ILLINOIS POLLUTION CONTROL BOARD
July 13, 2022

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

HEARING OFFICER ORDER

From February 4, 2022, to April 12, 2022, the parties have filed volumes of motions, responses, replies and sur-replies pertaining to the upcoming remedy hearing in the above-captioned enforcement matter. Due to the volume of the filings, I will summarize each separately and then provide ruling on each. However, because complainants, SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIE RIVERS NETWORK, AND CITIZENS AGAINST RUINING THE ENVIRONMENT (collectively, Environmental Groups or complainants), and respondent MIDWEST GENERATION, LLC (MWG or respondent) filed a few combined responses, replies or sur-replies, I combine those as well and abbreviate the headings as needed.

Abbriviated Procedural History

After 10 days of hearings, the Board entered an Interim Order finding that MWG violated the Illinois Environmental Protection Act (Act), including Sections 12 (a), 12 (d) and 21(a) of the Act, and Sections 620.115, 620.301(a) and 620.405 of the Board's regulations. The Board further found that an additional hearing was required because the record lacked sufficient information to determine the appropriate relief and any remedy, considering Sections 33(c) and 42 (h) of the Act (415 ILCS 5/33(c) and 42 (h) (2016)). Sierra Club, et.al, v. Midwest Generation, LLC, PCB 13-15 slip op. at 92-93 (June 20, 2019). (Interim Order).

Following the Board's Interim Order, the Board issued a revised Board order as a result of MWG's motion to reconsider and clarify. Sierra Club, et.al, v. Midwest Generation, LLC, PCB 13-15 (February 6, 2020) (Revised Board Order). In its Revised Order, the Board granted in part and denied in part MWG's motion to reconsider. The Board reversed its finding in the Interim Order that found that the GMZs had expired. "However, the Board affirms MWG's violations of the Act (415 ILCS 5/12 (a), 12(d), 21 (a) (2016)) since at least 2010. Additionally, the Board affirms MWG's violations of Part 620 (35 Ill. Adm. Code 620.115, 620.301 (a), 620.405) from at least 2010 until the GMZs were established: August 8, 2013, at Joliet; July 2,

2013, at Will County; and October 3, 2013, at Powerton. MWG's violations of those Board regulations are stayed as of those dates." *Id*. at 13.

Discovery was reopened for the remedy phase of this enforcement matter and has been completed. After discovery was completed, multiple motions were filed. Each of these will be addressed in turn below, starting with MWG's motions *in limine* filed on February 4, 2022. Complainants timely filed responses to the motions. There were motions to file replies, and in some cases for sur-replies.

Complainants also filed motions *in limine* on February 4, 2022, which will be addressed next. MWG timely filed responses to the motions. There were motions to file replies.

MWG's Motions *In Limine* Regarding Exclusion of Evidence

MWG's Motion *In Limine* to Exclude Evidence of the Need for a Remedy at the Historic Areas of CCR at Joliet 29 with Exhibits

On February 4, 2022, MWG filed a motion *in limine* to exclude evidence of the need for a remedy at the historic areas of CCR at Joliet 29 with exhibits. (Mot. or Joliet 29 Mot.). MWG argues that in the Board's June 20, 2019, Interim Order, the Board discussed three historic fill areas at the Joliet 29 Station: "where coal ash was deposited before MWG began operating – the Northeast Area, Northwest Area, and Southwest Area. Interim Order, pp. 26-28" Mot. at 2. MWG further argues that when the Board was discussing the Northeast, Northwest and the Southwest historic areas of Joliet Station 29, the Board noted that "no monitoring wells are installed around any of these areas [and] that the monitoring wells nearest to the historic fill areas are unlikely to show conclusive results of any contaminants emanating from this historical area." *Id*.

The respondent states that the parties proceeded to discovery for the remedy hearing with thousands of documents being exchanged, eleven witnesses deposed, including six expert witnesses. Mot. at 3. The documents included "annual inspections of the Northeast Area, including photographs, which show no release or discharge of material from the area. Also, the record shows that ash in the Northwest Area was removed in 2005 shortly after the material was analyzed." Mot. at 3.

Further, MWG argues that Section 21(r) of the Illinois Environmental Protection Act (Act), coupled with 21(d) of the Act, controls and not Section 21(a) of the Act. MWG argues that no remedy is required because "Section 21(r) allows storage or disposal of CCW outside of the permitted landfill- that was generated by a person's own activities." *Id*. at 5,7. "[B]ecause the CCW in the historic fill areas are in compliance with the Act, any evidence of a remedy for those areas should be excluded." *Id*. at 7. Citing People ex rel. Madigan v. Wildermuth, 2017 IL 120763, par. 17(one should give effect to the intent of the legislature), MWG states that "these are the protections that the General Assembly intended generators to have." *Id*. at 7. MWG also cites Knolls Condo. Ass'n v. Harms, 202 Ill 2d 450, 459 (2002), for its argument that "where

there exists a general statutory provision and a specific statutory provision…both relating to the same subject the specific provision controls and should be applied." *Id*.

In any event, MWG asserts that "[c]omplainants did not conduct any investigation of the historic fill areas at Joliet 29 during discovery to determine whether they were a source of groundwater contamination." *Id*. Nor is it MWG's obligation to do so. *Id*.

To that end, MWG requests that their motion *in limine* be granted "barring evidence relating to the need for a remedy, or remedy for, the historic fill areas at the Joliet 29 Station." Mot. at 8.

MWG'S Motion *In Limine* to Exclude the Former Ash Basin at the Powerton Station From Consideration of a Remedy with Exhibit

MWG also filed a Motion *in limine* to exclude the former ash basin at the Powerton Station from consideration of a remedy. (Mot. or Powerton Mot.) MWG requests that an order be entered "barring evidence relating to a need for remedy, or remedy for the Former Ash Basin (FAB) at the Powerton Station" because the Board found in its Interim Order that "FAB was not a source of contamination at the Station". (FAB Mot. at 1). In support, MWG states that the Board did not find that the groundwater samples taken downgradient of the FAB showed coal ash constituents and that "the Environmental Groups did not prove that it is more likely than not that this basin is a source of contamination at the Station." FAB Mot. at 2. Therefore, MWG continues, that "[b]ecause the Board found that the groundwater downgradient of the FAB showed no ash constituents, and thus was not a source of contamination at the Station, evidence concerning the need for a remedy, or a remedy, should be excluded for the FAB." *Id.*

MWG notes, however, that the Board, over MWG's objections, found that the ash in the historic fill areas was coal combustion waste. *Id*. at 1. Continuing its reliance of Section 21(r) of the Act, MWG argues that "coupled with Section 21(d), allows disposal of coal combustion waste on a person's property that was generated by a person's own activities. Thus, the material may remain in place." *Id*. at 2. Therefore, because the FAB that was used by the former owner was in compliance with Section 21(d) and (r) of the Act, Section 21(a) of the Act is not applicable and any evidence relating to a remedy must be barred. *Id*. at 4-5. MWG again cites to Wildermuth for its proposition that this what the General Assembly intended and one must give effect to the intent of the legislature. *Id*. at 4.

MWG's Motion In *Limine* to Exclude Evidence of the Need for a Remedy at the Former Slag and Bottom Ash Placement Area at Will County Station with Exhibits

MWG files this motion *in limine* to bar evidence relating to a need for a remedy for the Former Slag and Bottom Ash Placement Area at the Will County Station (Mot. or Will County Motion) "because there is no evidence that the area is a source of contamination and because Section 21(r) of the Illinois Environmental Protection Act allows disposal of coal combustion waste (CCW) that was generated by the site owner and disposed at the site." Mot. at 1. MWG refers to it as "Former Placement Area." *Id*. MWG states that the Board in its Interim Order found that while there was a monitoring well in the Former Placement Area in 1998, "the Board

did not include the results from the sampling of the well." *Id*. at 3. MWG then refers to the Environmental Groups Hearing Exhibit 18D, and attached to their motion, to demonstrate that there are no coal ash constituents.

MWG argues that it should not be required to investigate for groundwater contamination when "there is no evidence that the Former Placement Area is a potential source of contamination, and the totality of the evidence demonstrates that it is not." *Id*. at 5. "The Board's finding that MWG 'allowed' groundwater contamination at its Stations does not equate to forcing a remedy in those locations where there is no proof of a source…" *Id*. at 6.

Finally, MWG argues that because the Board found that the waste stored at the historic areas and other areas was CCW, Section 21(r) allows "the storage or disposal of CCW outside of a permitted landfill" is applicable and not 21 (a) of the Act. *Id.* at 7. MWG again cites to Wildermuth in support of its General Assembly statutory intent argument. *Id*. at 8.

Environmental Groups Responses to MWG's Motions *In Limine* to Bar Evidence of a Need for Remedy at the Historic Areas of CCR at Joliet 29, the Former Ash Basin atthe Powerton Station and at the Former Slag and Bottom Ash Placement Area at the Will County Station

The Environmental Groups combined and unpaginated responses argue that all three motions should be denied "because each one improperly attempts to challenge the Board's 2019 liability order, misstates the effect of Sections 21(d) and 21(r) of the Environmental Protection Act, and would frustrate the goals of these proceedings by preventing a remedy that cures all violations found by the Board." Resp. at 1-2 .

In response to MWG's argument that any evidence "relating to the need for a remedy, or remedy" at the historic fill areas at Joliet 29, including the Northeast Area, the Southwest Area and the Northwest Area should be excluded the Environmental Groups assert that the Board found that MWG's historical coal ash storage and fill areas are contributing to groundwater contamination and the MWG violated Section 21(a) of the Act at all four Stations. *Id*. Complainants argue that MWG's position "fundamentally misconstrues the procedural posture of this case. MWG cannot avoid its responsibility for a remedy by second-guessing the Board's liability findings. Regardless of whether the historic fill areas are a source of the contamination identified in a given groundwater monitoring well, they are violating Section 21(a) of the Act…" *Id*. at 3. In support, the Environmental Groups cite to the Board's finding that "it is immaterial whether any specific ash pond or any specific historic ash fill area can be pinpointed as a source to find MWG liable." *Id*.

Complainants maintain that it is indisputable that the Board found that all three historic coal ash sites; Northwest, Northeast and Southeast contain historic ash. *Id*. at 4. Given the Board's findings, complainants argue that they should not have to "re-establish liability because the Board already made a liability determination." *Id*. Complainants argue that "[i]t is now MWG's responsibility to remedy these violations." *Id*. The "appropriate" relief the Board seeks involves "a more thorough characterization of the nature and extent of the historic fill areas, and this is something that MWG--not Complainants--should do." *Id*.

The Environmental Groups next address MWG's reliance on Section 21(r) and Section 21(d) of the Act that MWG argues allow "unpermitted disposal of coal combustion waste that was generated by the site owner and disposed on the site, even that storage or disposal would otherwise violate Section 21 (a) of the Act." *Id*. at 8. Complainants take issue with MWG's citation to Knolls Condo Ass'n. to support MWG's statutory interpretation argument. Complainants agree that when there are conflicting statues, the more specific one applies. But complainants state and as found in Knolls Condo Ass'n., "[a] court presumes that the legislature intended that two or more statues relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative." *Id*. Complainants argue that neither Section conflicts with each other and both Sections can be read harmoniously and that "both Sections 21(a) and 21(r) apply to the historic ash at the MWG plants." *Id*. Complainants opine that that "21(r) generally prohibits coal ash storage disposal [but pursuant to] Section 21 (r)(1) [it] only provides an exemption from that general prohibition for two circumstances—where either the facility has a permit or is not required pursuant to Section 21(d)—and neither of these circumstances apply here." *Id*.

The Environmental Groups first state that the Board in its Interim Order found that MWG lacked permits in these historic coal ash areas. *Id*. And second, any exemption from a "permit requirement for 'wastes generated by such person's own activities which are stored, treated, or disposed within the site where the wastes are generated'" must be minor amounts as held by case law. *Id*. at 9. Complainants point out that the historical ash disposal areas at Joliet 29 do not contain minor amounts of waste. *Id*.

Powerton Station-FAB.

Complainants next incorporate their arguments made in Joliet 29 above but address the specific facts to MWG's Powerton motion.

Similar to the the Joliet 29 motion, MWG files this motion in *limine* to exclude evidence relating to the need for remedy or remedy for the FAB at the Powerton Station. The Environmental Groups state that the Board in its Interim Order found that MGW violated Section 21(a) of the Act at the Powerton Station "by allowing coal ash to consolidate in the fill areas around the ash pounds and in historical coal ash storage areas…" The Board likewise found that "MWG did not take measures to remove [the coal ash] or prevent its leaking into the groundwaters." Resp. at 10.

Complainant also point out that even though MWG insists that complainants "failed to prove the FAB is a source of groundwater contamination… [t]he Board did find open dumping violations [regarding] the Former Ash Basin…" *Id*. at 11.

Section 21 (r) of the Act does not absolve MWG of its liability under Section 21(a) for the FAB.

Complainants rehash their arguments found in Joliet 29 response above. Complainants argue that Section 21(a) of the Act and Section 21(r) of the Act when read together are harmonious and both apply here. *Id*. at 11. In any event, Section 21(d)(1) only exempts FAB if there was a permit or any coal ash storage disposal at the site was minor. *Id*. at 11. Neither apply here. *Id*.

MWG Improperly Seeks to Avoid a Remedy for Open Dumping of Coal Ash at Will County.

Complainants argue that the Board did find that there was open dumping violations pursuant to Section 21(a) of the Act, including a finding that MWG failed to remove coal ash from the historical fill and storage areas, and therefore complainants state that it must be remedied "regardless of whether there are conclusive links between the Former Placement Area and the evidence of contamination in certain monitoring wells." *Id*. at 12. "It is improper for MWG to attempt to relitigate the issue of liability…" *Id*. at 14.

Next, the Environmental Groups echo their arguments found above that MWG cannot rely on Section 21(r) of the Act to absolve them "of any need to perform a remedy at the Former Placement Area at Will County." *Id*.

MWG's Motion for Leave to File a Reply

On March 18, 2022, MWG filed a motion for leave to file a reply in support of its motions *in limine* to exclude evidence of the need for a remedy at certain areas at three stations. (Reply). The main issues MWG raises in its reply, which have already been briefed, are: 1. discussion regarding Section 21 (r) of the Act and its applicability in the liability phase of this matter; 2. Even if the Board found MWG violated the Act, "does not automatically mean that the Board must also recommend a remedy, particularly when there is no identified impact in certain specified areas." Reply at 1-11.

Complainants' Opposition to MWG's Motion for Leave to File a Reply and in Alternative, Motion for Leave to File Sur-reply

On April 1, 2022, The Environmental Groups filed their opposition to MWG's motion for leave to file a reply or in the alternative a sur-reply. (Oppos.). Complainants 21-page filing, again not paginated, offers no new arguments, only reiterates its prior filings and argues that MWG have offered no new arguments. Oppos. at 1-11.

MWG's Objection to The Complainants Motion to File a Sur-Reply

On April 12, 2022, MWG filed an objection to complainants' motion to file a sur-reply. (Obj.) MWG objects to complainants' misrepresentation allegation and complainants sur-reply is unhelpful. Obj. at 2-8.

Discussion and Ruling

MWG's motions *in limine* are denied.

Regarding the historical areas of Joliet 29, including the Northwest Area, the Northeast Area and the Southwest Area, the Board held that "the evidence establishes that it is more probable than not that these historical coal ash storage and fill areas are contributing to the groundwater contamination." Interim Order at 28. The Board further found that MWG violated Sections 12(a) and 21(a) of the Act at all four stations. (Joliet 29, Powerton, Will County and Waukegan). *Id*. at 92. The Board held MWG liable and directed the parties to a remedy hearing to determine the appropriate relief. *Id*. Therefore, evidence regarding the historical areas is a proper part of the remedy portion of this proceeding. The Board will exercise its judgment in determining the relevance and import of the evidence in determining an appropriate remedy.

As to the Former Ash Basin (FAB) at the Powerton station though the Board found "that the Environmental Groups did not prove that it is more likely than not that this basin [FAB] is a source of contamination at the Station…". However, the Board did find that the Environmental Groups did prove "that the coal ash is spread out across the Stations in the fill and is contributing to the [GQS] exceedances in the Stations monitoring wells." *Id*. at 41-42. Therefore, the Board held that MWG violated Sections 12(a), 21(a) and 21(d). *Id*. at 92. Because the Board found a violation that may be related to the FAB, the evidence will be admitted. The Board will exercise its judgment in determining the relevance and import of the evidence in determining an appropriate remedy.

Relating to the former slag and bottom ash placement area at Will County Station,the Board found that the complainants proved that "the historic areas and coal ash in the fill areas at the Station are causing or contributing to GQS exceedances at the Station." *Id*. at 56-57. The Board held that MWG violated Sections 12(a) and 21(a) of the Act. *Id*. at 92. Therefore, evidence regarding the former slag and bottom ash placement is a proper part of the remedy portion of this proceeding. The Board will exercise its judgment in determining the relevance and import of the evidence in determining an appropriate remedy.

MWG's reliance on Section 21(r) of the Act to argue its liability for contamination does not save it. Generally, under Section 21(r), the areas in question here must be exempt from the need of a permit under certain conditions or the owner has obtained a permit. Neither is present here. The Board found that none of the coal ash storage areas in question have permits. *Id*. at 90-91. Further, no exemptions exist for the areas in question. In any event, MWG's argument that Section 21(d) absolves it from liability is waived. The Board found MWG liable. MWG certainly could have raised a Section 21(r) argument in the liability proceeding along with its other affirmative defenses. *See* Interim Order at 19-20. It did not.

The reply and sur-reply are not necessary to fully analyze these issues. Therefore, the parties' motions to file leave to reply and sur-reply are denied.

MWG's Motion In Limine To Exclude Jonathon Shefftz Opinions with Exhibits MWG's Argument

MWG filed a motion *in limine* to exclude Jonathon Shefftz opinions. (Mot.) MWG presents 11 pages with an attached disclosable exhibit arguing that Mr. Shefftz expert opinions should be excluded because: 1. Economic benefits analysis not based on reliable evidence; 2. Speculative and lacks foundation; 3. Opines on how the Board should interpret its regulations. Mot. at 1. Because the above opinions must be excluded, MWG, continues, Mr. Shefftz opinion on MWG's ability to pay for his suggested penalty must also be excluded. *Id*.

Regarding MWG's argument that Mr. Shefftz economic benefit analysis must be excluded, MWG states that "Mr. Shefftz sourced almost all of his economic benefit analysis inputs (the date of compliance, length of remedy, and the correct remedy) solely from statements made by [complainants] counsel. *Id.* at 5. "Second, [Mr. Shefftz] determined his capital investment/cost of remedy from the report of the previous expert, James Kunkel." *Id*. Citing caselaw, MWG argues that "reliance on counsel's statements was improper. *Id*. at 6. MWG also alleges a confusing situation where complainants expert Mr. Knukel was replaced with a new remediation expert, Mark Quarles. *Id*. at 7. Instead of relying on Mr. Knukel's removal remedy, Mr. Quarles recommends "instead that MWG conduct a 'nature and extent' investigation." *Id*. Therefore, "the cost of Mr. Kunkel's removal remedy, relied upon by Mr. Shefftz to inflate his economic benefit, is apparently not the remedy [complainants] are recommending to the Board. If so, "…Mr. Shefftz reliance on [Kunkel's] cost is patently irrelevant." *Id*.

Finally, MWG argues that Mr. Shefftz opinion, interpretation and application of Section 42(h)(4) invades the Board's interpretation of its own rules and regulations. *Id*. at 9-11.

The Environmental Group's Response to MWG's Motion *In Limine* to Exclude Jonathon Shefftz Opinions

On March 4, 2022, the complainants filed its response to MWG motion. (Resp.) Complainants cite to numerous caselaw to refute MWG's argument that it is improper for an expert to rely on assumptions provided by counsel. Resp. at 1-9. Indeed, complainants argue, that it is "common practice" for an expert to rely on counsel's assumptions when forming his own opinions. Id. at 4. Any issue that MWG has regarding assumptions made by Mr. Shefftz's can be addressed through cross-examination. *Id*. at 5

Complainants also argue that it is proper "that the operational assumptions that were necessary for Mr. Shefftz to reach his opinion in this case either come directly from the previous expert reports in this case or arise naturally by reasonable inference from the record…" *Id*. at 5. Complainants also alleges that MWG misunderstands the scope of Mr. Shefftz's testimony. *Id.* at 9-11. Mr. Shefftz will "offer a methodology for calculating the economic benefit MWG reaped by failing to remediate groundwater contamination at any of the four sites…" *Id*. at 11. Complainants state that Mr. Quarles will testify that "a nature and extent study will be needed to identify the scope of contamination and ash material locations that will need to be cleared"-with an uncertain timeline of remedial action. *Id*.

Finally, complainants respond to MWG assertion that Mr. Shefftz's legal interpretation of Section 42(h) is improper. *Id*. at 12. The Environmental Groups state that Mr. Shefftz's interpretation is not a legal interpretation and that any penalty discussion regarding deterrence where the Board is at liberty "to consider any matters of record in mitigation and aggravation of penalty…" under Section 42(h). *Id*. at 13.

MWG's Motion For Leave to Reply in Support of its Motion *In Limine* to Exclude Jonathon Shefftz Opinion

On March 18, 2022, MWG filed a motion for leave to reply in support of its motion *in limine* to exclude Jonathan Shefftz opinion. (Reply). In summary, MWG argues that it cannot challenge the assumptions made by counsel based on Mr. Kunkel's expert report or the assumptions made by Mr. Shefftiz based on Mr. Kunkel's expert report through cross-examination because complainant's have elected to replace Mr. Kunkel with Mr. Quarles. Reply at 1-13. Moreover, MWG argues that it "cannot cross examine Complainants new expert, Mr. Quarles, about the Kunkel remedy estimates (relied on by Mr. Shefftz) because Mr. Quarles neither reviewed nor relied on the Kunkel reports in any way, he did not review Mr. Kunkel's deposition testimony, and he did not review Mr. Kunkel's hearing testimony." *Id*. at 3.

Complainants' Reply to MWG's Motion for Leave to Reply

On April 1, 2022, complainants file their reply for MWG's motion for leave to reply. (Reply). Citing Section 101.500(d) of the Board's procedural rules, complainants argue that MWG's motion for leave to reply should be denied because MWG fails demonstrate prejudice and MWG offers no new arguments. Reply at 1-4.

Discussion and Ruling

MWG's motion *in limine* to exclude Jonathon Shefftz' opinion is denied.

Experts oftentimes rely on assumptions to formulate their opinions but that does not require the Board to be bound by the opinions of the expert. Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Village Board and Groot Industries, Inc. PCB 14-99 slip at 18, (Aug. 21, 2014). Experts relying on counsel's assumptions or hypotheticals within the realm of direct or circumstantial evidence for their opinion is proper if based on direct or circumstantial evidence. The Board may exercise its own technical expertise in reviewing the assumptions when determining a proper remedy.

As background, complainants' expert, Mr. Kunkel, who testified at the liability proceeding was replaced by Mr. Shefftz. Mr. Shefftz testimony involves economic benefit analysis- as did Mr. Kunkel's. Complainants enlisted another expert, Mr. Quarles, to assist them with remediation issues. Any argument that MWG presents in its motion *in limine* is speculative as to what Mr. Quarles will testify to. Further, MWG may address any concerns it has during its cross-examination of Mr. Shefftz and/or Mr. Quarles. The Board will then consider the weight- not the admissibility- to be given to each.

Finally, expert testimony on the ultimate issue is not objectionable. KCBX v. IEPA, PCB 14-110, slip at 3. (H.O. April 28, 2014), *citing* Townsend v. Fassbinder, 372 3d 890, 905, 866 N.E.2d 631 (2d Dist. 2007)

MWG's motion for leave to reply is denied.

MWG's Motion In Limine to Preclude Evidence Regarding NRG Energy, Inc. MWG's Argument

MWG seeks to preclude evidence regarding NRG Energy, Inc. (Mot.) MWG requests that the Environmental Groups be precluded "from offering any documents, testimony or other evidence regarding the relationship between MWG and its indirect parent NRG Energy, Inc. (NRG), the financial condition of NRG, and any potential economic impact of a penalty and payment on NRG." Mot. at 1. Citing the Board's previous ruling in this case, Sierra Club et al. v. Midwest Generation, holding that NRG information was barred from these proceedings through the Shefftz Opinion unless "Midwest makes an inability to pay argument." *Id*. at 2. MWG alleges that it has not made any inability to pay argument thus far and therefore any information regarding NRG is irrelevant and should be barred. Id.

Complainants' Response to MWG's Motion *In Limine* to Preclude Evidence Regarding NRG

In response, complainants first take issue with MWG's reading of the Board's September 9, 2021, barring Shefftz Opinion regarding NRG information. Resp. at 2. Complainants argue that MWG is still seeking to exclude any information regarding the relationship between NRG and MWG, not just the Shefftz report. *Id*.

Complainants argue that this is what the Board contemplated in its opinion when it held that while the Shefftz report is excluded as it relates to NRG:

> The Board denies Midwest's request in its motion *in limine* to bar any witness from opining or testifying about an entity other than Midwest. Such a blanket request expands far beyond the limited exclusion of NRG from the Shefftz report. NRG information is barred from the expert report but will be allowed to be introduced if Midwest makes an inability to pay argument. Any further request to bar testimony or evidence must be based on specific objections and explanations as to why that information is not relevant. *Id*. 1-2.

Finally, the complainants argue that if the hearing officer does not find the Board's opinion controlling, the hearing officer "should nevertheless decline to decide MWG's Motion independently of other pending motions discussing the scope of evidence that may be before the Board as it conducts its economic reasonableness determination under Section 33 (c)." *Id*. at 3.

Discussion and Ruling

MWG's motion *in limine* to preclude evidence regarding NRG Energy is granted at this time. The Board as already addressed this issue in affirming my April 13, 2021, Order holding that NRG's financials are not relevant. Sierra Club, et al. v. MWG, PCB 13-15 slip op. 2. (September 9, 2021). The Board found that the complainants "have not yet demonstrated the relevance of NRG's finances. Should the facts being considered change, and should the Environmental Groups make a future argument regarding the relevance of NRG's finances, the Board will consider it at that time.". *Id*. at 7. Should the facts change at the remedy hearing under the terms of the Board Order, the door may open for complainants to offer evidence that MWG can draw on NRG's financial resources. Objections, if any, may be entertained at that time.

MWG's Motion In Limine to Exclude Quarles Opinions with Exhibits MWG's Argument

MWG also seeks to exclude Quarles opinions. (Mot.) MWG cites my Hearing Officer Order of September 14, 2020, in support where I allowed the complainants to substitute their expert James Kunkel with a different expert (Mark Quarles- opinion and rebuttal opinion attached as Exhibits 2 and 3). Mot. at 1-2. In that Order, I held that the complainants may substitute James Kunkel with another expert and that "[a]ny testimony already given (liability phase) stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." Order at 3.

MWG argues that Mr. Quarles has not relied on Mr. Kunkel's testimony or opinions, and "Mr. Quarles admits that he did not review Mr. Kunkel's prior reports and was not even aware that Mr. Kunkel had written three reports that included opinions on remedy" *Id*. at 3-4. MWG additionally argues that "one of the options Mr. Quarles proposes directly contradicts Mr. Kunkel's remedy opinion." *Id*.

MWG argues that because Mr. Quarles opinion does not build on or amplify Mr. Kunkel's opinions expressed in the liability phase of this hearing, it will confuse and not aid the Board and therefore should be excluded. *Id*. at 5. MWG further asserts that Mr. Quarles "does not recommend a specific investigation, admits he has not determined the type of nature and extent investigation that should be conducted, and states he has no plans to do so." *Id*.

Finally, MWG argues that Mr. Quarles opinions on the Weaver experts' qualifications should be excluded because they do not aid the Board, "are personal and unsubstantiated attacks on MWG's experts", and that his opinions "are based on nothing more than a review of the Weaver Experts CVs and internet search." *Id*. at 6-9.

Complainants Response to Respondent MWG's Motion *In Limine* to Exclude Quarles Opinions

Complainants argue that Mr. Quarles has been consistent with Mr. Kunkel's testimony in the liability phase and that my September 14, 2020, Order did not limit the substituted expert to only elaborate and amplify Mr. Kunkel's opinions. (Resp.) Complainants argue, however, that the substituted expert may offer "more information". Resp. at 1-3. Complainants allege that

"Mr. Quarles reports show that he builds on, elaborates on, and amplifies the most relevant testimony… and relies heavily on the Board's findings and Interim Order [that] obviously includes evidence, such as Kunkel's testimony, that provided the grounds for the Board's decision." *Id*. at 3.

Complainants continue their argument by stating that Mr. Kunkel's reports are not testimony, are not part of the liability phase record, and Mr. Kunkel's deposition testimony "is not part of the formal liability-phase record, and therefore does not qualify as the kind of testimony the hearing Officer was referring to." *Id.* at 4-5.

Moreover, complainants allege that MWG have not been surprised or prejudiced because MWG has knowledge of Mr. Quarles expert reports and Mr. Quarles has been deposed. *Id*. at 8.

Complainants' dispute MWG's allegations that Mr. Quarles opinions will not aid the Board because his "opinions are specific [and] detailed…" *Id.* at 8-12.

Finally, complainants take issue with MWG's request that Mr. Quarles opinions of the Weaver Experts must be barred. *Id*. at 12. Complainants insist, because Mr. Quarles is an established expert, his opinions of the Weaver Experts will be informative "and the Board can weigh Mr. Quarles testimony accordingly." *Id*. at 14.

MWG's Motion for Leave to file Reply

On March 18, 2022, MWG filed a motion for leave to file a reply. (Mot. for Leave). The main issue MWG presents is the complainants' argument that "any testimony" as found in my Order of September 14, 2020, means only hearing testimony-not Mr. Kunkel's deposition testimony. Mot. for Leave at 1-8. MWG again argues that Mr. Quarles did not build, amplify or elaborate on Mr. Kunkel's testimony and in instances contradicted it. *Id*.

Complainants Opposition to MWG's Motion for Leave to file Reply

On April 1, 2022, the Environmental Groups filed its opposition to MWG's motion for leave to file a reply. (Oppos.). The complainants allege that MWG's motion for leave to reply does not offer me assistance and is only a rebuttal to MWG's prior arguments. Oppos. at 2.

Discussion and Ruling

If complainants' argument that Mr. Kunkel's reports and deposition testimony are not part of the liability phase record is correct, then it was not the testimony my ruling was addressing. ("Any testimony already given stands…"). Complainants argue that Mr. Quarles opinions do not contradict Mr. Kunkel's testimony at the liability hearing, only that it elaborates, amplifies and builds on previous testimony and the Board's Interim Order. MWG's argument that Quarles opinions appears premature and better left to objections at the hearing on remedy. It may be that the Board, as a technical body, can parse through any objections that may arise as to Mr. Quarles testimony.

Mr. Quarles is allowed to give his opinions regarding the Weaver experts. The Board, of course, can weigh accordingly. Any reasonable objections will be entertained at hearing.

MWG's motion is denied.

MWG's motion to file a reply is denied.

Complainants' Motion *In Limine* Motion to Exclude Portions of Respondent's Expert Report, or in the Alternative to Reinstate Portions of Complainants' Expert Report

Complainants' Argument

Complainants seek to exclude portions of MWG's expert witness report, Gayle Koch, where she opines about the ability of MWG's to afford any remedies or penalties the Board my impose. Mot. at 1-2. In the alternative, The Environmental Groups request that portions of Jonathon Shefftz's expert opinion be reinstated where Mr. Shefftz opines about MWG's "close financial and operational relationship with its indirect parent corporation, NRG Energy, Inc." *Id*. at 1.

The Environmental Groups note that the Board previously excluded such testimony in the liability portion this case. Sierra Club et al. v. Midwest Generation, LLC, PCB 13-15 (September 9, 2020). In Sierra Club et al. v. Midwest, LLC, the Board found that Mr. Shefftz's opinion "determines the economic benefit of noncompliance that has been accrued by Midwest, as well as the economic impact of a civil penalty and cost of compliance for both Midwest and NRG." *Id*., slip op. 4. The Board in affirming the Hearing Officer's ruling, found that "Midwest has not put forth an inability to pay argument at this time. It is therefore inappropriate to consider NRG's financials when evaluating Midwest's economic benefit under Section 42(h) of the Act, as NRG is not a named party in this matter." *Id*., slip op. 8. The Board, however, stated that [s]hould Midwest make an inability to pay argument in the future, or should the facts been considered change, the Board will that at the time and the Environmental Groups may renew their request for admission of NRG's financial information." *Id*., slip 9.

Complainants state that Ms. Koch's report "includes a discussion of MWG's financial history," and "as her deposition testimony makes clear, this is an explicit argument that the size of a possible remedy should be reduced to make it more commensurate with MWG's financial limitations." Mot. at 4. To allow Ms. Koch's opinion and exclude Mr. Shefftz's opinion, complainants argue, would be prejudiced if they cannot respond to Ms. Koch's opinion. *Id*.

Midwest's Response in Opposition to Complainants Motion *In Limine* to Exclude Portions of Gayle Koch's Expert Report

MWG argues that Ms. Koch's opinions about economic reasonableness is in "direct rebuttal to Mr. Shefftz's repeated opinions about the financial condition of MWG." Resp. at 2. MWG states that in Mr. Shefftz Second Supplemental Report, (made after the Board denied

complainants efforts to include NRG's finances), Mr. Shefftz opined that MWG could afford compliance costs and penalty. *Id*. at 3. MWG, citing to Shefftz deposition, equates his opinion on MWG's ability to pay. *Id*. "Because Mr. Shefftz concludes that compliance costs and penalty are "economically reasonable and "affordable" to MWG, Ms. Koch's opinions in response regarding MWG's financial condition must be allowed." *Id*. at 4.

Complainants' Motion for Leave to Reply

On March 18, 2022, complainants filed a motion for leave to reply to MWG's opposition to complainants' motion *in limine* to exclude portions of Gayle Koch's expert report (Mot. For Leave). The Environmental Groups reiterate their previous arguments and can be summarized as follows: "MWG is laying the groundwork for an inability to pay argument, and Complainants will therefore be prejudiced if they are unable to offer evidence [including its ability to draw on resources from NRG] to counter MWG's assertions." Mot. For Leave at 2.

MWG's Objection to Complainants Motion for Leave to Reply

On April 5, 2022, MWG filed its objection to complainant's motion for leave to reply. (Obj.) MWG takes issue with complainants' "speculative" assertion the MWG is laying groundwork for an inability to pay argument. Obj. at 6. MWG argues that complainants' motion for leave to reply presents no new information and should be denied. *Id*. at 7.

Discussion and Ruling

Ms. Koch's expert report and her opinions regarding MWG's ability to pay does not pass the threshold the Board envisioned when it held that complainants "have not yet demonstrated the relevance of NRG's finances…" Sierra Club, et al., v. MWG, PCB 13-15 slip op. 2. Ms. Koch's report was merely rebutting Mr. Shefftz's report regarding MWG's ability to pay.

Complainants' motion *in limine* is denied and their alternative argument that portions of Mr. Shefftz's expert report where he opines about the financial and operational relationship between MWG and NRG should be reinstated is likewise denied.

Complainants' motion for leave to file a reply is denied.

Complainants' Motion *In Limine* To Exclude Certain Documents

The Environmental Groups first seek to exclude a newspaper article that MWG's experts may rely on. Mot. at 2. Included in the article are statements made by Faith Bugel, Sierra Club's counsel. Id. at 4.

Complainants argue that the newspaper article is hearsay, and even if not hearsay, it is not evidence that "would be relied upon by prudent persons in the conduct of serious affairs" pursuant to Section 101.626 (c) of the Board's procedural rules. *Id*. at 4.

Next, complainants seek to exclude "derogatory" language found in complainants' expert, Mark Quarles, notes. Complainants state that [i]n one of the note entries, the language "they are idiots too for suggesting too" appears." *Id*. at 5. Complainant seeks to redact the derogatory language because it is prejudicial and has no probative value. *Id*.

MWG's Response to Complainants' Motion *in Limine* to Exclude Certain Documents

MWG argues that Ms. Bugel's statements are the type reasonably relied upon by experts under Illinois Rules of Evidence 703. Resp. at 2. MWG references two excerpts from an article entitled **Historic coal ash raises concerns at iconic Illinois coal plant site,** by Kari Lyderson, Energy News Network (Dec. 21, 2021). (Article) (Attachment 1 to complainants' motion), *Id*. at 4.

MWG notes that first, Ms. Bugel said "[e]nviromentalists' expert witnesses have also not found an immediate risk to drinking water…" Id. at 1-2. Next, MWG quotes a passage from the article:

> "Bugel explained that most of the coal ash repositories at Midwest Generation's coal plants are lined, and unlike many other companies, Midwest Generation frequently emptied the ash and sold it for "beneficial reuse" as construction materials and other uses. That means Midwest Generation's active coal ash ponds subject to the state and federal rules were probably less likely to be contaminating groundwater than many other coal ash sites…" Article at 4.

MWG cites to Illinois Rule of Evidence where it states in pertinent part- "[i]f of a type reasonably relied upon experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." *Id*. at 2-3. MWG argues that "the express statements made by the Sierra Club, directly support the opinions by MWG's experts, Weaver Consultants Group…" *Id*. at 2.

Nevertheless, MWG argues, the statements made by Ms. Bugel are statements made by a party-opponent and not hearsay and therefore admissible. Id. at 4. (*citing* Illinois Rules of Evidence 801(d)).

Citing case law, MWG argues that in the alternative, Ms. Bugel's statements to the reporter is not hearsay, but serves an independent purpose. Here, "MWG may opt to submit Ms. Bugel's statements to show that complainant, Sierra Club, is aware that MWG's ash ponds are less likely to be contaminating groundwater and aware that there is no immediate [sic] to the drinking water. *Id*. at 9.

Finally, MWG argues, again citing case law, that the statement made by complainants' expert, Mr. Quarles, that MWG's experts are "idiots" should not be redacted because it shows bias and impartiality and usually relevant because it goes to his credibility. *Id*. at 9.

Discussion and Ruling

Complainants motion *in limine* to exclude certain documents is denied in part and granted in part. Newspaper articles are generally inadmissible and the "contents of newspaper articles, when offered for the truth of their statements, are hearsay and inadmissible. [Cite- Graham Evidence"?]. Here, MWG argues that Ms. Bugel's statements in the article support its experts that "the surface impoundments likely are not impacting the environment, and that lack of risk supports at the MWG Stations supports its opinion on remedy." *Id.* at 2. Such argument encompasses the truth of the matter asserted. However, the statements by Ms. Bugel are statements by a party-opponent, an exception to the hearsay rule and is not hearsay. Ill. R. Evid. 801(d)(2). Complainants do not contest that Ms. Bugel was misquoted. I also find that the newspaper article expresses Ms. Bugel's opinions about the Waukegan Station "is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged." *See* Section 101.626 of the Board's procedural rules.

The parties' experts, however, are prohibited from giving an opinion on the article or Ms. Bugal's statements within the article because it is not the "type relied upon by experts in a particular field in forming opinions or inferences upon the subject…" *See* Ill. R. Evid. 703.

The motion *in limine* to redact derogatory language found in Mr. Quarles notes is granted. Any relevancy arguments fail where the potentially prejudicial effect is outweighed by its probative value. *See generally* People v. Serritella, No. 1-20-0072, 86 (May 20, 2022).

Complainants' Motion *In Limine* to Exclude New or Revised Expert Opinions Based on Untimely Disclosed Documents

Complainants' arguments

The Environmental Groups filed a motion *in limine* to exclude new or revised expert opinions based on untimely disclosed documents. (Mot.). The documents are as follows:

a. **MWG v. IEPA,** PCB 21-108 (Board Order, Sept. 9, 2021);
b. **MWG v. IEPA**, PCB 21-109 (Board Order, Sept. 9, 2021);
c. **In the Matter of: MWG Petition for Adjusted Standard (Joliet 29 Station),** AS 21-1-including filings in the case;
d. **In the Matter of: MWG Petition for Adjusted Standard (Powerton Station),** AS 21-2- including filings in the case;
e. **In the Matter of MWG Petition for Adjusted Standard (Waukegan Station),** AS 21-3-including filings in the case.

Mot. at 2.

Complainants note that the respondent stated that their experts [Weaver Consulting] may rely on the above documents but have not disclosed which of their experts "may rely on these documents nor what opinions these documents are related to.". *Id*. The Environmental Groups state the "dockets containing the documents listed above were all initiated …before expert depositions, so the initial docket filings could have been disclosed at expert depositions." *Id*. at 4.

Complainants allege that they will be prejudiced by respondent's failure to timely file these documents. *Id*. at 3. Because "[c]omplainants have not been given an opportunity to have their expert review any expert testimony or opinion Respondent's experts base on these documents…Complainant cannot properly prepare for cross-examination.". *Id*.

Complainants request that respondent's experts be prohibited from providing any new opinions as a result of the untimely production of these documents. *Id*. at 5.

MWG's Response in Opposition to Complainants' Motion *in Limine* to Exclude New or Revised Expert Opinions

MWG argues that, yes, it did timely provide additional materials their experts may rely on pursuant to the agreed discovery schedule and, no, MWG did not offer any new opinions. Oppos. at 1.

MWG argues that the complainants were aware of the public documents, and extensively questioned MWG's experts regarding compliance with the CCR rules and requirements. *Id*. at 3-4. MWG also states that some of the filings and Board Orders relating to their production on January 10, 2022, were filed and or issued after the December 15, 2021, cut-off. *Id*. In support of their position, MWG cites to and attaches to their response in opposition my July 18, 2017, Order which states, in pertinent part, "[t]he testimony at hearing from Environmental Groups' experts may rely on discovery documents produced after those experts' depositions in order to elaborate previously disclosed opinions." Order at 1.

MWG maintains that all the additional documents that were disclosed to the Environmental Groups support Weaver Consulting's existing opinions, including their opinions on compliance. Id. at 2-9. MWG suggest that any opinion that may go beyond elaboration can be objected to at hearing. *Id*. at 2.

Complainants' Motion for Leave to File a Reply

Complainants filed a motion for leave to file a reply. (Mot. for Leave). Complainants allege that MWG's response in opposition misleads the reader because MWG was required to produce any supplemental discovery by December 15, 2021, and that by January 10, 2022, MWG was required to give notice of what their experts will rely on that was produced on December 15, 2021. Mot. for leave at 1-2.

The Environmental Groups distinguish my Order of July 18, 2017, with this scenario. There, the Environmental Groups sought to introduce discovery documents developed and produced after their experts' depositions. Mot. for leave at 6.

MWG's Objection to Complainants' Motion for Leave to File Reply

MWG filed an objection to complainants' motion for leave to reply. (Obj.) MWG argues that complainants' motion *in limine*, filed February 4, 2022, requested that MWG's experts be barred "from providing new opinions (i.e. opinions that were not provided in the expert report and depositions) based on these untimely produced documents. Such documents may only be used to strengthen any previously stated opinion." Obj. at 3. MWG maintains that there will be no new or revised opinions based on the additional documents produced on January 10, 2022. *Id*. The additional documents will be used only to support or strengthen their previously stated opinions. *Id*. Now in complainants' motion for leave to reply, MWG argues that the Environmental Groups have changed their request to prohibit respondent from relying on the additional documents in any way because of their untimely filing. *Id*. at 3-4.

Discussion and Ruling

It appears that complainants were aware of the public documents and questioned the MWG's experts regarding compliance with the CCR rules and regulations. Any of the documents that were submitted after close of discovery is considered to be a party's duty to supplement discovery. If any of MWG's experts go beyond elaboration of their existing opinion, the complainants may object at that time. In any event, the Board may take official notice of the documents on their website. *See* Board's procedural rules 101. 630; People v. Toyal, Inc. PCB 00-211 slip op. 1-3 (July 15, 2000); McAfee v. IEPA, PCB 15-84 slip op. 2 (March 5, 2015); Dupage Publications v. IEPA, PCB 85-44; 85-70; 85-130 (consol.) slip op. 7 (August 14, 1986).

The Environmental Groups' motion *in limine* is denied.

The parties' respective motions for leave to file a reply are denied as they are not needed to further their arguments.

Complainants' Motion to Incorporate Certain Documents Into the PCB 13-15 Docket

On February 4, 2022, complainants filed a motion to incorporate certain documents into the PCB 13-15 docket. (Mot.). The complainants' incorporation request concerns a rulemaking initiated by the Illinois Environmental Protection Agency (IEPA) and now before the Board. Mot. at 3. The Board's docket, **In re Standards for the Disposal of Coal Combustion Residuals in Surface Impoundments:** 35 Ill. Adm. Code 845, R 2020-19, (March 30, 2020). One of the topics included "areas of environmental justice concern". *Id*. Pre-filed testimony by IEPA attorney Chris Pressnall stated in part- "The proposed prioritization scheme assists owners and operators in determining where and how to spend their resources by categorizing impoundments based on risk to health and the environment and the impoundments proximity to areas of environmental justice concern…". *Id*.

The Environmental Groups argue that Pressnall's pre-filed testimony is relevant to this proceeding especially because "[o]ne of the factors that the Board considers when determining a remedy is "the suitability or unsuitability of the pollution source to the area in which it is located, including the question or priority of location in the area involved." 415 ILCS 5/33(c)(iii). *Id*.

Another relevant document found in the docket, complainants argue, is the IEPA's pre-filed answers that was filed on August 3, 2020. *Id*. at 4. "This document contains IEPA's answers to pre-filed questions directed at Chris Pressnall, including a table that indicates which surface impoundments in Illinois are within Environmental Justice areas.". Id. at 4-5.

The complainants opine that the documents are authentic, relevant and credible where the IEPA witnesses were cross-examined at the hearing, including cross-examination of IEPA's answers to the pre-filed testimony. Id. at 5.

MWG's Response in Opposition to Complainant' Motion to Incorporate Certain Documents

On March 4, 2022, MWG filed a response in opposition to complainants' motion to incorporate certain documents. (Resp.) MWG argues that Mr. Pressnall's pre-filed testimony and pre-filed answers do not discuss any of the Stations at issue here and therefore unrelated and irrelevant. Oppos. At 2-3. MWG states that Mr. Pressnall's testimony concerned "environmental justice considerations for closure of statewide impoundments in a proposed rule. Simply because this case and the Illinois CCR Rulemaking concern the overriding and general topic of CCR impoundments does not make Mr. Pressnall's testimony or material relevant." *Id*. at 4. None of his testimony assist in determining a remedy under Section 33 (c) of The Illinois Environmental Protection Act. *Id*. at 6. To allow Mr. Pressnall's irrelevant testimony and pre-filed answers to be incorporated in this case would be prejudicial to MWG without any connection to the suitability or unsuitability of the MWG Stations and its CCR surface impoundments to their location." *Id*. at 7.

Next, MWG argues that complainants failed to file the material to be incorporated as required by Section 101.306 of the Board's procedural rules. Id. Moreover, while the links the complainants provided in their motion include Mr. Pressnall's pre-filed testimony and pre-filed answers, they also include the seven other IEPA witnesses, creating confusion as to what excately the complainants wish to be incorporated. *Id*. at 8. Further, MWG argues that if Mr. Pressnall is an expert, complainants should have named him pursuant to the discovery schedule and therefore the complainants waived the right to name him now. *Id*. at 10. Contrarily, MWG argues that Mr. Pressnall is not an expert in CCR or groundwater contamination or remedies and therefore "does not have the experience and qualification to afford him the knowledge to give an opinion here." *Id*. at 11. "To include Mr. Pressnall's testimony from the Illinois CCR Rulemaking into this private enforcement proceeding would require reopening discovery, allowing MWG to depose Mr. Pressnall, and allowing MWG to submit an expert testimony in rebuttal. *Id*.

Complainants' Motion for Leave to Reply to MWG's Response in Opposition with Exhibits

On March 18, 2022, the Environmental Groups filed a reply to MWG's response in opposition. (Reply). The complainants allege "MWG's Response fundamentally mischaracterizes Complainants Motion, creating material prejudice." Reply at 1. The

Complainants cite **Webb & Sons, Inc. v. IEPA**, 2007 WL 555673, in support of their argument of incorporation. *Id*. at 3-4. The first incorporated document in **Webb** was regarding the same site but separate appeals and was found relevant as background information. **Webb** at. In regards to the second document that was incorporated- testimony from a UST Rulemaking document- the Board found that the documents were "public Board records related either to the site at issue or to the Boards regulations generally. Granting Webb's motion would not incorporate new data into Agency record but would only incorporate documents of which the Board can take notice." *Id*. at.

Complainants agree with MWG that Mr. Pressnall's testimony does "describe the environmental considerations for closure of statewide impoundments in a proposed rule, those considerations still apply to the sites at issue and are therefore relevant." *Id*. at 4.

Due to the length of the documents requested to be incorporated, complainants state that they provided the links with the relevant page numbers. Reply at 8. In any event, complainants now attach the documents in question to their reply. *Id*. at 9.

MWG Objection to Complainants' Motion for Leave to File a Reply

On April 5, 2022, MWG filed its objection to complainant's motion for leave to file a reply. (Obj.) MWG offers no new arguments, however, it does argue that complainants ran afoul of Section 101.306 of the Board's procedural rules by not submitting/attaching the documents in their initial motion- and then submitting/attaching the documents to their motion for leave to file a reply does not cure the omission. Obj. at 4-5.

Discussion and Ruling

Section 101.306 (b) of the Board's procedural rules provides;

> The Board will give the incorporated matter the appropriate weight in light of following factors: the standard of evidence under which the material was previously presented to the Board; the present purpose for incorporating the material; and the past and current opportunity for cross-examination of the matters asserted within the incorporated material.

MWG's argument that complainants did not attach the material sought to be incorporated to its motion has been remedied. The Board may find that the rulemaking regarding coal ash residual/ponds assists them in determining a remedy in this matter and therefore relevant. The absence of MWG's cross-examination of Mr. Pressnall, either then or at the upcoming remedy hearing, will be appropriately weighed by the Board. *See also* Dupage Publications, slip op. 7 (Board took official notice of proposed regulatory language).

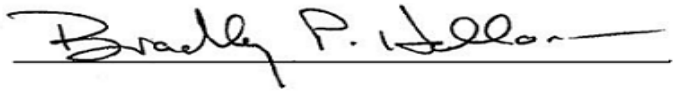
Complainants motion to incorporate certain documents is granted.

Complainants motion for leave to file a reply is denied.

Motions for Interlocutory Appeal from Hearing Officer Orders

The parties are advised that if they choose to file an interlocutory appeal, it must be filed within 14 days after the party receives the hearing officer's written order. Filing a motion for interlocutory appeal will not postpone a scheduled hearing, stay the effect of the hearing officer's ruling, or otherwise stay the proceeding. *See* Section 101.518 of the Board's procedural rules. *But see* Section 101.514 of the Board's procedural rules addressing motions to stay proceedings.

IT IS SO ORDERED.



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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed on July 13, 2022, to each of the persons on the service list below.

It is hereby certified that a true copy of the foregoing order was e-mailed to the following on July 13, 2022:

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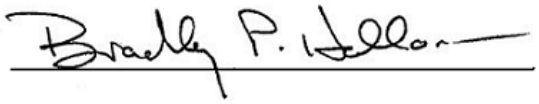

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