

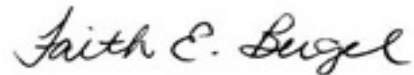
BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
)	
SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
CITIZENS AGAINST RUINING THE)	
ENVIRONMENT)	
)	PCB No-2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION IN LIMINE TO EXCLUDE THE KUNKEL REMEDY REPORT** copies of which are attached hereto and herewith served upon you.

Respectfully submitted,



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Attorney for Sierra Club

Dated: May 12, 2023

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:)	
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SIERRA CLUB, ENVIRONMENTAL)	
LAW AND POLICY CENTER,)	
PRAIRIE RIVERS NETWORK, and)	
CITIZENS AGAINST RUINING THE)	
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)	(Enforcement – Water)
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

COMPLAINANTS’ RESPONSE TO MIDWEST GENERATION, LLC’S MOTION IN LIMINE TO EXCLUDE THE KUNKEL REMEDY REPORT

Midwest Generation’s (MWG’s) Motion in Limine (“MWG’s Motion”) to exclude the Kunkel Remedy Report should be denied. It is untimely because it was filed after the time for motions in limine had passed. It also raises issues that have already been decided against MWG in the Hearing Officer’s order of July 13, 2022 (pp.7-10) and the Board’s Order of December 15, 2022 (pp.15-7), both of which allowed the testimony of Complainants’ expert Jonathan Shefftz to be offered into evidence even though it explicitly assumed matters contained in the Kunkel Remedy Report. Most clearly, however, MWG’s Motion should be denied because MWG misconceives and misrepresents the limited purpose for which the Kunkel Remedy Report is being offered, which is simply to show the starting point and context for the Shefftz report and testimony.

Given the limited purposes for which the Kunkel report is being offered, testimony from Mr. Shefftz that he received the Kunkel report, and used it in developing his expert testimony, is

authentication enough. And Complainants intend to authenticate, the Kunkel Remedy Report as the document on which Mr. Shefftz relied, through Mr. Shefftz's testimony. In the words of *Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35 (2000), cited by MWG (Mot. in Lim. p.4), Complainants have fully authenticated that the Kunkel Report is what Complainants "claim[] it to be," which is the document on which Mr. Shefftz relied.

The Kunkel Remedy Report is not being offered for the truth of anything in the report. For the limited purpose for which the report is being offered (which was to provide a baseline cost assumption to ground Mr. Shefftz's calculations), Dr. Kunkel's particular authorship is immaterial. If MWG wishes to try to prove through cross-examination of Mr. Shefftz that he is lying or confused and did not in fact rely on the Kunkel Report, it is free to do so. But the cases MWG cites, which all involve reports offered to prove the truth of matters contained in those reports, are simply irrelevant.

The vehemence of MWG's motion seems to be based on a misreading of the Complainants' Pre-Hearing Memorandum Regarding Remedies. While more or less accurately describing at length all the times Complainants have stated that we are not introducing testimony from Kunkel in order to support any particular remedy for MWG's violations, MWG proceeds to fabricate a fantastical plot that Complainants will somehow use Dr. Kunkel's report to collaterally persuade the Board to adopt Dr. Kunkel's suggested remedy, full clean-up of the MWG sites. (MWG Mot. in Lim. p.3)

To be clear, Complainants do argue and believe that the Board would be justified in ordering a cleanup as a matter of law. But this belief is not based on Dr. Kunkel's report; it is based on an interpretation of the applicable law. Complainants have no intention, nor have we ever stated an intention, to use Dr. Kunkel's report to support the legal argument that the Board

is entitled to do what the law allows and presumes will be done. In fact, Complainants have offered extensive expert testimony in support of an entirely different remedy. This is explained in Complainants' Pre-Hearing Memorandum on Remedy in the section entitled "Presumption of Removal" (pp. 4-5). Kunkel is not even mentioned in this section of the Complainants' Pre-Hearing Memorandum on Remedy.

The limited purpose of Dr. Kunkel's Remedy Report in this proceeding and the fact that Complainants are not asking the Board to order the remedy proposed by Dr. Kunkel is spelled out later in the Pre-Hearing Memorandum on Remedy. (p.8) That Dr. Kunkel's suggested remedy is the same as the remedy that the Board may find is necessary as a matter of law does not mean that Complainants are implicitly offering Dr. Kunkel's testimony or even advocating for a remedy other than the nature and extent study supported by Complainants' expert Mark A. Quarles. The remedy Complainants seek is exactly what is discussed in the Quarles Report, about which Quarles has been deposed by MWG.

MWG's fear that the Board will somehow rely on the Kunkel Report to reach a conclusion for which no one is offering the report is not plausible. There is no reason to believe that the Board is incapable of using the Kunkel Report simply as a basis for understanding the testimony to be given by Dr. Shefftz. As the Board held in holding that the Shefftz testimony could be admitted:

MWG's concerns regarding the basis for the input values Mr. Shefftz used in his economic model can be raised during cross-examination. Deficiencies, faults, inconsistencies can also be raised at that time or elaborated in post-hearing briefs. Again, the Board is a technical body – it has been able to and is currently about to evaluate expert testimony including arguments regarding the scientific and mathematical basis for the expert testimony. (p.17)

Even the case principally relied on by MWG, *People v. Johnson*, 238 Ill. 2d 125 (2010) *aff'd Williams v. Illinois*, 567 U.S. 50 (2012), does not support MWG's position. To the contrary,

Williams makes clear that evidence that is not admissible for one purpose can still be offered for another purpose, and that an expert may testify on conclusions that are based on assumptions taken from a non-testifying expert's report. Indeed, *Williams* held that the State's expert was allowed to testify as to the facts and data that he assumed based on the non-testifying expert's report, 238 Ill. 2d at 145-50. *Williams* held that this was acceptable as long as the non-testifying expert's report on which the State's expert relied was not offered "for the truth for the matter asserted." 238 Ill. 2d at 150. This is exactly the case here with Mr. Shefftz and his reliance on Dr. Kunkel's report.

Nor is it particularly relevant that in *Williams* the non-testifying expert's report was not itself admitted into evidence, 218 Ill.2d at 145; there is no indication that the decision in *Williams* would have changed if the report were admitted instead of discussed by the testifying expert. Indeed, direct admission of the report is preferable to the situation in *Williams*; it is hard to imagine how testimony regarding a non-testifying expert's report presents any lesser hearsay concerns than the actual report; and conversely, it is easy to see how having the actual report in the record will make it easier for the Board to evaluate whether the testifying expert interpreted the assumptions on which he based his opinions accurately. Thus, it is better to let the decision maker see the underlying report than to fill the transcript with unverifiable testimony about the report.

Williams repeatedly emphasized that the testimony about the report was admissible given the limited purpose for which the testifying expert used the non-testifying expert's report, and that the non-testifying expert's report was not offered for the truth of the matters stated in the non-testifying experts report. 238 Ill. 2d at 144, 145, 147, 150. Again, Complainants here do not offer the Kunkel Remedy Report for the truth of anything other than as a document on which

Shefftz relied for an assumption.

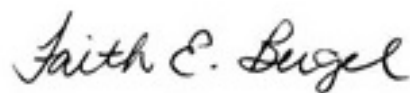
MWG also argues that the whole Kunkel Report should not be admitted because Shefftz testified that he only “relied” on a portion of it. One can be certain that if Complainants proposed to only offer a portion of the Kunkel Report to show the assumptions underlying the Shefftz testimony, MWG would object that Complainants were cherry picking or otherwise trying to cover something up. Shefftz obviously was given the entire Kunkel Report in order to determine what pieces to rely on, and the Board should have access to the entire Kunkel Report in order to gauge the reasonableness of Shefftz’ use of it.

Conclusion

MWG is exaggerating its risks here: Complainants have given MWG no reason to believe that it is offering the Kunkel Report in any way that was not fully disclosed years ago and discussed at length in the Shefftz deposition. Further, the Board is fully capable of using at the Kunkel Report for its explicitly intended purpose: as a document Mr. Shefftz relied on to develop assumptions that underpin his economic benefit calculations. Complainants have made clear time and again how Dr. Kunkel’s report will be used; its inclusion in this case is useful for that limited purpose, and should not be limited based on MWG’s unfounded fears.

Dated: May 12, 2023

Respectfully submitted,



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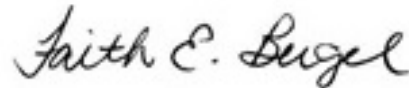
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CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION IN LIMINE TO EXCLUDE THE KUNKEL REMEDY REPORT** before 5 p.m. Central Time on May 12, 2023 to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 9 pages.

Respectfully submitted,



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