling because the draft letter is unreliable.

Midwest Gen appeals three of the hearing officer’s rulings. At hearing, the Environmental Groups offered into evidence (1) Midwest Gen’s responses to interrogatories submitted during discovery; (2) draft memoranda to Midwest Gen written by a consultant; and (3) sets of groundwater monitoring samples from Midwest Gen’s plants. The hearing officer allowed these exhibits into evidence. Midwest Gen appealed these rulings. The Board affirms the hearing officer’s rulings because the exhibits are material, relevant, and reliable and, for the groundwater samples, not unduly cumulative. However, the Board overturns the hearing officer’s ruling to admit into evidence an exhibit that the Environmental Groups offered (part of

the groundwater data); the Environmental Groups did not oppose Midwest Gen's objection to its admission.

In today's order, the Board provides brief background before turning to the hearing officer's rulings.

## **BACKGROUND**

### **Procedural History**

The Environmental Groups filed a complaint against Midwest Gen on October 3, 2012. Sierra Club v. Midwest Generation, PCB 13-15 (Jan. 23, 2014) (accepting complaint). For reasons immaterial to this opinion, the Environmental Groups filed an amended complaint on January 14, 2015. The amended complaint alleged that Midwest Gen violated water pollution prohibitions of the Environmental Protection Act (415 ILCS 5/12(a), 12(d), 21(a) (2016)) and Board regulations. The alleged violations relate to discharges from coal ash ponds at four power plants owned by Midwest Gen: Powerton Station in Pekin, Tazewell County; Joliet 29 Station in Will & Kendall Counties; Waukegan Station in Lake County; and Will County Station in Will County.

After the Board denied a motion for summary judgment from the Environmental Groups, the parties prepared for a hearing on the issue of liability. *See* Sierra Club v. Midwest Generation, PCB 13-15 (Jan. 19, 2017) (denying Mot. for S.J.). The hearing began on October 23, 2017 and lasted five days, through October 27, 2017. The hearing was not complete, so the hearing officer continued the hearing. The hearing will resume on January 29, 2018.

Both parties appealed to the Board for review of evidentiary rulings that the hearing officer made at the October hearing. On November 13, 2017, the Environmental Groups appealed the hearing officer's decision to exclude from evidence a draft letter purportedly from a Midwest Gen employee to the Agency, Exhibit 37 (Letter Obj.). Also on November 13, 2017, Midwest Gen appealed the hearing officer's decision to admit into evidence Midwest Gen's responses to interrogatories submitted during discovery, Exhibits 5.5, 6, and 7 (Interrog. Obj.), and a consultant's draft memorandum to Midwest Gen, Exhibit 16 (Memo Obj.). On November 14, 2017, Midwest Gen appealed the hearing officer's decision to admit into evidence sets of groundwater monitoring samples from Midwest Gen's plants, Exhibits 204G–209G, 210H–215H, 222J–228J, 235L–241L, and 261 (Data Obj.). Midwest Gen responded to the Environmental Groups' objection (Letter Resp.); the Environmental Groups responded to Midwest Gen's objections (Interrog. Resp., Memo Resp., Data Resp.).

### **Evidentiary Standard in Board Adjudicatory Hearings**

Board rules establish the evidentiary standard that applies in Board adjudicatory hearings. Generally, the "hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois . . ." 35 Ill. Adm. Code 101.626. However, some evidence may be admitted even if inadmissible in Illinois civil courts. The Illinois Administrative Procedure Act provides that evidence not admissible in Illinois civil courts may be admitted in administrative hearings when "commonly relied upon by reasonably prudent men in the conduct of their affairs . . ." 5 ILCS 100/10-40(a) (2016).

The Board's procedural rules reiterate this principle. They state that, at an adjudicatory hearing, the hearing officer "may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs . . ." 35 Ill. Adm. Code 101.626(a). Therefore, evidence is generally admissible in Board adjudicatory hearings if (1) it is admissible under Illinois civil courts' rules of evidence; or (2) it is material, relevant, and reliable.

## **DISCUSSION**

### **Motions for Interlocutory Appeal Granted**

The Board's procedural rules allow for interlocutory appeal from a hearing officer ruling only with the Board's permission. For hearing officer rulings made on the record at hearing, "any motion for interlocutory appeal must be filed within 14 days after the hearing." 35 Ill. Adm. Code 101.518. The parties' motions were timely filed. The Board grants their motions for interlocutory appeal and rules upon their merits below.

### **Hearing Officer's Rulings Affirmed**

#### **Draft Letter Was Properly Excluded from Evidence**

The Environmental Groups offered a draft letter as evidence at hearing that was purportedly written by a witness, Maria Race, while Midwest Gen employed her—her name appears at the close of the letter. The letter is addressed to an Agency employee named Lynn Dunaway and dated July 26, 2013. It concerns groundwater sampling near ash ponds at Waukegan Station. The hearing officer excluded it from evidence upon Midwest Gen's objection. The letter was accepted, however, as an offer of proof and labeled Exhibit 37. Oct. 23 Tr. 177:13–180:24.

The hearing officer excluded the draft letter as unreliable; the Environmental Groups could not show that Ms. Race wrote the letter. Oct. 23 Tr. 179:5–11, 180:16–23. When making his ruling, the hearing officer noted that Ms. Race had no recollection of writing the letter or its contents (Oct. 23 Tr. 178:11–12) and that the letter is unsigned and not on official Midwest Gen letterhead (Oct. 23 Tr. 178:1–16).

The Board agrees with the hearing officer—the draft letter's irregularities make it unreliable. Lacking a letterhead or signature, there nothing indicates that the letter was ever sent to the Agency. *See* Letter Resp. at 7–9. Though Ms. Race admitted to corresponding with Ms. Dunaway (*see* Letter Obj. at 4), Ms. Race could not testify as to any specific context about the nature of the letter.

The Environmental Groups argue that Ms. Race's inability to remember the letter increases its importance, making it admissible as a past recollection recorded. Letter Resp. at 5. The Environmental Groups rely upon Castellari v. Prior, PCB 86-79 (May 28, 1987). *Id.* However, in that case, the Board allowed evidence to be admitted as past recollection recorded when the evidence was reliable. Here, the draft letter is not reliable. The Board upholds the hearing officer's ruling to exclude it.

### **Interrogatory Responses Were Properly Admitted into Evidence**

Midwest Gen responded to interrogatories posed by the Environmental Groups during discovery in this case. The hearing officer entered these responses into evidence at hearing over Midwest Gen's objection and labeled them Exhibits 5.5, 6, and 7. The interrogatory responses generally concerned the ash ponds' location, Midwest Gen's ash pond inspection methods, and ash pond liners. Oct. 23 Tr. 52–53, 57–58.

Midwest Gen argues that the Board must exclude the interrogatory responses from evidence under Section 101.626(f) of the Board's procedural rules. Interrog. Obj. at 2. This rule allows prior inconsistent statements made under oath to be admitted into the evidence "to impeach a witness if the statement is inconsistent with the witness' testimony at hearing." 35 Ill. Adm. Code 101.626(f). Midwest Gen argues that because the Environmental Groups did not use the interrogatory responses to impeach a witness, the Board should overturn the hearing officer's decision to admit them. Interrog. Obj. at 2.

The Board finds, however, that Section 101.626(f) does not delineate the only instances in which prior statements made under oath may be admitted. Instead, the general rule of admissibility applies here—the evidence will be admitted if it is material, relevant, and reliable. The interrogatory responses satisfy this rule, and therefore the Board affirms the hearing officer's ruling admitting them into evidence. The Board also grants Midwest Gen's request (Interrog. Obj. at 7–8) to limit use of the interrogatory responses to those portions that were discussed on the record at hearing in October 2017.

### **Consultant Email and Memoranda Were Properly Admitted into Evidence**

The Environmental Groups offered into evidence an email to Midwest Gen written by an environmental consultant with several draft memoranda attached, also written by the consultant. The consultant's email with attached memoranda was addressed to Maria Race and dated February 10, 2012. The memoranda analyze ash pond data at the four Midwest Gen plants. Over Midwest Gen's objection, the hearing officer admitted the email with attached memoranda into evidence, labeling them Exhibit 16. Oct. 23 Tr. at 89:11.

Midwest Gen argues that the email and attachments are unreliable and therefore should be excluded from evidence. Specifically, because no final copies of the draft memoranda were offered into evidence and because the author of the draft memoranda was not asked to testify, they are "uncertain, speculative, and unreliable." Memo Obj. at 1–2. Midwest Gen also argued that the documents were hearsay evidence and that the memoranda contain conclusions that were later altered upon further investigation, making their contents unreliable. Memo Obj. at 2–3.

The memoranda's draft marking does not make them unreliable. As the Environmental Groups note, no subsequent, final version of the memoranda are available and no testimony at hearing revealed any errors in the draft memoranda. *See* Memo Resp. at 4–5. Though the conclusions in the draft memoranda may have been preliminary or contradicted by later analysis (Memo Obj. at 3–4), that does not mean that the memoranda were considered unreliable upon being sent in 2012. If conclusions in the draft memoranda were later contradicted, the Board may consider any such evidence alongside these memoranda. For these reasons, the Board

affirms the hearing officer's decision to admit the exhibit into evidence under Section 101.626(a).

### **Groundwater Monitoring Samples Were Properly Admitted into Evidence**

The Environmental Groups offered documents containing groundwater monitoring data from samples taken at Midwest Gen's four plants. The sampling is required by federal regulations. The samples were collected between the first quarter of 2016 through the second quarter of 2017. The hearing officer admitted the samples into evidence over objection from Midwest Gen and numbered the corresponding exhibits as 204G–209G, 210H–215H, 222J–228J, and 236L–241L. Oct. 25 Tr. 61:3–6, 63:22–24, 68:12–15, 71:20–24.

Midwest Gen argues that the samples are cumulative and therefore should be excluded. Data Obj. at 6–7. According to Midwest Gen, the samples taken under federal coal ash regulations are largely the same as other samples in evidence, but for a “minor difference in the sampling process.” *Id.* The other samples were taken under a State compliance agreement. Midwest Gen argues that including both sets of samples in evidence may prejudicially be interpreted by the Board as “additional alleged violations.” *Id.*

However, the samples are not cumulative. The Environmental Groups note, among other things, that some samples taken under the federal rule were taken from wells that were not sampled under the State compliance agreement. Data Resp. at 2–3. Even for those wells that appear in both sampling reports, the different sampling process used for each set may be a significant distinction. Generally, one set measures “total recoverable” metals while the other measures “dissolved” metals. Oct. 27 Tr. at 7:21–8:2. The sampling reports, while similar, may be sufficiently different, and therefore the federal data is not inadmissibly cumulative. The Board, as a technical body, can parse the multiple sets of sampling reports without misapprehending them. The Board affirms the hearing officer's decision to admit the sampling reports into evidence.

However, the Board grants Midwest Gen's motion to exclude Exhibit 261 from evidence as cumulative. *See* Data Obj. at 4. The Environmental Groups do not oppose this motion because the evidence is available elsewhere in the record. Data Resp. at 10.

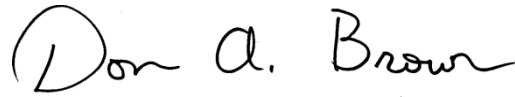
### **CONCLUSION**

The Board affirms the hearing officer's ruling to exclude Exhibit 37 from evidence. The Board also affirms the hearing officer's rulings to admit into evidence Exhibits 5.5, 6, 7, 16, 204G–209G, 210H–215H, 222J–228J, and 236L–241L. But the Board overturns the hearing officer's ruling to admit Exhibit 261 into evidence, and instead excludes it.

IT IS SO ORDERED.

Board Member B.K. Carter abstained.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on January 25, 2018, by a vote of 4-0.

A handwritten signature in black ink that reads "Don A. Brown". The signature is written in a cursive style with a large, circular initial "D".

Don A. Brown, Clerk  
Illinois Pollution Control Board