

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 2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Don Brown, Clerk	Attached Service List
Illinois Pollution Control Board	
60 E. Van Buren St., Ste. 630	
Chicago, Illinois 60605	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Midwest Generation, LLC's Appeal of the Hearing Officer's Decision to Admit Mark Quarles' Opinions and Reports, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 26, 2023

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing and Midwest Generation, LLC's Appeal of the Hearing Officer's Decision to Admit Mark Quarles' Opinions and Reports was filed electronically on July 26, 2023 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605

and that true copies of the pleading were emailed on July 26, 2023 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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**MIDWEST GENERATION, LLC'S APPEAL OF THE
HEARING OFFICER'S DECISION TO ADMIT
MARK QUARLES' OPINIONS AND REPORTS**

Pursuant to 35 Ill. Adm. Code 101.502(b), 101.518 and 101.626, Respondent Midwest Generation, LLC (“MWG”) appeals the Hearing Officer’s admission of the opinions of Complainant’s expert, Mark Quarles, and his reports, Comp. Exhibit 1101 and Comp. Exhibit 1102. Mr. Quarles entirely disregarded the Hearing Officer’s and Illinois Pollution Control Board (“Board”) orders to build on, elaborate, amplify or sufficiently rely upon the opinions of Complainants’ original expert, and his opinions do not assist the Board. In support of its Appeal, MWG incorporates by reference and attaches: (1) Its Motion in Limine to Exclude Quarles’ Opinions, filed February 4, 2022 (Attachment 1); (2) its Reply in Support of that Motion, filed March 18, 2022 (Attachment 2); and (3) its Appeal of the Hearing Officer’s denial of that motion and memorandum in support of same, filed July 27, 2022 (Attachment 3), and states as follows:

I. BACKGROUND

1. The history underlying the basis for this appeal begins before the first hearing and is described in detail in MWG's July 27, 2022 Appeal of the Hearing Officer's Decision to allow Mr. Quarles's opinions, attached as Exhibit 1 and incorporated by reference.¹ During initial discovery, Complainants' original expert witness, Mr. Kunkel, issued several reports in this case. Then this matter was bifurcated into separate liability and remedy phases. Because the case was bifurcated, Mr. Kunkel's report concerning remedy was not used or placed into evidence. Mr. Kunkel did not testify about any remedy opinions during the first hearing on liability.

2. Following the first hearing on liability, Complainants sought to designate new experts. MWG objected, stating that while substitution of an expert may be allowed under certain circumstances, it is not an opportunity to "introduce new and different theories in this case." *Ind. Ins. Co. v. Valmont Elec., Inc.*, 2001 U.S. Dist. LEXIS 23256, at *4 (S.D. Ind. Dec. 27, 2001).

3. Over MWG's objection, the Hearing Officer allowed the parties to name new expert witnesses, but with conditions. Hearing Officer Order, Sept. 14, 2020. The Hearing Officer stated, "Any testimony already given stands and *the parties must proceed to build on that information and present more information, including elaboration and amplification.*" Hearing Officer Order, Sept. 14, 2020, p. 3 (emphasis added).

4. Complainants then identified a new groundwater expert witness, Mr. Quarles, to replace Mr. Kunkel, and a new economic expert, Mr. Shefftz. Mr. Quarles prepared an opinion and rebuttal opinion: "Expert Opinion of Mark A. Quarles, P.G.," dated January 25, 2021 (Comp. Exhibit 1101), and "Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G.," dated July 16, 2021. (Comp. Exhibit 1102).

¹ To reduce the volume of the record and duplicity, MWG is attaching the appeal and motion *without* their attachments.

5. On February 4, 2022, MWG filed a motion to exclude the opinions of Mr. Quarles because he failed to build upon, elaborate, or amplify Mr. Kunkel's expert reports and testimony. *See* MWG's Motion in Limine to Exclude Quarles's Opinions, attached as Exhibit 2 and incorporated by reference.² In fact, Mr. Quarles ignored all of Mr. Kunkel's opinions completely, and did not recommend any remedy for the "remedy" phase. Instead, he recommended even more investigations, but did not provide any opinion on the type and scope of the investigation, admitting he had no plan to do so. *Id.*

6. On July 13, 2022, the Hearing Officer denied MWG's Motion in Limine to Exclude the Quarles's Opinions. The Hearing Officer determined MWG's argument regarding Quarles's opinions were "premature and better left to objections at the hearing on remedy." Hearing Officer's July 13, 2022, Order, p. 12.

7. On July 27, 2022, MWG timely filed an interlocutory appeal of that decision, stating that Mr. Quarles's opinions did not comply with the Hearing Officer's Sept. 14, 2020 limitation, MWG was prejudiced by the admission of his opinions, and Mr. Quarles's opinions did not aid the Board. *See Ex. 1 - Appeal of Hearing Officer's Ruling Allowing Quarles's Opinions.*

8. On December 15, 2022, the Board denied MWG's appeal and delayed the determination of Mr. Quarles's opinions until the hearing. The Board Order stated, "[w]hen presented at hearing, the Board will determine whether Mr. Quarles's opinion sufficiently relies upon Mr. Kunkle's [*sic*] previous opinions. . . MWG will be able to cross-examine Mr. Quarles at hearing. If MWG finds Mr. Quarles's responses during cross-examination insufficient, that can be addressed by the

² MWG also filed a motion (and subsequent appeal) to exclude the opinions of Mr. Shefftz because they are not relevant and not reliable. Mr. Shefftz's opinions and reports relied on the withdrawn remedy report by the first expert witness, Mr. Kunkel, and assumptions fed to him by Complainants' counsel that are not based on direct or circumstantial evidence.

hearing officer at hearing or MWG can explain to the Board in post-hearing briefs why Mr. Quarles's responses are insufficient." Dec. 15, 2022, Board Order, p. 14 (emphasis added).

9. During Mr. Quarles's testimony at the May 15, 2023 hearing, counsel for MWG reasserted its objection to Mr. Quarles's opinions and reports incorporating its previously briefed objections (incorporated here as Attachments 1-3). 5/15/2023, Tr., pp. 118:15-22. Over MWG's objections, the Hearing Officer admitted Mr. Quarles's testimony and reports. 5/15/2023, Tr., p. 68:15-24 & 101:7-16, Comp. Exs. 1101 & 1102.

II. ARGUMENT

A. Mr. Quarles's Opinions Should Have Been Excluded Because They Violated the Hearing Officer and Board Orders

10. Mr. Quarles readily admitted during the hearing that he did not rely upon, build, amplify, or elaborate on Mr. Kunkel's opinions, in violation of the Hearing Officer's direction and limitation, stating:

10	Q. So you have not attempted to
11	elaborate upon Mr. Kunkel's opinions, correct?
12	A. That's correct.
13	Q. And you have not attempted to
14	amplify Mr. Kunkel's opinions, correct?
15	A. That's right.

5/15/2023 Tr., p. 154:10-15.

11. Immediately following his admission, MWG renewed its motion to strike the opinions of Mr. Quarles because his opinions were directly contrary to the Hearing Officer's order, as affirmed by the Board, to elaborate or amplify the first expert's opinions. 5/15/2023 Tr. p. 154:16-155:8. The Hearing Officer noted MWG's objections stating that he could not tell if Mr. Quarles had

relied on Mr. Kunkel's reports, or even elaborated or amplified, but "[i]t sounds like no." *Id.*, p. 156:11-19 (emphasis added).

12. Mr. Quarles's reports support his admission that he did not elaborate, amplify, or rely upon Mr. Kunkel's prior reports or testimony. The reports list the documents Mr. Quarles relied on for his opinions, and none of Mr. Kunkel's reports or opinions are listed. 5/15/2023 Tr. p. 153:6-13, Comp. Ex. 1101, p. 26-27, and Comp. Ex. 1102, p. 37.

13. Mr. Quarles also unequivocally admitted he did not know Mr. Kunkel's name ("It doesn't ring a bell"), was not aware he was the prior expert, did not review any or Mr. Kunkel's opinions or reports, and wasn't even aware that Mr. Kunkel wrote three reports. *Id.* at 153:6-154:1-9. He confirmed the next day that he did not review Mr. Kunkel's report. 5/16/23 Tr., p. 113:16-18.

14. The Hearing Officer heard correctly – Mr. Quarles did *not* elaborate or amplify Mr. Kunkel's opinions. Moreover, because Mr. Quarles had no idea who Mr. Kunkel was, his role, nor even reviewed his reports, there is no way he could have "sufficiently relied" upon Mr. Kunkel's previous opinions as required by the Board.

15. Because Mr. Quarles admitted he did not follow the Hearing Officer's and Board's directions, it was a clear error to admit his opinions and reports, and the Hearing Officer's decision must be reversed.

B. Mr. Quarles's Opinions Do Not Aid the Board

16. Mr. Quarles's opinions and reports do not aid the Board because they fail to elaborate or amplify Mr. Kunkel's opinion and because Mr. Quarles does not identify a corrective action or remedy for any MWG stations. Instead, by failing to build upon and amplify the Kunkel opinions, his opinions only create confusion.

17. In evaluating an expert's opinion, the critical issue is whether the expert's testimony aids the trier by explaining a factual issue. *Martin v. Sally*, 314 Ill. App. 3d 308 (2nd Dist. 2003); *See*

also *People v. King*, 2018 IL App. (2d) 151112 (2nd Dist. 2018) (*partially reversed on other grounds*) (“A requirement of expert testimony is that it will assist the trier of fact in understanding the evidence.”) “A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision.” *Johns Manville*, (PCB 14-3, April 26, 2016, B. Halloran), *citing Thompson v. Gordon*, 221 Ill. 2d 414, 428-429; Ill. R. Evid. 702. Additionally, under the Board’s procedural rules, evidence, such as an expert opinion, is admissible if “(1) it is admissible under Illinois civil courts’ rules of evidence; or (2) it is material, relevant, and reliable.” Board Order, Jan. 18, 2018, p. 2-3.

18. Here, Mr. Quarles admits he is not recommending any particular remedy. 5/15/2023 Tr., p. 162:21-23. Instead, he opines solely that additional investigation should occur, but has no opinion on the specific scope of the investigation for each Station. *Id.* p. 161:18-24 & 162:11-15 (“Q: But so we are clear, you are not opining specifically as to the scope of the nature and extent investigation at each of the stations, correct? A: That’s right”).

19. Adding more confusion, Mr. Quarles does not even know who would handle disagreements regarding the scope of the investigations, nor whether the Board would need to be involved in the evaluation of the sampling and analysis plan. 5/15/2023 Tr., pp. 163:20-164:11. Moreover, following completion of the hypothetical investigation, he opined that there could be an alternative opinions about what a remedy should be, but he had no idea whether the parties would be in front of the Board again to evaluate the alternatives, nor the amount of time the entire process would take. 5/15/23 Tr. p. 169:21-170:19.

20. Mr. Quarles’ failure to provide any parameters or guidance for what he believes is the necessary next step does not aid the Board, rendering it immaterial, unreliable and irrelevant. The

Board could reach Mr. Quarles's conclusion (i.e., that some level of unknown investigation in unidentified areas might be required) on its own. If the Board were to order additional investigation, however, as suggested by Mr. Quarles, will the Board determine the scope of that currently unknown investigation (i.e., which areas need to be further investigated)? Mr. Quarles suggests that MWG should develop the scope. If that is the case, who will decide if the scope of the investigation is sufficient? And then, once the investigation is complete, who will evaluate the investigation to conclude it is complete? Complainants and Mr. Quarles seem to be suggesting that the Board will issue a series of future orders that require the Parties to return for additional hearings regarding the scope of investigation, the results of the investigation, and then to potentially determine a remedy at each Station at unknown future dates. These are the same issues and questions MWG posed in its July 27, 2022 Appeal of the Hearing Officer's Order allowing Quarles' Opinions (Ex. 1, Memo in Support, p. 11), and Mr. Quarles and the Complainants made no effort to answer them. This is untenable and results in a proceeding that never ends.

21. While an investigation could be part of a remedy, suggesting an investigation without any parameters, scope, description or analysis is not useful and does not require an expert. The Board, or any witness, could recommend "additional investigation;" it does not need to come from an expert.

22. Mr. Quarles, and ultimately Complainants, failed to comply with the guard-rails established by the Hearing Officer and upheld by the Board to build on the information from Mr. Kunkel. Even if the Board decides not to reverse the Hearing Officer's decision, MWG would be materially prejudiced if the Board were to give his opinions any weight because of Complainants failure to comply with the rules and orders issued by this Board and Hearing Officer.

III. CONCLUSION

23. The Hearing Officer's decision to allow Mr. Quarles' opinions as evidence should be reversed. Mr. Quarles' opinions violate the Hearing Officer's and the Board's own orders and do not aid the Board because they do not recommend a remedy or scope of investigation. At the very least, the Board should give Mr. Quarles' opinions no weight.

WHEREFORE, for the reasons stated above, MWG requests that the Board reverse the Hearing Officer's order and exclude Mr. Quarles' testimony and Complainants' Exhibits 1101 and 1102.

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

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EXHIBIT 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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60 E. Van Buren St., Ste. 630	
Chicago, Illinois 60605	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes and Memorandum in Support of Midwest Generation, LLC's Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 27, 2022

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service, Midwest Generation, LLC's Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes, and Memorandum in Support of Midwest Generation, LLC's Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes, a copy of which is hereby served upon you was filed on July 27, 2022 with the following:

Don Brown, Clerk
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and that true copies of the Notice of Filing, Certificate of Service, Midwest Generation, LLC's Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes, and Memorandum in Support of Midwest Generation, LLC's Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes were emailed on July 27, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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NETWORK, and CITIZENS AGAINST)	
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MIDWEST GENERATION, LLC’S APPEAL FROM HEARING OFFICER’S RULINGS ALLOWING QUARLES’S OPINIONS AND REDACTING QUARLES’S NOTES

Respondent Midwest Generation, LLC (“MWG”) requests that the Illinois Pollution Control Board (“Board”) reverse the Hearing Officer’s July 13, 2022 Order denying MWG’s motion to exclude the expert opinions of Mark Quarles (35 Ill. Adm. Code 101.518). Mr. Quarles, Complainants replacement expert, entirely disregards Complainants’ original expert and fails to build on or amplify the original opinions, as required by the Hearing Officer’s previous order and Illinois law. In addition, Mr. Quarles’s opinion does not assist the Board because he does not even recommend a remedy, adding confusion to an already complex case. MWG also appeals the Hearing Officer’s denial of MWG’s motion to exclude certain disparaging and unsupported assertions Mr. Quarles made in his expert reports about MWG’s experts, while at the same time granting Complainants’ motion to exclude a derogatory statement in Mr. Quarles’s notes on the same issue relating to those experts. MWG has also filed a motion for expedited review of this appeal as well as its appeal of the Hearing Officer’s denial of MWG’s motion to exclude Complainants’ economic expert, Jonathon Shefftz.

In support of its Appeal, MWG incorporates by reference its Motion *in Limine* and Reply, submits its Memorandum in Support, and states as follows:

1. On April 1, 2020, Complainants moved for leave to designate substitute expert witnesses, claiming that their original groundwater testifying expert, James Kunkel (“Kunkel”), who had issued detailed opinions about proposed remedies for the MWG stations, was “not the best-placed expert to address the remaining issues in this matter.” *See* Complainants’ Motion for Leave to Designate Substitute Expert Witness and Memorandum in Support, April 1, 2020, p. 6.
2. MWG objected to Complainants’ motion because the parties had already presented expert opinions on all elements of the litigation, including remedy, and Complainants provided no basis for substitution. MWG stated that it would be highly prejudiced by the substitution because it conducted its discovery and litigation strategy based upon the complete expert opinions of both parties.
3. MWG also argued that if Complainants were allowed to replace their experts, then the new experts must maintain substantially the same opinions as the original experts. Under Illinois law, substitution of an expert may be allowed under certain circumstances, but it is not an opportunity to “introduce new and different theories in this case.” MWG’s Response to Complainants’ Motion to Designate Substitute Expert Witnesses, April 15, 2020, p. 14, *citing Ind. Ins. Co.*, 2001 U.S. Dist. LEXIS 23256, at *4.
4. On September 14, 2020, the Hearing Officer allowed the parties to name new expert witnesses, but with conditions. The Hearing Officer stated, “Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification.” Hearing Officer Order, Sept. 14, 2020.

5. Following the Hearing Officer's September 14, 2020, Order, Complainants identified a new groundwater expert witness, Mark Quarles ("Quarles"), to replace Mr. Kunkel. Mr. Quarles prepared an opinion and rebuttal opinion: "Expert Opinion of Mark A. Quarles, P.G.," dated January 25, 2021, and "Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G.," dated July 16, 2021, attached as Exhibits 1 and 2, respectively.

6. On February 4, 2022, MWG filed its Motion *in Limine* to Exclude the Quarles opinions, arguing that his opinions violate the September 14, 2020, Hearing Officer Order because they do not "elaborate and amplify" the previously admitted expert reports and testimony. MWG also moved to exclude Mr. Quarles's opinions because they do not aid the Board, as is required for expert opinions, since they do not recommend a remedy. MWG further argued that Mr. Quarles's unsubstantiated and unprofessional attacks on the qualifications of MWG's experts within his expert reports should be excluded, as, having no legitimate basis, they do not aid the Board and, in fact, invade the purview of the Board.

7. On July 13, 2022, the Hearing Officer denied MWG's Motion *in Limine* to Exclude the Quarles Opinions. The Hearing Officer's decision does not resolve the critical dispute between the parties as to how his September 14, 2020 ruling (allowing replacement experts, *if* they expound on and amplify testimony of prior experts) should be interpreted in accordance with Illinois law. Hearing Officer's July 13, 2022, Order, pp. 12.

8. Further, the Hearing Officer allowed Mr. Quarles's unsupported and disparaging opinions in his reports about MWG's experts to stand; yet at the same time granted Complainants' request to redact and exclude a statement in Mr. Quarles's notes further disparaging MWG's experts and showing his bias. Hearing Officer's July 13, 2022, Order, pp. 12, 16.

9. The Hearing Officer's decisions should be reversed. Mr. Quarles's opinions violate the Hearing Officer's Order, materially prejudice MWG by allowing new opinions unrelated to the former opinions (even while Complainants rely on the former Kunkel opinions for economic benefit purposes), and do not aid the Board because they do not even recommend a remedy.

10. Mr. Quarles's unsubstantiated attacks on the qualifications of MWG's experts within his expert reports are improper challenges to credibility and do not aid the Board. Alternatively, if Mr. Quarles is allowed to give his opinion about MWG's experts' qualifications (which is the purview of the Board), then MWG is entitled to cross-examine Mr. Quarles about those statements using his own notes. Yet, the Hearing Officer specifically precluded MWG from using the relevant portion of Mr. Quarles's notes. Mr. Quarles's unprofessional, pertinent statements showing his bias should be available in the record for impeachment purposes.

11. The Hearing Officer erred in allowing Complainants to have it both ways. However, if the attacks in Mr. Quarles's opinions are excluded, as MWG believes they should be, MWG would not object to the exclusion of the derogatory statement in Mr. Quarles's notes. In other words, either both items should be allowed or both items should be excluded. It is inconsistent to include one in the record but not the other.

WHEREFORE, for the reasons stated above, MWG requests that the Board reverse the Hearing Officer's rulings and exclude Mr. Quarles's opinions.

Respectfully submitted,
Midwest Generation, LLC
By: /s/ Jennifer T. Nijman
One of Its Attorneys

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**MEMORANDUM IN SUPPORT OF MIDWEST GENERATION, LLC’S
APPEAL FROM HEARING OFFICER’S RULINGS ALLOWING
QUARLES’S OPINIONS AND REDACTING QUARLES’S NOTES**

The Board should reverse the Hearing Officer’s July 13, 2022 Order denying MWG’s motion to exclude the expert opinions of Complainants’ replacement expert Mark Quarles. Mr. Quarles’s opinions entirely disregarded opinions issued by Complainants’ original expert and fail to build on or amplify the original opinions, as required by the Hearing Officer’s previous order and Illinois law. The Hearing Officer’s decision allowing Mr. Quarles’s opinions materially prejudices MWG and does not aid the Board.

In addition, the Hearing Officer’s decision creates the untenable position of allowing Mr. Quarles to opine about MWG’s expert qualifications, while at the same time precluding MWG from cross examining Mr. Quarles with his own notes on the issue. The two rulings are inconsistent and fundamentally unfair to MWG. If Mr. Quarles is allowed to speak to MWG’s experts’ qualifications in his opinions, pertinent statements in his notes should be available in the record for impeachment purposes to show his bias or other motives toward those experts. Complainants should not be allowed to have it both ways.

In support of its Appeal, MWG states as follows:

I. Brief Background

Until February 9, 2017, the parties proceeded through discovery as if the final hearing would be about both liability on Complainants' claims and any remedy or penalty that might be imposed. Accordingly, both parties identified and submitted expert reports addressing all elements of the litigation, including the condition of the groundwater, the constituents in the groundwater, and proposed remedies.¹

a. Complainants' Original Expert

Complainants' original groundwater expert in this matter was James Kunkel, who issued five opinions.² Mr. Kunkel specifically opined on the issue of a remedy for the four MWG Stations and issued a separate "Expert Report on Remedy for Ground-water Contamination," attached as Ex. 3 ("Remedy Opinion"). He issued a rebuttal report again detailing his proposed remedy, which was admitted in the record as Hearing Exhibit 407 and Supplemented as Hearing Ex. 412 ("Rebuttal Report"). In his Remedy Opinion, Mr. Kunkel stated that his proposed remedy for all of the Stations was the complete removal of the CCR surface impoundments and ash-impacted soils. Ex. 3, Kunkel Remedy Opinion. He also prepared cost estimates for his proposed remedy, including costs of excavation, hauling, and backfilling at each Station. Ex. 3, Table 6. Mr. Kunkel reiterated in his Rebuttal Report that his opinion for the remedy was CCR removal. Hearing Ex. 407, p. 12.

¹ A detailed history of the discovery in this matter is in MWG's Motion for Interlocutory Appeal of the Hearing Officer's Ruling on MWG's Motion *in Limine* to Exclude Jonathan Shefftz Opinions filed on July 27, 2022.

² Complainants also disclosed an economic expert, David Schlissel.

b. Hearing on Liability

After all discovery was complete, the Hearing Officer bifurcated the matter on February 9, 2017, ordering that the first hearing would be on liability only. In 2017 and continuing to 2018, the parties participated in the hearing on liability. In consideration of the potential for a second hearing on damages with the same expert witnesses, MWG tailored its hearing strategy in the liability phase, particularly in its cross-examination of Complainants' expert, Mr. Kunkel.

c. Complainants Sought and Were Allowed to Replace Their Experts

Following completion of the liability phase hearing, Complainants moved for leave to replace their original experts, including Mr. Kunkel. MWG objected to Complainants' motion because the parties had already presented expert opinions on all elements of the litigation, including remedy, and MWG would be highly prejudiced by the substitution because it conducted its litigation strategy based upon the complete expert opinions. MWG also pointed out that, if parties are allowed to replace their experts, then the new experts must maintain substantially the same opinions as the original experts because, under Illinois law, while substitution of an expert may be allowed under certain circumstances, it is not an opportunity to "introduce new and different theories in this case." MWG's Response to Complainants' Motion to Designate Substitute Expert Witnesses, April 15, 2020, p. 14, *citing Ind. Ins. Co.*, 2001 U.S. Dist. LEXIS 23256, at *4.

The Hearing Officer allowed the parties to name new expert witnesses, but with conditions in line with Illinois law, stating: "Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." Hearing Officer Order, Sept. 14, 2020. In light of this ruling, Complainants identified a new expert witness, Mark Quarles, to replace Mr. Kunkel. Mr. Quarles prepared an opinion and rebuttal opinion: "Expert Opinion of Mark A. Quarles, P.G.," dated January 25, 2021,

and “Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G.,” dated July 16, 2021, Exhibits 1 and 2.

d. Quarles’s New Opinions

Despite the Hearing Officer’s ruling to elaborate and amplify prior expert opinions, Mr. Quarles’s new opinions make no mention of the Kunkel remedy opinions. Exs. 1 and 2. In fact, Mr. Quarles admits that he did not even review Mr. Kunkel’s prior reports and was not even aware that Mr. Kunkel had written three reports for this matter that included opinions on remedy. *See* Quarles Dep. attached as Ex. 4, p. 53:24-54:8. Mr. Quarles similarly did not review Mr. Kunkel’s deposition, nor even Mr. Kunkel’s testimony during the first hearing. *Id.*, p. 54:15-20. In short, he admitted that he made no attempt to elaborate or amplify Mr. Kunkel’s previous opinions on remedy. *Id.* p. 54:21-55:5.

Mr. Quarles fails to even identify a corrective action or remedy for any of the MWG Stations in his expert reports. Instead, he recommends that MWG conduct a “nature and extent” investigation at each Station, despite the fact that the groundwater at each of the Stations has been analyzed since 2010³ and despite the fact that Mr. Kunkel developed a proposed remedy based on that existing data. Ex. 1, p. 17. Mr. Quarles also admitted that he was not proposing any type of sampling program or guidance, and he does not even know “in totality what information Midwest Gen has collected.” Ex. 4, p. 83: 7-8; 143:15-16.

While Mr. Quarles briefly mentions some possible concepts for a potential remedy in his report, he emphasizes that he is not recommending a remedy at all, and he is not intending to recommend a remedy during the next hearing. Ex. 4, pp. 86:24-87:10, 106:17-19. Moreover, one of the options he proposed directly contradicts the Kunkel remedy opinion. Mr. Quarles speculates

³ See Hearing Exs. 809-812, which are the tables of the groundwater analytical results for each of the Stations from 2010 to 2017.

that pumping and treating the groundwater might be a potential remedy (Ex. 1, p. 25); yet Mr. Kunkel specifically rejected pump and treat as a remedy in his Rebuttal Report. Hearing Exhibit 407, p. 11.

e. MWG's Motion *in Limine* to Exclude Quarles Opinions and the Hearing Officer's Decision

On February 4, 2022, MWG filed its Motion *in Limine* to Exclude Quarles Opinions, stating that the Quarles opinions violated the September 14, 2020 Hearing Officer Order because they do not "elaborate and amplify" the Kunkel opinions and because they do not aid the Board, as they do not recommend a remedy but rather suggest more investigation. MWG also argued that Mr. Quarles's unsubstantiated and unprofessional attacks on the qualifications of MWG's experts should be excluded as, having no legitimate basis, they do not aid the Board and in fact invade the purview of the Board.

MWG also filed a motion for leave to file *instanter* a reply and a reply in support of its motion. The Hearing Officer denied MWG's motion, disregarding MWG's reply.

f. Complainants' Motion *in Limine* to Exclude Quarles's Derogatory Language and MWG's Response

On the same date, Complainants filed a Motion *in Limine* to Exclude Certain Documents seeking, *inter alia*, to exclude derogatory statements Mr. Quarles set out in his own notes that referred to MWG's expert witnesses from the Weaver Consulting Group ("the Weaver Experts") as "idiots." Ex. 5, (Bates Comp 70313-314). In response, MWG argued that Mr. Quarles's notes should not be redacted because his written statement shows his motive, bias, and lack of impartiality in conducting what should be an independent technical analysis -- all of which is relevant because it goes to his credibility as an expert witness. MWG's Response to Complainants' Motion to Exclude Certain Documents, March 4, 2022, pp. 9-11.

g. Hearing Officer's Decision

On July 13, 2022, the Hearing Officer denied MWG's Motion *in Limine* to Exclude the Quarles Opinion. In his order, he summarized each party's argument and states in his Discussion:

"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 [*sic*] 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."

H.O. July 13, 2022, Order, at 12-13. (emphasis added).

Later in his opinion he granted Complainants' motion to exclude the disparaging remarks Mr. Quarles wrote in his notes, stating "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." *Id.*, p. 16 (citation omitted).

II. The Hearing Officer's Ruling Allowing Quarles's Opinions Should Be Reversed

The Hearing Officer's Discussion about Mr. Quarles's opinion simply repeats Complainants' arguments, but it does not resolve the fundamental dispute between the parties – whether Complainants (and Mr. Quarles) complied with the Hearing Officer's prior order (September 14, 2020) requiring replacement experts to amplify and elaborate prior expert opinions. He also gave no ruling on whether or how Mr. Quarles's opinions would aid the Board. The Hearing Officer's decision should be reversed because MWG is materially prejudiced by the admission of Mr. Quarles's opinions that are inconsistent with and wholly unrelated to Complainants' first expert's opinion, in violation of the Hearing Officer's September 14, 2020 Order and Illinois law, and do not aid the Board.

The Hearing Officer's decision is also internally inconsistent as it relates to Mr. Quarles's disparaging remarks about MWG's experts. On one hand, the Hearing Officer allows Mr. Quarles to make a specious and baseless opinion about credentials of MWG's experts, yet the Hearing Officer then bars the inclusion of Mr. Quarles's notes that relate to the same issue, and would serve to show Mr. Quarles's bias.

a. It was Error to Allow Complainants to Violate the Hearing Officer's Sept. 4, 2022 Order

The Hearing Officer's September 14, 2020 Order allowed the parties to call new replacement experts but also stated that that "[a]ny testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." Hearing Officer Order, Sept. 14, 2020, p. 3. This Order was written to be consistent with Illinois law and precedent stating that a new expert cannot espouse new theories. *Nelson v. Upadhyaya*, 361 Ill. App. 3d 415, 417-18, 836 N.E.2d 784, 786-87 (1st Dist. 2005) (Court barred new expert because the new expert reviewed far more material than the original expert and held opinions the original expert had not expressed). The Hearing Officer's Order was not limitless and did not allow Complainants to present an entirely new opinion that completely ignores Complainants' original expert. Yet, that is exactly what they did. Mr. Quarles admits that he made no attempt to review, elaborate on, or amplify Mr. Kunkel's opinions. *See* Ex. 4. p. 54:21-55:5.

Complainants misled the Hearing Officer by focusing their argument on the term "testimony" in the Hearing Officer's Sept. 14, 2020 Order. Complainants, however, conveniently ignore Illinois law – the law that led the Hearing Officer to place the conditions on allowing a new expert. In any case, even allowing a focus on the word "testimony", it is evident that the term includes evidence given "at trial or in an affidavit or deposition." Black's Law Dictionary (11th ed. 2019). In this case, Mr. Kunkel's deposition testimony expressly included detailed discussions

of his proposed remedy, and all three of Mr. Kunkel's reports that were the subject of the deposition questions, including his remedy report, were part of the deposition testimony and attached thereto. Mr. Kunkel presented detailed "testimony" regarding his proposed remedy that "already stands." Similarly, the Hearing Officer's Sept. 14, 2020 Order states that the parties must proceed to "build on that information," referencing back to the words "any testimony." Mr. Quarles does nothing of the sort. As described above, Mr. Quarles completely ignored the Kunkel opinions, never read his testimony (at hearing or from the deposition), and made no attempt to build on, elaborate or amplify Mr. Kunkel's opinions. See Ex. 4, p. 54:21-55:5.

Yet, Complainants do not entirely reject Mr. Kunkel's opinion when it serves their purposes for another expert. Complainants ignore Mr. Kunkel's remedy opinions when seeking to include Mr. Quarles's new remedy opinions, but they purposefully provide the Kunkel remedy report to their new economic benefit expert, Jonathan Shefftz, in order to falsely increase the alleged economic benefit calculation. Mr. Shefftz relies solely on the Kunkel remedy opinions and costs for his estimate of economic benefit, and Mr. Shefftz had never heard of the replacement expert Mr. Quarles. Ex. 6, Shefftz Table 3, Ex. 7, Shefftz Dep. p. 59:6 – 60:23.⁴ Again, MWG is prejudiced by being faced with rulings that are internally inconsistent.

Unfortunately, the Hearing Officer's July 13, 2022 Order on the motions *in limine* does nothing to resolve these issues. Instead, the decision states that "**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...". The discussion seems to be a question,

⁴ MWG also filed a motion *in limine* to exclude Mr. Shefftz's opinion because it is not based upon direct or circumstantial evidence, and because it relies on Kunkel's Remedy Report, which Complainants attempt to disavow through Mr. Quarles. The fact that Mr. Shefftz now relies on the Kunkel report clearly places it in the record in any case. The Hearing Officer denied MWG's motion and MWG has also filed a motion to appeal the Hearing Officer's decision on July 27, 2022.

not a finding, and ignores the fact that Mr. Kunkel's rebuttal report specifically addressing his proposed remedy and related costs were, in fact, admitted in evidence and clearly part of the record. Moreover, the fact that Complainants' new economic expert now relies on the Kunkel Remedy report places it directly in the record for the next phase of hearing. The Hearing Officer then speculates that the Board, as a technical body, may be able to "parse through the objections that may arise as to Quarles's testimony." H.O. July 13, 2022 Order, p. 12. However, that defeats the whole purpose of a motion *in limine*, which is "to permit a party to obtain an order before trial excluding inadmissible evidence and prohibiting interrogation concerning such evidence without the necessity of having the questions asked and objections thereto made in the presence of the jury." *Wilbourn v. Cavalenes*, 398 Ill. App. 3d 837, 851, 338 Ill. Dec. 77, 91, 923 N.E.2d 937, 951 (2010). The Hearing Officer's choice to not resolve this issue was in error and should be reversed.

b. MWG is Materially Prejudiced by the Admission of Quarles's Opinions

The Hearing Officer's admission of Complainants' contradictory opinions (Kunkel's and Quarles's) highly prejudices MWG. Mr. Kunkel's proposed remedy was complete removal of CCR at the MWG Stations. Pursuant to the discovery schedule, MWG had an opportunity to interrogate that remedy during Mr. Kunkel's deposition. Now, Complainants' new expert, Mr. Quarles, does not present a remedy. Instead, he recommends additional investigation at each of the Stations. Ex. 1, p. 17. Yet, despite the many years of investigation that already exists at the MWG stations, Mr. Quarles admitted during his deposition that he has no idea of the scope or size or locations of his proposed investigations. Ex. 4, pp. 83:6-8, 105:22-106:1, 106:17-19. Nor did he review Mr. Kunkel's report that specifically stated that the existing investigations at the Will County and Waukegan Stations were already sufficient to develop a remedy. *Id.* p. 54:4-8. Mr. Kunkel opined that both Stations have sufficient soil borings and groundwater monitoring wells to

adequately characterize the thickness of coal ash-impacted soils and the groundwater impacts. Ex. 3, Kunkel Remedy Rpt. Pp. 7-8. Mr. Quarles simply ignored the fact that Mr. Kunkel reviewed the boring and groundwater data, made an assessment of the groundwater monitoring, ash areas and quantity, and concluded no further investigations were required there.

Mr. Quarles also admitted he did not review Mr. Kunkel's hearing testimony, in which Mr. Kunkel specifically testified to many issues that are relevant to the remedy hearing. For example, Mr. Kunkel agreed at the hearing that MWG's stations have no impact on offsite drinking water, and that the concentrations at wells downgradient of the Former Ash Basin at the Powerton Station were below the Class I standards. 10/27/17 Hearing Tr. pp. 181:4-182:7, 210:16-22. Because he did not even review the hearing testimony (Ex. 4, p. 54:15-20), Mr. Quarles presents a new opinion that requires MWG to begin again. Though the Hearing Officer claimed that MWG could simply cross-examine Mr. Quarles at the hearing, MWG was unable to do so during his deposition because Mr. Quarles had no basis to testify as to the prior opinions by Mr. Kunkel, having not reviewed or relied on them. *Id.* The same will occur at hearing and Mr. Kunkel is not available to be examined.

At this point in the case, when the second phase of discovery is long closed, MWG has no indication how Complainants' experts will testify. Are Complainants seeking a removal action as opined by Mr. Kunkel, relied upon by Mr. Shefftz, but rejected by Mr. Quarles? Or is Mr. Quarles entitled to ignore the previous expert testimony, rendering irrelevant all of MWG's prior work to prepare for this case, and instead take three steps backward and present a new, vague recommendation for an undefined investigation? Do we accept Mr. Quarles' opinions? Or those of Mr. Shefftz (who relies on Mr. Kunkel)? This type of trial by surprise is not permitted by the Board or by procedural Illinois law. Illinois does not permit "trial by ambush" and the prejudice MWG is now facing. Because Complainants are not suggesting a remedy now, but are still relying

upon a remedy previously presented when it is convenient to them, the Hearing Officer is allowing MWG to be surprised and prejudiced by whatever remedy Complainants present at the hearing.

These inconsistent decisions result in serious confusion and resulting prejudice. It appears that Complainants see the remedy hearing as not the end of these proceedings, but the beginning of at least two more phases of hearings. Complainants stated in their Response to MWG's motion that Mr. Quarles recommends "a process for selecting a remedy." Comp. Quarles Resp., p. 11. If the Board were to order additional investigation, as suggested by Mr. Quarles, will the Board need to assess the scope of that currently unknown investigation (which likely will be disputed by the parties)? And then, once the investigation is complete, will the Board order the Parties to return for another hearing based on the results of the investigation to potentially determine a remedy at each Station at some unknown future date? The "process" proposed is directly contrary to the Board's Interim Order ordering the Parties to proceed to a hearing on remedy. *Sierra Club v. Midwest Generation LLC*, PCB13-15, Feb. 6, 2020 Order. MWG prepared and submitted expert opinions that include a proposed remedy based on over ten years of sampling data from the Stations. Complainants' failure to similarly present a remedy to the Board violates the Board Interim Order, and it is prejudicial to MWG to subject MWG to multiple hearings on a remedy.

Because Complainants have submitted two conflicting expert opinions and rely on both of them, MWG will be highly prejudiced if Mr. Quarles's opinions are allowed. Accordingly, the Board should reverse the Hearing Officer's decision and exclude the opinions.

c. Quarles's Opinions Do Not Aid the Board

The Hearing Officer also gave no guidance as to whether Mr. Quarles's opinions aid the Board. They do not, and instead, by failing to build upon and amplify the Kunkel opinions, only create confusion. In evaluating an expert's opinion, the critical issue is whether the expert's testimony aids the trier by explaining a factual issue. *Martin v. Sally*, 314 Ill. App. 3d 308 (2nd

Dist. 2003); *See also People v. King*, 2018 IL App. (2d) 151112 (2nd Dist. 2018) (*partially reversed on other grounds*) (“A requirement of expert testimony is that it will assist the trier of fact in understanding the evidence.”) “A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision.” *Johns Manville*, (PCB 14-3, April 26, 2016, B. Halloran), *citing Thompson v. Gordon*, 221 Ill. 2d 414, 428-429; Ill. R. Evid. 702.

Here, Mr. Quarles’s opinion is of no assistance to the Board. He does not recommend a specific investigation, admits he has not determined the type of nature and extent investigation that should be conducted, and states that he has no plan to do so. Ex. 4, p. 105:22-106:1, 106:17-19. He specifically states that he’s “not thinking grid versus non-grid versus discreet versus integrated sampling. I’m not defining what that sampling program should be.” *Id.*, p. 83:6-8. He also admits that he does not know “in totality what information Midwest Gen has collected.” *Id.*, p. 143:15.

Suggesting that an investigation should be done, without any indication or idea of what has already been done, how it should be conducted, the scope, or where, is a very general conclusion that the Board could certainly reach on its own, if it so desires, after hearing all the evidence. There is over 10 years of monitoring data and samples covering the Stations, yet Mr. Quarles apparently could not make the effort of reviewing that information to assess whether gaps existed. Instead, he makes a broad conclusion without any detail to aid the Board.

Mr. Quarles’s opinion adds nothing to an already complex case. As mentioned above, even though Mr. Quarles ignores the Kunkel opinions, Complainants’ economic expert, Jonathan Shefftz, specifically and solely relies upon the Kunkel opinions for his estimate of economic benefit. Ex. 6, Shefftz Table 3,⁵ Ex. 7, Shefftz Dep. p. 59:6 – 60:23. So now, MWG and the Board

⁵ See MWG’s Motion for Interlocutory Appeal of the Hearing Officer’s Denial of MWG’s Motion *in Limine* to Exclude Shefftz Opinions, filed on July 27, 2022.

are faced with the question of which remedy Complainants will put forward. Is it removal as opined by Mr. Kunkel, relied upon by Mr. Shefftz, but rejected by Mr. Quarles? If so, then no “nature and extent” investigation of the Stations is required and Mr. Quarles’s opinions are meaningless and must be excluded. Or is it Mr. Quarles’s vague recommendation that more investigation is required? If so, then Mr. Shefftz’s reliance upon the Kunkel remedy opinions and costs is baseless.

The Hearing Officer seems to recognize this confusion by stating that the Board “can parse through any objections that may arise...” during Mr. Quarles’s testimony. H.O. July 13, 2022 Order, p. 12. But parsing through objections created by a confusing scenario is of no use to the Board. Based on the requirement that an expert opinion must assist the Board in understanding the facts (*People v. King*, 2018 IL App. (2d) 151112), Mr. Quarles’s opinions should be excluded.

III. The Hearing Officer’s Rulings -- Allowing Quarles’s Unfounded Attack on MGW’s Experts’ Qualifications and Excluding Quarles’s Derogatory Remark -- Are Inconsistent and Should be Reversed

The Hearing Officer also denied MWG’s request to exclude Mr. Quarles’s personal and unsubstantiated attacks on the credentials of MWG’s experts, holding that “Mr. Quarles is allowed to give his opinions regarding the Weaver experts,” H.O. July 13, 2022, Order, at 13. But, at the same time the Hearing Officer also granted Complainants’ Motion *in Limine* to exclude “derogatory” language that Mr. Quarles wrote in his own notes, unprofessionally referring to MWG’s experts from the Weaver Consultants Group as “idiots.”

The Hearing Officer’s decisions are internally inconsistent and preclude MWG from fair and effective cross examination. The Hearing Officer is allowing Mr. Quarles to attack MWG’s witnesses, but barring MWG from demonstrating Mr. Quarles’s motive and bias, which is fundamentally unfair to MWG. If Mr. Quarles is allowed to opine about MWG’s experts’ qualifications, even though the opinions are unsupported and baseless, then pertinent statements in Mr. Quarles’s notes on the very same issue must be available for impeachment purposes. The

Board cannot allow Complainants to have it both ways by casting aspersions on MWG's experts' qualifications on the one hand and removing evidence that would speak to the nature and credibility of the one making those judgments on the other hand.

On balance, Mr. Quarles's attacks on the Weaver Experts should be excluded. Mr. Quarles's derogatory and baseless statements about other experts have no place in this proceeding. They are based solely on a cursory review of a resume, without ever having worked with or met the Weaver Experts, without speaking to other consultants about them, and without having even reviewed the Weaver Experts' deposition testimony. The statements are unprofessional and provide nothing to aid the Board.

An expert is not permitted to opine on the credibility of another witness, which is exactly what Complainants are attempting to do through Mr. Quarles. Mr. Quarles attacks the Weaver Experts' credibility by stating that their testimony in this case would be "especially concerning" (based on Quarles's conclusions drawn from review of one unrelated case with limited reports found online) and due to alleged "minimal CCR experience." Such general criticisms of credibility are simply unproven statements that are inadmissible. *La Playita Cicero, Inc. v. Town of Cicero*, 2017 U.S. Dist. LEXIS 44868, *26-27 (N.D. Ill. March 28, 2017) (excluding expert's general opinions on witness's character and credibility because they were not supported by the facts and would not help the trier of fact).⁶

If the attacks in Mr. Quarles's opinions are excluded, as they should be, MWG would not object to the exclusion of the derogatory statement in Mr. Quarles's notes. The Board should either reverse the Hearing Officer's decision and exclude Mr. Quarles's opinions on the MWG experts,

⁶ While the case relates to Federal Rule 702, the key language of Illinois Rule of Evidence 702 is the same, both rules requiring that the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

and leave his decision excluding Mr. Quarles's insulting note in place; *or* affirm the Hearing Officer's decision not to exclude Mr. Quarles's opinions and reverse the Hearing Officer's decision to exclude Mr. Quarles's insulting note. In other words, the Board should allow both items or exclude both items. It is inconsistent to include one in the record but not the other.

IV. Conclusion

Allowing Mr. Quarles's opinions amounts to Complainants being permitted to submit conflicting remedy opinions, resulting in prejudice to MWG and failing to aid the Board. Further, Mr. Quarles's opinions on the Weaver Experts are baseless and of no aid to the Board, and, if these opinions are to remain in the record, Mr. Quarles's derogatory statement in his notes about the same experts should remain in the record as well, as relevant and probative of Mr. Quarles's bias and credibility with respect to giving opinions about these experts. The Board should reverse the Hearing Officer's inconsistent rulings and exclude Mr. Quarles's opinions.

Respectfully submitted,
Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
One of Its Attorneys

Jennifer T. Nijman
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

July 27, 2022

EXHIBIT 2

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 2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

NOTICE OF FILING

TO: Don Brown, Clerk	Attached Service List
Illinois Pollution Control Board	
James R. Thompson Center	
100 West Randolph Street, Suite 11-500	
Chicago, IL 60601	

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC’s Motion *In Limine* to Exclude Quarles Opinions with Exhibits, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: February 4, 2022

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service for Midwest Generation, LLC's Motion *In Limine* to Exclude Quarles Opinions with Exhibits, a copy of which is hereby served upon you was filed on February 4, 2022 with the following:

Don Brown, Clerk
Illinois Pollution Control Board
James R. Thompson Center
100 West Randolph Street, Suite 11-500
Chicago, IL 60601

and that true copies of the Notice of Filing, Certificate of Service for Midwest Generation, LLC's Motion *In Limine* to Exclude Quarles Opinions with Exhibits were emailed on February 4, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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 2013-015
Complainants,)	(Enforcement – Water)
)	
v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondent.)	

MIDWEST GENERATION, LLC’S
MOTION IN LIMINE TO EXCLUDE QUARLES OPINIONS

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC (“MWG”), submits this Motion *In Limine* requesting the Hearing Officer enter an order excluding the “Expert Opinion of Mark A. Quarles, P.G.”, dated January 25, 2021 and “Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G.”, dated July 16, 2021. Mr. Quarles’s opinions violate the September 14, 2020 Hearing Officer Order because they do not “elaborate and amplify” the previously admitted expert reports.

Complainants’ first expert in this matter was James Kunkel, who issued detailed opinions about remedies for the MWG stations. In April 2020, Complainants sought to replace Mr. Kunkel over MWG’s objections. In ruling on the request, the Hearing Officer allowed Complainants to name new experts, but only on the condition that “the parties must proceed to build on that information and present more information, including elaboration and amplification.” Hearing Officer Order, Sept. 14, 2020, attached as Exhibit 1, p. 3. Complainants’ new expert, Mark Quarles, fails to elaborate and amplify and, in fact, admits to never having read Mr. Kunkel’s reports or opinions.

As such, his reports and testimony violate the existing Order and must be excluded. Moreover, Mr. Quarles's opinion does not aid the Board, as is required for expert opinion, and his failure to build upon and amplify the Kunkel opinions creates confusion.

Finally, Mr. Quarles's unsubstantiated and unprofessional attacks on the qualifications of experts from Weaver should be excluded as they do not aid the Board.

In support of its Motion, MWG states as follows:

A. BACKGROUND

1. On April 1, 2020, Complainants moved for leave to designate substitute expert witnesses claiming that their previously disclosed and testifying expert, James Kunkel, was "not the best-placed expert to address the remaining issues in this matter." *See* Complainants' Motion for Leave to Designate Substitute Expert Witness and Memorandum in Support, April 1, 2020, p. 6.

2. MWG objected to Complainants' motion because the parties had already presented expert opinions on all elements of the litigation, including remedy, and Complainants had provided no basis for substitution. MWG stated that it would be highly prejudiced by the substitution because it conducted its litigation strategy based upon the complete expert opinions of both parties.

3. MWG also argued that if Complainants were allowed to replace their experts, then the new experts must maintain substantially the same opinions as the original experts. Under Illinois law, substitution of an expert may be allowed under certain circumstances, but it is not an opportunity to "introduce new and different theories in this case." MWG's Response to Complainants' Motion to Designate Substitute Expert Witnesses, April 15, 2020 , p 14, *citing Ind. Ins. Co.*, 2001 U.S. Dist. LEXIS 23256, at *4.

4. On September 14, 2020, the Hearing Officer allowed the parties to name new expert witnesses, but with conditions. The Hearing Officer stated that "Any testimony already given

stands and the *parties must proceed to build on that information and present more information, including elaboration and amplification.*” Ex. 1, Hearing Officer Order, Sept. 14, 2020, p. 3 (emphasis added).

5. Following the Hearing Officer’s Order, Complainants identified in their “Notice of Expert Witness for Remedy Phase” a new expert witness, Mark Quarles, to replace Mr. Kunkel. Mr. Quarles prepared an opinion and rebuttal opinion, attached as Exhibits 2 and 3 respectively.

B. QUARLES’S OPINION VIOLATES THE HEARING OFFICER ORDER TO ELABORATE AND AMPLIFY

6. Mr. Quarles simply ignores Mr. Kunkel’s previous opinions. In fact, Mr. Quarles admits that he made no attempt to elaborate or amplify Mr. Kunkel’s opinions. *See* Quarles Dep. p. 54:21-55:5, attached as Ex. 4. This is a clear and direct violation of the Hearing Officer’s order to build on the expert information previously provided and to elaborate and amplify.

7. Mr. Kunkel specifically opined on the issue of a remedy for the four MWG Stations, and issued a separate “Expert Report on Remedy for Ground-water Contamination,” attached as Ex. 5 (“Remedy Opinion”). He issued a rebuttal report again detailing his proposed remedy, which was admitted as Hearing Exhibit 407, attached here as Exhibit 6. In his Remedy Opinion, Mr. Kunkel concluded that the remedy for all of the Stations was the complete removal of the CCR surface impoundments and ash-impacted soils. Ex. 5, Kunkel Remedy Opinion. Table 6 of Kunkel’s Remedy opinion shows Mr. Kunkel’s estimated costs for excavation, hauling, and backfilling at each Station and including the CCR surface impoundments. Ex. 5, Table 6. Mr. Kunkel reiterated in his Rebuttal Report that his opinion for the remedy was CCR removal. Ex. 6, Hearing Ex. 407, p. 12.

8. Mr. Quarles’s new opinions make no mention of Mr. Kunkel’s remedy opinions. Exs. 2 and 3. In fact, 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 for this matter that included opinions on remedy. Ex. 4, p. 53:24-54:8. Mr. Quarles similarly did not review Mr. Kunkel's deposition, nor even Mr. Kunkel's testimony during the first hearing. Ex. 4, p. 54:15-20.

9. Mr. Quarles fails to even identify a corrective action or remedy for any of the MWG Stations in his report. Instead, Mr. Quarles recommends that MWG conduct a "nature and extent" investigation at each Station, despite the fact that the groundwater at each of the Stations has been analyzed since 2010.¹ Ex. 1, p. 17. He also agreed that he was not proposing any type of sampling program. Ex. 4, p. 83: 7-8.

10. While Mr. Quarles briefly mentions some possible concepts for a potential remedy in his report, he emphasizes that he is not recommending a remedy at all, and he is not intending to recommend a remedy during the next hearing. Ex. 4, p. 86:24-87:10, p. 106:17-19. In fact, one of the options Mr. Quarles proposes directly contradicts Mr. Kunkel's remedy opinion. Mr. Quarles speculates that pumping and treating the groundwater is a potential remedy. Ex. 2, p. 25. Yet, Mr. Kunkel specifically rejected pump and treat as a remedy in his Rebuttal Expert Opinion. Ex. 6, Hearing Exhibit 407, p. 11.

11. Mr. Quarles's rejection of Mr. Kunkel's opinions directly violates the Hearing Officer's order, which limited new expert opinions to elaboration and amplification. This is no different than *Ind. Ins. Co. v. Valmont Elec., Inc.*, 2011 U.S. Dist. LEXIS 23256, *4 (S.D. Ind. 2001). In that case, the court allowed the plaintiff to substitute its expert, but ordered that the opinions of the new experts to be the same and barred any introduction of new and different theories. *Id.* Because the plaintiff failed to follow the court's directive, the court barred the new expert from testifying on

¹ See Hearing Exs. 809-812, which are the tables of the groundwater analytical results for each of the Stations from 2010 to 2017.

his new opinions. *Id.* Here, due to Complainants' blatant violation of the Hearing Officer's order, Mr. Quarles's opinion must be excluded.

C. QUARLES'S OPINION DOES NOT ASSIST THE BOARD

12. Mr. Quarles's opinion does not aid the Board and his failure to build upon and amplify the Kunkel opinions creates confusion. In evaluating an expert's opinion, the critical issue is whether the expert's testimony aids the trier by explaining a factual issue. *Martin v. Sally*, 314 Ill. App. 3d 308 (2nd Dist. 2003); *See also People v. King*, 2018 IL App. (2d) 151112 (2nd Dist. 2018) (*partially reversed on other grounds*) ("A requirement of expert testimony is that it will assist the trier of fact in understanding the evidence.") "A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its decision." *Johns Manville*, (PCB 14-3, April 26, 2016, B. Halloran), *citing Thompson v. Gordon*, 221 Ill. 2d 414, 428-429; Ill. R. Evid. 702.

13. Here, Mr. Quarles's opinion is of no assistance to the Board. He does not recommend a specific investigation, admits he has not determined the type of nature and extent investigation that should be conducted, and states that he has no plan to do so. Ex. 4, p. 105:22-106:1, 106:17-19. He specifically states that he's "not thinking grid versus non-grid versus discreet versus integrated sampling. I'm not defining what that sampling program should be." *Id.*, p. 83:6-8. He also admits that he does not know "in totality what information Midwest Gen has collected." *Id.*, p. 143:15-16. Suggesting that an investigation should be done, without any indication or ideas of how it should be conducted, the scope, or where, is a very general conclusion that the Board could certainly reach on its own, if it so desires, after hearing all the evidence. The Board has 10 years of monitoring data and samples covering the Stations, yet Mr. Quarles apparently could not make

the effort of reviewing that information to assess whether gaps existed. Instead, he makes a broad conclusion without any detail to aid the Board.

14. Mr. Quarles's opinion simply adds confusion to an already complex case. Even though Mr. Quarles ignores Kunkel's opinions, Complainants' economic expert, Jonathan Shefftz, specifically and solely relies upon the Kunkel opinions for his estimate of economic benefit. Ex. 7, Shefftz Table 3,² Ex. 8, Shefftz Dep. p. 59:6 – 60:23. So now, MWG and the Board are faced with the question of which remedy Complainants will put forward. Is it removal as opined by Mr. Kunkel, relied upon by Mr. Shefftz, but rejected by Mr. Quarles? If so, then no "nature and extent" investigation of the Stations is required and Mr. Quarles's opinion is meaningless and must be excluded. Or is it Mr. Quarles's vague recommendation that an investigation is required? If so, then Mr. Shefftz's reliance upon the Kunkel remedy opinions and costs is baseless.

15. It is exactly this confusing scenario that led the Hearing Officer to order that the existing expert reports stand, and new experts were only permitted to "elaborate and amplify." Complainants violated that Order and, based on the requirement that an expert opinion must assist the Board in understanding the facts (*People v. King*, 2018 IL App. (2d) 151112), Mr. Quarles's opinions should be excluded.

D. QUARLES UNFOUNDED ATTACK ON WEAVER'S QUALIFICATIONS SHOULD BE EXCLUDED

16. At the very least, Mr. Quarles's personal and unsubstantiated attacks on MWG's experts, Douglas Dorgan and Michael Maxwell, should be excluded as improper challenges to credibility that invade the purview of the Board.

² See MWG Motion *in Limine* to Exclude Shefftz Opinions, filed on this date. Mr. Shefftz's opinion is marked as Non-Disclosable Information, but the information in Table 3 (attached as Exhibit 6) is not Non-Disclosable Information, accordingly, MWG did not file it pursuant to Part 130 of the Board's Rules.

17. In his rebuttal report, Mr. Quarles provides his “opinions” about the qualifications of MWG’s experts, Douglas Dorgan and Michael Maxwell of Weaver Consultants Group (“Weaver Experts”). Ex. 3, Sec. 2.1. His “opinions” are based on nothing more than a review of the Weaver Experts’ CVs and an internet search. *Id.* In fact, the Weaver Experts testified that their CVs are only intended to be summaries of their experience, and do not represent the entirety of their many years of practice (25 and 30 years, respectively). Ex. 9, Excerpt of Weaver Dep., p. 38:8-10. MWG’s experts further described their technical experience related to coal ash during their deposition, detailing their work on coal ash projects in their lengthy careers. Ex. 9, pp. 25:2- 26:23, 34:4-38:10. Mr. Quarles conveniently ignores the hundreds of site investigations and remedy projects the Weaver Experts have performed, including countless within Illinois, without even having an Illinois license himself nor developed a groundwater remedy in Illinois (Ex. 4, p. 8:7-14, 36:1-3, 37:14-17), and without acknowledging that the remedial concepts remain the same for categories of constituents like metals. Ex. 9, p. 207:20-208:7.

18. There is no doubt that whether an expert is qualified is for the Board to determine. Mr. Quarles’s limited, biased, and uninformed “opinions” about two environmental consultants who have been practicing in their fields for more than 30 years does not assist the Board. Under Illinois Rule of Evidence 702, expert testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue.” Il. R. Evid. 702. But an expert’s opinion is of no assistance when the trier of fact is equally competent to form an opinion on an ultimate fact issue. *People v. King*, 2020 IL 123926, ¶ 38, 443 Ill. Dec. 19, 31, 161 N.E.3d 143, 155 (Supreme Court held admission of expert testimony was a reversible error because the testimony “fell within the ken of an average juror and therefore did not necessitate expert assistance.”) *Bachman v. GMC*, 332 Ill. App. 3d 760, 784, 267 Ill. Dec. 125, 148, 776 N.E.2d 262, 285 (4th Dist. 2002) (Court upheld exclusion of expert

witness testimony because opinions were not beyond the average juror). In fact, this Board has stated that it is within its discretion “to determine whether the subject is a proper one for expert testimony and whether the witness is qualified by special knowledge and skill.” *People of the State of Illinois v. Consolidated Freightways Corp. of Delaware*, PCB76-107, Oct. 4, 1978 1978 Ill. ENV LEXIS 550, *14.

19. Here, the “jurors” are the Board members, who are statutorily required to be “technically qualified” to serve and quite competent to form an opinion about an expert witness’s qualifications. 415 ILCS 5/5(a). Because of their technical qualifications and competency, they do not need Mr. Quarles’s one-sided and limited statements to determine whether other experts are qualified to provide an opinion.

20. Certainly, if Complainants truly believe the Weaver Experts should be subject to exclusion based on qualifications, they can attempt to present evidence at the hearing and request the Hearing Officer make that determination after *both* sides are heard. It is not a matter for Complainants’ expert to “opine” and there is no specialized knowledge needed. At present, there is no such evidence and Mr. Quarles’s attacks on the Weaver Experts should not be allowed to remain in the record.

21. The Hearing Officer should not allow the professional reputations of both Mr. Dorgan and Mr. Maxwell to be improperly and unfairly insulted in a publicly available expert report, without basis and without response. Even if Complainants respond that the Weaver Experts can address this at the hearing, it does not correct the public nature and potential impact of written expert opinions (as opposed to hearing testimony that few will read).

22. An expert is not permitted to opine on the credibility of another witness, which is exactly what Complainants are attempting to do through Mr. Quarles. Mr. Quarles attacks the Weaver

Experts' credibility by stating that their testimony in this case would be "especially concerning" (based on Quarles's conclusions drawn from review of one unrelated case with limited reports found online) and due to alleged "minimal CCR experience". Such general criticisms of credibility are simply unproven statements that are inadmissible. *La Playita Cicero, Inc. v. Town of Cicero*, 2017 U.S. Dist. LEXIS 44868, *26-27 (N.D. Ill. March 28, 2017) (Court excluded expert's general opinions on witness's character and credibility because they were not supported by the facts and would not help the trier of fact).³

23. Because the Quarles's opinions on the Weaver experts qualifications do not assist the Board and are not beyond the technical expertise of the Board, Section 2.1 of his Rebuttal opinion should be excluded.

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order excluding the Expert Opinion of Mark A. Quarles, P.G.", dated January 25, 2021 and "Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G.", dated July 16, 2021, and excluding Mr. Quarles's opinion about the MWG experts.

Respectfully submitted,

Midwest Generation, LLC

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³ While the case relates to Federal Rule 702, the key language of Illinois Rule of Evidence 702 is the same, both rules requiring that the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.