

ILLINOIS POLLUTION CONTROL BOARD
March 1, 2018

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

HEARING OFFICER ORDER

On January 30, 2018, respondent, during the questioning of Maria Race, moved to admit Exhibit 662 into evidence. Complainants objected to the motion, arguing among other things that the Exhibit is an inadvertently disclosed First-Amendment protected communication. This Exhibit is an internal Sierra Club communication concerning its “Beyond Coal Campaign” activities in Illinois, discussing several coal power plants at issue in this enforcement case. At the hearing, I denied respondent’s motion to admit the Exhibit into evidence, but allowed respondent to make an offer of proof regarding the Exhibit. At that time, counsel for complainants declined to ask any questions of Ms. Race within the offer of proof. I then ordered the parties to address in briefs Exhibit 662’s admissibility. At the hearing on January 31, 2018, however, counsel for complainants did ask some follow-up questions of Ms. Race regarding Exhibit 662 within the offer of proof. Complainants filed a motion to exclude Exhibit 662 and strike all related testimony on February 5, 2018 (Mot.). Respondent filed a response to complainants’ motion on February 9, 2018 (Resp.).

Under Board rules, the hearing officer may admit evidence that is “material, relevant, and would be relied upon by prudent persons in the conduct of series affairs, unless the evidence is privileged.” 35 Ill. Adm. Code 101.626(a). As explained below, Exhibit 662 is not relevant and therefore I grant the complainants’ motion to strike it and all testimony regarding it.

COMPLAINANTS’ ARGUMENTS TO EXCLUDE EXHIBIT 662

Complainants’ argue that Exhibit 662 is not relevant evidence. Specifically, complainants argue that Exhibit 662 is immaterial, irrelevant, and cannot prudently be relied upon. Mot. at 3. Complainants argue that only evidence which is relevant to claims under Sections 12(a) and 21(a) of the Illinois Environmental Protection Act (“Act”) should be admitted. *Id.* at 4, *citing* 415 ILCS 5/12(a), 21(a) (2016). Sections 12(a) and 21(a) regulate pollution *via* water discharge or open dumping. *Id.*

Complainants argue that evidence admitted to the record in this proceeding must directly relate to water pollution and open dumping; otherwise it is irrelevant and should be excluded. *Id.* Because Exhibit 662 does not contain facts that relate to the presence or absence of water pollution or open dumping at the power plants in question, complainants contend it is irrelevant and must be excluded.

Complainants also argue that admitting Exhibit 662 would violate complainants' First Amendment rights. *Id.* Complainants state that numerous courts have confirmed the right to associate include the right to internal communications at advocacy organizations. Thus, complainants argue, admitting Exhibit 662 would violate Sierra Club's right to protected organization speech under the First Amendment. *Id.*

RESPONDENT'S ARGUMENT TO ADMIT EXHIBIT 662

Respondent argues that Exhibit 662 should be admitted because it is a relevant document that a prudent person would rely upon. Resp. at 2. There are two components to respondent's argument: (1) Ms. Race is a reasonable and prudent person who relied on the document; and (2) the document is relevant because it addresses Sierra Club's "Beyond Coal Campaign" which is directly relevant to the citizen enforcement action. *Id.* at 3. Furthermore, respondent argues that the document shows complainants' motives in the litigation at hand: to shut down coal plants. *Id.* at 4.

Respondent also argues that First Amendment privilege is inapplicable here because the document was discovered on a public website, and Sierra Club was not compelled to reveal it *via* discovery or other legal means. *Id.* Furthermore, respondent asserts that Sierra Club did not make a *prima facie* showing of a First Amendment right. *Id.*

DISCUSSION

Relevant evidence means any evidence having a tendency to make any fact of consequence to the determination of the action more or less probable. Ill. R. Evid. 401. Furthermore, section 101.616(a) of the Board's procedural rules provides that "[a]ll relevant information and information calculated to lead to relevant information is discoverable, excluding those materials that would be protected from disclosure in the courts of this State pursuant to statute, Supreme Court Rules or common law, and materials protected from disclosure under 35 Ill. Adm. Code 130." 35 Ill. Adm. Code. 101.616(a). Specifically, Board rules state that a hearing officer may "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). Additionally, the Board may look to the Code of Civil procedure and the Supreme Court Rules for guidance where the Board's procedural rules are silent. 35 Ill. Adm. Code. 101.616(a).

Exhibit 662 Is Not Relevant

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.

Respondent also asserts that Exhibit 662 is relevant because it illustrates complainants' motives. The Board has previously found that motive is irrelevant when there is a clear and justifiable basis in law for the party's action. *E.g.*, Ashland Chemical Company v. Environmental Protection Agency, PCB 76-186, slip op. at 4 (Feb. 17, 1977). Complainants' allegations are directly relevant to enforcement. Thus, there is a clear and justifiable basis in the law and Sierra Club's motives are irrelevant.

Having found Exhibit 662 is irrelevant, I will not address the constitutional issues raised by complainants. "It is settled that courts should avoid constitutional issues when a case can be decided on other grounds." People v. Alcozer, 241 Ill. 2d 248, 253 (2011). Because Board rules resolve this issue, it is unnecessary to consider the parties' First Amendment arguments.

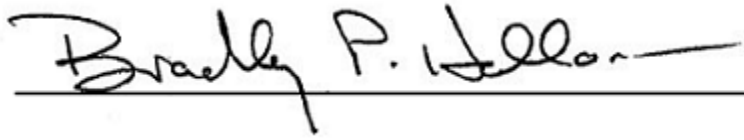
Exhibit 662 Is Struck from the Record

Having found Exhibit 662 irrelevant and immaterial, I now consider whether to strike Ms. Race's testimony regarding Exhibit 662. In considering a motion to strike, I must consider whether "material prejudice would result if the motion is not accepted." People v. Skokie Valley Asphalt Co., Inc., PCB 96-98, slip op. at 2 (Oct. 17, 2002). Here, as discussed above, Exhibit 662 contains material that has no probative value and may be prejudicial if admitted. I find that this same assessment applies equally to Ms. Race's testimony based on Exhibit 662. Thus, Exhibit 662 and all testimony regarding it is stricken. Accordingly, the Exhibit and related testimony are not part of the record of this case.

ORDER

I find Exhibit 662 irrelevant and immaterial. I order Exhibit 662 excluded from evidence and testimony regarding it stricken from the record.

IT IS SO ORDERED.

A handwritten signature in black ink that reads "Bradley P. Halloran". The signature is written in a cursive style and is positioned above a solid horizontal line.

Bradley P. Halloran
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