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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board Midwest Generation, LLC's Appeal of the Hearing Officer's Ruling Denying its Objection to Jonathan Shefftz's Opinions, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 26, 2023

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3400
Chicago, IL 60603
(312) 251-5255
jn@nijmanfranzetti.com
sf@nijmanfranzetti.com
kg@nijmanfranzetti.com

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605
Brad.Halloran@illinois.gov

Albert Ettinger
7100 N. Greenview
Chicago, IL 60626
Ettinger.Albert@gmail.com

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Greg.wannier@sierraclub.org

Megan Wachspress
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Megan.wachspress@sierraclub.org

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 Ruling Denying its Objection to Jonathan Shefftz's Opinions 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

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 APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS OBJECTION TO JONATHAN SHEFFTZ'S OPINIONS

Respondent Midwest Generation, LLC ("MWG") appeals the Hearing Officer's admission of the opinions of Complainants' expert, Jonathan Shefftz, and his expert reports, Exhibits 1201, 1203, 1207, because his opinions are not relevant and are not based on reliable information. (35 Ill. Adm. Code 101.502(b), 101.518). The Board is faced with opinions presented by an expert that are based on assumptions from counsel or a withdrawn and unavailable expert, and there is no witness or evidence available to allow the assumptions to be questioned for their relative weight.

Introduction

1. None of the sources for Mr. Shefftz's opinions are based on direct or even circumstantial evidence supported by facts or reasonable inferences, as required by the Board's opinion and applicable law. For his testimony at the hearing on this matter, Complainants' second economic expert (Mr. Shefftz) issued opinions that were based on a cost table presented by Complainants' first groundwater expert (Mr. Kunkel), along with information fed to Mr. Shefftz by Complainants'

counsel. But Complainants withdrew and replaced Mr. Kunkel prior to this second phase (remedy phase) of the hearing -- so Mr. Kunkel never testified to his opinions on remedy or his cost table as used by Mr. Shefftz. And Complainants failed to submit into evidence any support for the information that Complainants' counsel fed to Mr. Shefftz.

2. In that regard, MWG's predictions of how the Complainants' expert testimony would proceed were correct. *See* Appeal of the Hearing Officer's denial of Motion in Limine (and memorandum in support of same,) filed July 27, 2022, attached as Exhibit 3, pp. 2, 15-21. Because Complainants' original groundwater expert (Mr. Kunkel) was not available to testify, and because Complainants' did not provide any basis for their opinions that they fed to Mr. Shefftz, MWG could not interrogate whether there is any basis for the information on which Mr. Shefftz relies. Mr. Shefftz's opinions are not based on reliable information, in a clear violation of Illinois Rules of Evidence, and MWG is materially prejudiced by their admission. The Illinois Pollution Control Board ("Board") should reverse the Hearing Officer's decision, exclude Mr. Shefftz's opinions and strike his testimony.

3. In support of its Appeal, MWG incorporates by reference and attaches: (1) Its Motion in Limine to Exclude Jonathan Shefftz Opinions, filed February 4, 2022 (Exhibit 1); (2) its Reply in Support of that motion, filed March 18, 2022 (Exhibit 2); and (3) its appeal of the Hearing Officer's denial of that motion (and memorandum in support of same,) filed July 27, 2022 (Exhibit 3).[1] MWG also submits its Memorandum in Support of this Appeal and states as follows:

Background

4. Following the Hearing Officer's decision (over MWG's objection) to allow Complainants to identify new experts who would amplify and build on testimony of Complainants' original

[1] To reduce the volume of record and duplicity, MWG is filing its motion, reply, and appeal *without* the attachments.

experts, Complainants submitted expert reports and rebuttal reports from their second groundwater expert, Mark Quarles, and their second economic expert, Jonathan Shefftz. As described more fully in MWG's July 27, 2023 appeal of the Hearing Officer's Decision (Ex. 3), Complainants' new groundwater expert (Mr. Quarles) ignored and disregarded the remedy opinions made by Complainants' first expert (Mr. Kunkel). Complainants' economic expert, Jonathon Shefftz, then issued his opinions on purported economic benefit to MWG by using, as the heart of his analysis, (i) Mr. Kunkel's cost estimates for a remedy that was never presented (and Mr. Kunkel was withdrawn), and (ii) positions taken by Complainants' counsel, without any further support. Mr. Quarles' admitted he had barely even heard of Mr. Kunkel.

5. On February 4, 2022, MWG filed a motion to exclude Mr. Shefftz's opinions because they rely on opinions of cost estimates from an expert that Complainants had withdrawn, and because they are based on assumptions fed to him by Complainants' counsel that are not direct or circumstantial evidence as supported by the facts or reasonable inferences. Ex. 1.[2]

6. On July 13, 2022, the Hearing Officer issued his decisions on the parties' motions in limine. The Hearing Officer denied MWG's motion in limine to exclude Mr. Shefftz's opinions in a brief three-paragraph discussion.

7. On July 27, 2022, MWG timely filed an interlocutory appeal of that decision pursuant to 35 Ill. Admin. Code 101.518. MWG accurately predicted that it would be "faced with a hearing in which it is barred from cross examining the facts and evidence on which Mr. Shefftz bases his opinions…" Exhibit 3, p. 2.

[2] MWG also filed a motion to exclude the opinions of Mr. Quarles because, among other issues, they violate the Hearing Officer's order. Because Mr. Quarles admitted to violating the Hearing Officer's order, MWG is separately appealing the Hearing Officer's decision to admit Mr. Quarles's testimony to the Board.

8. On December 15, 2022, the Board denied MWG's appeal, stating that Mr. Shefftz's opinion "relies upon reasonable assumptions arising from the factual evidence." Board Order at 16 (Dec. 15, 2022). The Board does not describe this alleged factual evidence and was apparently hopeful that Mr. Shefftz would shed light on the situation at the hearing. *Id.*

9. On May 1, 2023, MWG filed a Motion in Limine seeking to bar the admission of the report Mr. Kunkel had issued concerning a possible remedy for the MWG Stations ("Kunkel Remedy Report") on the grounds that Complainants had withdrawn Mr. Kunkel as a witness, and Complainants' new expert, Mr. Quarles, was unable to testify to the Kunkel Remedy Report.

10. On May 12, 2023, the Complainants filed a response arguing that the exclusion was unnecessary because "the Kunkel Remedy Report is not being offered for the truth of anything in the report." Comp. Resp. Mot. Exclude Kunkel Report, at 2 (May 12, 2023).

11. At the hearing on May 16, 2023, the Hearing Officer granted MWG's motion to bar the Kunkel Remedy Report, and allowed Mr. Shefftz to testify about limited portions of the report that he had reviewed (i.e. costs) only as an offer of proof. 5/16/23 NDI Tr., 22: 15-23, 91:14-15.

12. MWG renewed its objection to Mr. Shefftz offering testimony at the hearing for the same reasons as outlined in its Motion in Limine -- because the opinions were based on the Kunkel Remedy Report costs and based on assumptions provided by Complainants' counsel, neither of which were "…based on facts or data reasonably relied upon." 5/16/23 Tr., pp. 122-23. The objection was overruled.

13. Mr. Shefftz proceeded to offer testimony relying on the same hearsay assumptions that MWG had previously objected to, *i.e.* duration of remedial work, beginning of noncompliance at each site, etc. This included the remedy cost estimate prepared by Mr. Kunkel, even though the

Complainants had told the Hearing Officer that it was "not being offered for the truth of anything in the report." Comp. Resp. Mot. Exclude Kunkel Report, at 2 (May 12, 2023).

The Opinions of Jonathan Shefftz Violate the Rules of Evidence and the Hearing Officer Erred by Overruling MWG's Objections.

14. The Board's December 15, 2022 ruling allowing Mr. Shefftz's opinions quotes Illinois case law stating: "As long as the hypothetical assumptions are within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible . . . ." (Dec. 15, 2022 Order, at 16, quoting *Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1st Dist. 1993).) The Board went on to state this principle in different terms: "Courts have held that expert witnesses are allowed to rely upon data 'presented to him outside of court and other than by his perception,' so long as it is of a type ordinarily relied upon by experts in the field forming their opinions." (*Id.* quoting *Rock v. Pickleman*, 214 Ill. App. 3d 368, 374 (1st Dist. 1991).) The Board then suggested that MWG could resolve any issues through cross-examination of Mr. Shefftz.

15. But here, there *is no direct or circumstantial evidence*, and no witness or documents for MWG to cross-examine. Mr. Kunkel's cost estimates, which form the basis of Mr. Shefftz's opinions, are Mr. Kunkel's opinion of costs for his opinion on a remedy -- opinions that Complainants' replacement expert (Quarles) completely ignored, did not adopt, and could not testify to. The costs are not "data." Complainants have withdrawn Mr. Kunkel and no one can testify to the costs on which Mr. Shefftz relies. Mr. Shefftz also relies on assumptions made by Complainants' counsel that have no basis in fact, and no direct or circumstantial evidence to support them. 5/17/23 NDI Tr., 37:16-24.

16. When an expert opinion is "totally lacking in factual support, it is nothing more than conjecture and guess and should not be admitted as evidence." *Harris Tr. & Sav. Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 393 (1st Dist. 1998). It is well established that, "For expert

testimony to be admissible, an adequate foundation must be laid establishing that the information that the expert bases the opinion upon is reliable." *Taylor v. Cnty. of Cook*, 2011 IL App (1st) 093085, ¶ 32. To lay an adequate foundation for expert testimony, "it must be shown that the facts or data relied upon by the expert are of a type *reasonably relied upon* by [experts] in that particular field in forming opinions or inferences." *People v. Burhans*, 2016 IL App (3d) 140462, ¶ 30. (emphasis added); see also Ill. R. Evid 703; Fed. R. Evid. 703.[3]

17. As the Board noted, circumstantial evidence may be allowed as evidence. However, the information that formed the basis of Mr. Shefftz's opinions does not qualify as circumstantial. Circumstantial evidence is "the **proof** of certain facts and circumstances from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind." *Consolino v. Thompson*, 127 Ill. App. 3d 31, 33, 468 N.E.2d 422, 82 Ill. Dec. 160 (1984) (emphasis added). The proven circumstantial facts must be of such a nature and so related as to make the facts to be inferred the more probable. *Pyne v. Witmer*, 129 Ill. 2d 351, 369, 543 N.E.2d 1304, 135 Ill. Dec. 557 (1989).

18. In this case, Complainants cannot point to any direct or circumstantial evidence to support Mr. Shefftz's use of the Kunkel cost data or statements from counsel. Instead, Mr. Shefftz used information from unavailable witnesses that MWG had no ability to cross-examine. Mr. Shefftz developed his economic opinions based on cost data from the Kunkel Remedy Report, yet Complainants replaced Mr. Kunkel, did not present Mr. Kunkel to testify about his cost opinions, and Mr. Kunkel's testimony during the first hearing was limited to liability.[4] Because Mr. Kunkel

[3] In *Wilson v. Clark*, 84 Ill. 2d 186, 192-96, 417 N.E.2d 1322, 49 Ill. Dec. 308 (1981), the Illinois Supreme Court adopted Federal Rules of Evidence 703.

[4] The Board incorrectly implied in its Dec. 15, 2022 Order that most of the questions MWG would have presented at the remedies-phase hearing were questions that MWG already had an opportunity to pose at the liabilities-phase hearing, where Mr. Kunkel testified in October 2017 and January 2018. *Id* at 17. That is not true. While Mr. Kunkel may have testified "at length," his testimony was limited to his opinion related to liability (Comp. Ex. 401). MWG

does not live in Illinois, MWG could not subpoena him to appear at the second phase of this hearing. MWG also could not cross-examine Complainants' second expert Mr. Quarles about Kunkel's remedy cost estimates, relied on by Mr. Shefftz, because Mr. Quarles did not review the Kunkel report -- his name did not even "ring a bell." 5/15/2023 Tr., p. 153:14-154:9.

19. The remaining information Mr. Shefftz relies on is from Complainants' counsel, who also are not available to cross-examine and who did not present any evidence to support the statements they fed to Mr. Shefftz. Complainants simply told Mr. Shefftz to use Complainants' counsel's assumptions for key inputs into Mr. Shefftz's report, specifically (i) the duration of Mr. Kunkel's opinion for a remedy, (ii) the start date of Mr. Kunkel's purported remedy, (iii) whether groundwater violations are continuing, or (iv) whether MWG's previous compliance measures should be accounted for. MWG has no way to challenge counsel's assumptions.

20. Mr. Shefftz himself stated that he had no opinion on the quality or validity of the estimates that form the basis of his entire opinion and was simply told to use them. 5/16/23 NDI Tr., p. 24:13-24, Ex. 1201, Shefftz Jan. 2021 Rpt. p. 22, Ex. 1202, Shefftz Rebuttal Rpt. p. 14.

21. MWG's expert, Gayle Koch, who teaches a course on how to become an expert, testified that it is not customary to nor consistent "with the ordinary role an expert plays in litigation" to rely solely on counsel. 6/15/23 NDI Tr., p. 11:15-23, 12:1-5.

22. While the Board may generally prefer to allow testimony and assess its weight, this situation is particularly egregious and a clear exception. As the Hearing Officer stated, an expert must still rely on evidence, be it direct or circumstantial, and it must be evidence that is reasonably relied on by experts. Just like the courts in Illinois, the Board has a responsibility for expert "gatekeeping" when the circumstances require it. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 147 (2nd

---

was barred from cross-examining Mr. Kunkel on his Remedy Report because, as the Board points out in its Order, "remedy was not a part of the testimony or evidence at the liability hearing." *Id.* at 7.

Dist. 2000) (Court found trial court abused its discretion allowing unreliable expert testimony stating "[a]s the gatekeeper of expert opinions disseminated to the jury, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability"); *Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum,* 348 Ill. App. 3d 398, 401 (5th Dist. 2004) (Court approved trial court, as "gatekeeper," striking of the defendant's expert opinion because it was based upon speculative information).

23. Here, the Board is faced with opinions presented by an expert that are based on *assumptions from counsel or a withdrawn and unavailable expert*, and there is no witness available to allow the assumptions to be questioned for their relative weight. Mr. Shefftz's opinions and testimony do nothing to assist the Board, and it would be arbitrary and capricious if the Board were to allow the testimony to stand. There is no question that MWG is prejudiced by expert testimony about an alleged penalty that MWG is unable to attack in any meaningful way.

24. The Board should follow standard Illinois procedural and evidentiary law, reverse the Hearing Officer's admission of Mr. Shefftz's reports and strike Mr. Shefftz's testimony, or, alternatively, recognize that MWG could not challenge the bases for Mr. Shefftz's opinions and therefore give Mr. Shefftz's report and testimony no weight.

WHEREFORE, for the reasons stated above, MWG requests that the Board reverse the Hearing Officer's evidentiary ruling and strike/exclude the baseless opinion testimony by Complainants' expert Jonathan Shefftz.

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 3400

Chicago, IL 60603
312-251-5255

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 MEMORANDUM IN SUPPORT OF ITS APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS OBJECTION TO JONATHAN SHEFFTZ'S OPINIONS

Midwest Generation, LLC ("MWG") submits this Memorandum in Support of its Appeal of the Hearing Officer's decision to admit the expert opinions of Complainants' expert, Jonathan Shefftz. Mr. Shefftz's opinions exceed the limits of Illinois Rule of Evidence 703 and, in being based on a report not submitted for "the truth of anything in the report" and on unsupported assumptions of counsel, even Mr. Shefftz admits that his opinion is has no validity.

The morass the Board now faces is exactly as MWG predicted. Mr. Shefftz's testimony relies on information that has no basis in direct or circumstantial evidence. Mr. Shefftz's opinions were based on the hearsay *opinions* of an expert that Mr. Shefftz has no insight into and who was cut loose by the Complainants before he could be cross-examined at the remedy-phase hearing. This "parroting" of hearsay expert testimony by a non-testifying witness is forbidden by Illinois Supreme Court precedent. Mr. Shefftz similarly erred by preparing his estimates based on unsupported representations of counsel. Such representations are not evidence and cannot meet

the "direct or circumstantial evidence" requirement the Board identified in 2022. (Board Order at 16.). MWG is materially prejudiced by the admission of opinions because MWG was prevented from cross-examining the assumptions on which Mr. Shefftz based his opinions about purported economic benefit.

I. Background

The history on this issue is voluminous and reaches back to before the matter was bifurcated. It is described in detail in MWG's July 17, 2022 appeal and memorandum in support, attached as Exhibit 3. Following the Hearing Officer's decision to allow Complainants to substitute its experts, to amplify and build upon prior experts' testimony, Complainants submitted expert and rebuttal reports of their second groundwater expert, Mark Quarles, and their second economic expert, Jonathan Shefftz. Mr. Quarles ignored and entirely disregarded opinions made by Complainants' first expert, Mr. James Kunkel and developed new remedy opinions. And yet, instead of using Mr. Quarles' new remedy opinions, Mr. Shefftz developed his opinions of purported economic benefit to MWG by using costs that the withdrawn expert, Mr. Kunkel, had opined to but never presented.[1] Mr. Shefftz's opinions were also based on statements that Complainants' counsel told Mr. Shefftz to assume as true, without any support for those statements.

a. Pre-Hearing Briefing

On February 4, 2022, MWG filed its motions in limine, including a motion to exclude the Shefftz opinions. MWG moved to exclude the Shefftz opinions in part because the opinions rely on cost estimates for a removal remedy expounded by a witness that Complainants have withdrawn, and rely upon assumptions fed to him by Complainants' counsel that are not based on

[1] Mr. Shefftz did not even rely upon the correct remedy suggested by Mr. Kunkel. Mr. Shefftz relied upon the remedy to remove the *entire* stations, but Mr. Kunkel stated that he never intended for the entire stations to be removed, only the ash ponds and specific other areas he had identified. Comp. Ex. 412, pp. 11-12.

direct or circumstantial evidence. *See* Ex. 1. On July 13, 2022, the Hearing Officer denied MWG's motion to exclude the Shefftz opinions, stating that "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." H.O. July 13, 2022 Order, p. 9.

On July 27, 2022, MWG appealed the denial of its Motion in Limine to exclude Mr. Shefftz's opinions, largely restating the arguments that had been presented to the Hearing Officer. Despite denying MWG's appeal, the Board noted that there were limits on the ability of experts to rely on the opinions of non-testifying experts and hypotheticals presented by counsel. The outside information must be "of a type ordinarily relied upon by experts in the field in forming their opinion." (Board Order, at 16, citing *Rock v. Pickleman*, 214 Ill. App. 3d 368, 374 (1st Dist. 1991).) And to the extent that Complainants planned on rephrasing Mr. Kunkel's estimates as "hypotheticals," Illinois evidentiary rules would only tolerate that strategy if the hypothetical assumptions were connected to "circumstantial or direct evidence, as supported by the facts or reasonable inferences . . . ." (Board Order at 16, *quoting Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1993).)

Shortly before the remedies-phase hearing, MWG moved to exclude the Kunkel Remedy Report from evidence, in part due to the fact that Mr. Kunkel was not testifying at the hearing and could not be subpoenaed from out of state. MWG Mot. in Limine to Exclude Kunkel Report (May 1, 2023). Complainants argued in response that, "the Kunkel Remedy Report is not being offered for the truth of anything in the report." Comp. Resp. Mot. Exclude Kunkel Report, at 2 (May 12, 2023). During the hearing, the Hearing Officer granted MWG's motion in limine. 5/16/23 NDI Tr., 22: 15-23, 91:14-15.

b. Mr. Shefftz Testifies at the Remedies Phase Hearing on Behalf of the Complainants Using Unsupported Information.

Prior to Mr. Shefftz's direct testimony at the May 16, 2023 hearing, counsel for MWG reasserted its objection to Mr. Shefftz's testimony due to his reliance on assumptions and information that has no basis or foundation in fact. 5/16/23 Tr., pp. 122-23. The objection was overruled.

Mr. Shefftz would go on to testify that that he stood by the opinions he expressed in his deposition and expert reports, and that he had not taken any meaningful steps to vet the information he had been given as inputs for his economic benefit model. He used, as the basis for his opinions, "Table 6" from the Kunkel Remedy Report, even though he had no independent knowledge or expertise to support or verify any of the cost estimates in that table. 5/16/23 NDI Tr., 101:1-4. And the expert Complainants hired to replace Mr. Kunkel (Mr. Quarles) admitted that it was "impossible" for one to estimate the costs of a site-wide excavation based on the existing evidence regarding the historical ash deposits, further undermining the reliability of Mr. Kunkel's report. 5/16/23 NDI Tr., 85:24, 86:1-3; 6/15/23 NDI Tr., 32:6-7.

In fact, Mr. Shefftz incorrectly used the cost estimates in Table 6 of the Kunkel Remedy Report. Mr. Shefftz used the "worst case scenario-*plus*": A double-counted site-wide excavation. Mr. Shefftz's original opinion had an error that incorrectly inflated his estimate. He double-counted the site-wide excavation by totaling the site-wide excavation costs plus the costs to remove the ash ponds and certain alleged areas of ash. 5/16/23 NDI Tr., p. 131:19, 134:135:2, 6/15/23 NDI Tr., p. 33:3-21. On redirect, Mr. Shefftz attempted to correct his error by calculating an economic benefit using the site-wide excavation calculations only, and excluding the excavations for the ash ponds and alleged ash areas. 5/17/23 NDI Tr., p. 23:26:13-27:10. But, Mr. Kunkel hadn't even recommended site-wide excavation as the removal option, but instead insisted he only intended

for the ash ponds and certain limited ash areas to be removed. Comp. Ex. 412, p. 12, 6/15/23, 31:10-12. At the very least, Mr. Shefftz should have used the cost estimate that reflected the more limited proposal to which Mr. Kunkel opined based the removal of the ash ponds and certain ash areas.[2]

Indeed, some inputs for Mr. Shefftz's model were based, not on any materials given to him for analysis, but instead on opinions provided by Complainants' counsel. In particular, Counsel had directed Mr. Shefftz to assume that the cost-estimates developed by Mr. Kunkel would be spread out over a ten-year period. 5/16/23 NDI Tr., 115:7-14 & 5/17/23 NDI Tr, 37:8-11. Mr. Shefftz took no steps to confirm whether ten years was an appropriate or defendable time period, and even pointed out that he did not regard that as a "fact" at all. 5/17/23 NDI Tr., 37:16-24. The same was true of his reliance on Complainants' counsel's opinion about the beginning date to apply to MWG's alleged noncompliance. 5/16/23 NDI Tr., 115:20-24, 116:1-3, 117:14-16. He had no basis to verify or support using the start date provided by counsel. Indeed, taking any steps to confirm that he was basing his opinions on reasonable assumptions would go against his practice of "follow[ing] the legal inputs from the side that is retaining me." 5/17/23 NDI Tr., 38:20-22.

Mr. Shefftz insisted that there was nothing unusual about his reliance on cost estimates prepared by an environmental engineer---he had done so in prior cases. 5/17/23 NDI Tr., 13:16-20. But he did not claim that it was typical for others in his field to do so, and presumably in those the prior cases the engineer testified or other support was in the record. He nonetheless maintained that he was merely acting as the last runner in a "relay race" and that the question of whether Mr. Kunkel's cost estimates are true (whether Mr. Kunkel "veered off track" or his estimates are "the wrong baton") is for the factfinder to determine. *Id.* at 15:1-13. Of course, in this case the factfinder

[2] As MWG's expert, Gayle Koch, testified, this was still not the least cost alternative required under Section 42(h) of the Act. 415 ILCS 5/42(h), 6/15/23 NDI Tr., p. 30:21-31:7; *see also infra* §I.c.

cannot make that determination. Complainants already admitted that they were not presenting Mr. Kunkel's report as true. And Mr. Kunkel was withdrawn as an expert and not available for the hearing. He never testified about his Remedy Report or the costs stated in the Report and no other witness was able to do so because Mr. Quarles ignored the Kunkel Remedy Report.

c. MWG's Expert, Gayle Koch, Testifies at the Hearing About an Expert's Obligation to Verify.

Gayle Koch, an economist retained by MWG, attested that she has testified as an expert witness in over 25 court proceedings, and her testimony has never been rejected for falling outside of the applicable evidentiary rules. 6/15/23 NDI Tr., 9:20-24. She further noted that Mr. Shefftz's practice of relying almost entirely on information provided by an attorney and lack of effort to validate that information through external efforts was "concerning." (*Id.* 13:19-24, 14:1-3, 29:20-22.) Relying on "advocacy pieces of information," she maintains, produces "advocacy testimony," not "expert testimony." (*Id.* 14:4-9.). She stated she had never relied on counsel for that type of information, instead requesting for documentary or other sources of the information because otherwise the person is "no longer an expert then. You can no longer sponsor your analysis. It's now an advocacy piece." *Id.*, p. 29:20-30:5.

To illustrate, she highlighted Mr. Shefftz's economic-benefit analysis, which relies on three assumptions regarding (1) the date MWG's noncompliance started, (2) the date MWG's noncompliance ended, and (3) the amount of money that would be spent on excavation work each year during the period of noncompliance. (*Id.* at 29:11-19) For each of those inputs, she noted, Mr. Shefftz used information from Complainants' attorney and failed to take any steps to verify the information he was given. (*Id.* at 29:17-19)

A second illustration related to the manner in which the Complainant's attorney had curated the information that was provided to Mr. Shefftz. Table 6 of Mr. Kunkel's Remedy Report outlined

two different removal projects that he claimed MWG could have undertaken to achieve regulatory compliance and proffered cost estimates for each of them – a site-wide removal versus a removal of the ash ponds and certain ash areas. An economic-benefits analysis is supposed to be based around the least expensive compliance option. 415 ILCS 5/42(h)(3). Yet, Mr. Shefftz used costs for the site-wide removal *plus* the removal for the ash ponds and certain areas, and not the lower cost option on Table 6. In any case, Ms. Koch noted that removal as a remedial option is the "worst case scenario," and not the least expensive compliance option. 6/15/23 NDI Tr., 31:1-7. As Ms. Koch pointed out, MWG's Weaver Opinion had a lowest cost alternative that was available to Mr. Shefftz that he should have used in his rebuttal report. Ex. 1802, p. 21.

II. Admission of Mr. Shefftz's Opinions Is Clear Error.

The Hearing Officer's decision to admit Mr. Shefftz's reports and opinions was in error. Under the Board's procedural rules, evidence 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. 25, 2018, pp.2-3. Here, Mr. Shefftz's opinions are not based on direct or circumstantial evidence rendering each opinion unreliable, immaterial, and ultimately not relevant. And to the extent that experts may base opinions on hypotheticals, they cannot do so when the hypothetical is not connected to direct or circumstantial evidence pertaining to the matter at hand. Also, under Illinois Rules of Evidence, experts cannot parrot the opinions of non-testifying experts from a different field without any validation or basis. Experts must base their opinions on "facts or data," not representations of counsel and not on expert reports that are not even being submitted for the truth of their contents. Ill. R. Evid. 703.

Mr. Shefftz's opinions do not conform to these rules, making them as irrelevant to the case as the testimony of any other person called to give fact testimony about a matter they have no direct knowledge of. To say that these "expert opinions" should be admitted anyway materially

prejudices MWG because it unduly risks an unjust outcome in this case and, perhaps as importantly, will muddle future proceedings by encouraging parties to treat the *Illinois Rules of Evidence* and the Board's rules as mere suggestions, not rules.

a. None of Mr. Shefftz's Assumptions Are Based on Direct or Circumstantial Evidence or His Own Expertise

The Board is correct that an expert may rely on counsel's assumptions or hypotheticals "*if* [they are] based on direct or circumstantial evidence." Board Order, Dec. 15, 2022 at 16. (emphasis added). But here, none of the assumptions Mr. Shefftz relies on to formulate his opinion are based on direct or circumstantial evidence or even his own expertise and experience.

When an expert opinion is "totally lacking in factual support, it is nothing more than conjecture and guess and should not be admitted as evidence." *Harris Tr. & Sav. Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 393 (1st Dist. 1998). It is well established that, "For expert testimony to be admissible, an adequate foundation must be laid establishing that the information that the expert bases the opinion upon is reliable." *Taylor v. Cnty. of Cook*, 2011 IL App (1st) 093085, ¶ 32; *Kruzek v. Estate of Kruzek*, 2012 IL App (1st) 121239-U, ¶ 31 (limiting testimony based on lack of reliable foundation); ILL. R. EVID. 703. It is the burden of the proponent of expert testimony to lay this foundation. *People v. Safford*, 392 Ill. App. 3d 212, 221 (1st Dist. 2009) (trial court erred when it allowed proposed expert examiner to testify to conclusions without providing evidentiary foundation for his opinion). A tribunal "is not required to blindly accept the expert's assertion that his testimony has analyzed the adequacy of the foundation." *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2d Dist. 2000). After all, an "expert's opinion is only as valid as the reasons for the opinion." *Perona v. Volkswagen of America, Inc*., 2014 IL App (1st) 130748, ¶ 51; *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781 (1st Dist. 2009). In other words, if an expert's opinion lacks factual support or fails to follow established standards, it should not be received. *Musburger*, 394 Ill. App.

3d at 802 (affirming barring expert opinion that lacked factual basis); *In re Marriage of Cutler*, 334 Ill. App. 3d 731, 736–37 (5th Dist. 2002) (expert opinion should not have been received because it lacked a proper foundation).

To lay an adequate foundation for expert testimony, "it must be shown that the facts or data relied upon by the expert are of a type *reasonably relied upon* by [experts] in that particular field in forming opinions or inferences." *People v. Burhans*, 2016 IL App (3d) 140462, ¶ 30. (emphasis added); see also Ill. R. Evid 703; Fed. R. Evid. 703.[3] Moreover, even if the opinion passes the reasonable reliance test, the testimony can still be inadmissible if it "runs afoul of other evidentiary requirements." *Modelski v. Navistar Int'l Transp. Corp.*, 302 Ill. App. 3d 879, 885 (1st Dist. 1999). For example, "testimony grounded in guess, surmise, or conjecture, not being regarded as proof of a fact, is irrelevant as it has no tendency to make the existence of a fact more or less probable. From this conclusion follows the rule that expert opinions based upon the witness's guess, speculation, or conjecture as to what he believed might have happened are inadmissible." *Id.* at 886. Moreover, "[t]he party calling the expert witness must lay a foundation sufficient to establish that the information upon which the expert bases his opinion is reliable." *Turner v. Williams*, 326 Ill. App. 3d 541, 553 (2d Dist. 2001).

The Board has previously rejected an expert's opinion presented at a hearing because it was solely based upon assumptions. *Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Village Board and Groot Industries, Inc.* concerns a request by a home association to review a village's decision to grant siting for a waste transfer station. PCB 14-99 slip at 18, (Aug. 21, 2014), p. 1. Each party engaged expert appraisers to opine on the potential impact to property

[3] In *Wilson v. Clark*, 84 Ill. 2d 186, 192-96, 417 N.E.2d 1322, 49 Ill. Dec. 308 (1981), the Illinois Supreme Court adopted Federal Rules of Evidence 703.

values. *Id.* p. 19-20. The Board accepted the two respondents' expert appraisers' opinions because they were based upon evidence. The Board, however, specifically rejected the home association's expert opinion because it was solely based upon assumptions. *Id.* at 72.

Here, Mr. Shefftz's expert opinion is solely based upon assumptions, totally lacking in factual support, and not supported by direct or circumstantial evidence. As explained throughout this appeal, Mr. Shefftz's opinion is based upon costs from prior expert opinions that Complainants have withdrawn – the Kunkel remedy cost opinions. Complainants admit that they are not claiming that the Kunkel remedy costs are correct, and admit that the Board cannot rely on the Kunkel Report for any factual findings. Comp. Resp. Mot. Exclude Kunkel Report, at p. 2 (May 12, 2023). They claim that the cost opinions provided by withdrawn expert Mr. Kunkel are little more than a "baseline cost assumption to ground Mr. Shefftz's calculations." (*Id.*) But, again, that baseline cost assumption is simply another expert's opinion that has no basis in the record. Even Mr. Shefftz would admit that that his opinion must be rejected. Mr. Shefftz testified that if Mr. Kunkel's cost estimates are not "the truth," then Mr. Shefftz's own opinions are irrelevant and his work "in vain." 5/17/23 NDI Tr., 15:1-7. Moreover, Complainants second expert, hired to replace Mr. Kunkel (Mr. Quarles) admitted that it was "impossible" for one to estimate the costs of a site-wide excavation, which, as Ms. Koch testified, "undercuts the reliability of the Kunkel report." (*Id.*, 85:24, 86:1-3).[4]

In effect, Complainants seem to argue that they are presenting Mr. Shefftz with the Kunkel cost estimates for Mr. Shefftz to create a hypothetical economic benefit analysis (though Complainants never use that term) – but the Board has already determined that hypotheticals must

[4] Mr. Shefftz recently had a portion of his expert opinion in a matter in California excluded for a similar reason – his opinion relied upon another expert's opinion that was found to be unreliable. 5/16/2023 NDI Tr., pp. 109:4-113:19; *San Francisco Baykeeper v. City of Sunnyvale*, 2022 U.S. Dist. LEXIS 164053, pp. 11, 28-29 (N.D. Cal, 2022).

be grounded in truth through direct or circumstantial evidence. The Kunkel Report costs have neither.

The Board's 2022 opinion states that hypotheticals must be "within the realm of circumstantial or direct evidence, as supported by the facts or reasonable inferences, the question is permissible…and facts suggested in hypothetical questions need not be undisputed but only supported by the record." Dec. 13, 2022 Board Order, p. 16, *quoting Carter v. Johnson*, 247 Ill. App. 3d 291, 297 (1993). It is undisputed that there is no direct evidence to support Mr. Kunkel's cost opinions. There is also no circumstantial evidence. Circumstantial evidence is evidence that supports "an inference which is reasonable and probable, not merely possible." *Stojkovich v. Monadnock Bldg*., 281 Ill. App. 3d 733, 739-740 *citing Pyne v. Witmer*, 129 Ill. 2d 351, 543 N.E.2d 1304, 135 Ill. Dec. 557 (1989). "When a party seeks to rely on circumstantial evidence, the conclusion sought must be more than speculative, it must be the only probable conclusion that could be drawn from the known facts. *Id. citing Williams v. Chicago Board of Education*, 267 Ill. App. 3d 446, 642 N.E.2d 764, 204 Ill. Dec. 863 (1994). Here, Table 6 of the Kunkel opinions is not based on any known facts in the record, and does not support an inference that is reasonable or probable.

Similarly, the assumptions from Complainants' counsel, on which Mr. Shefftz specifically bases his opinions, are also not verified by facts or any direct or circumstantial evidence. There is no document, fact, evidence, or testimony in the record supporting the assumptions counsel told Mr. Shefftz to rely on -- that a removal action should have begun one month after the initial sampling event or that a removal action would take ten years. There is also no document, evidence, or testimony that, as counsel told Mr. Shefftz, MWG would have had to reline its ponds or that MWG would have even continued to manage the wet ash in the CCR surface impoundments. As

discussed above, none of the assumptions fed to Mr. Shefftz from Complainants' counsel qualify as circumstantial evidence because they are not based on known facts, nor are they supported by an inference that is reasonable or probable. *Stojkovich*, 281 Ill. App. 3d at 739-740. Each of these unverified assumptions was used by Mr. Shefftz as a key input to his model for him to opine on alleged economic benefit. Comp. Ex. 1201, p. 22, Table 3. Mr. Shefftz agreed that his assumptions were solely from Complainants' counsel and nothing more. 5/16/2023 NDI Tr., pp. 114:17-115:10, 115:15-116:1 117:14-16, 136:13-140:13.

Mr. Shefftz also agreed that he had no factual basis to support any of these inputs from counsel. Mr. Shefftz stated that Complainants' counsel provided him "with their positions on certain issues," but he did not "know if [he] would consider them facts." 5/17/23 NDI Tr. p. 37:22-38:1. MWG's attorney asked him whether his opinion regarding the relevant period of time "would apply to facts . . . like the start date that petitioner's counsel gave you." 5/17/23 NDI Tr., 37:16-20. Mr. Shefftz pointed out that that "fact" was not an appropriate term: "I wasn't aware that was a fact. I was aware that it was an assertion or a position or an argument by complainant's counsel that that is when the remedy costs should have started to be incurred . . . ." 5/17/23, NDI Tr. pp. 37:16-24 & 38:1-4. Mr. Shefftz further admits that he made no effort to determine whether the 10-year figure had any relationship to the facts of the case, and testified that his standard practice is to simply "follow the legal inputs from the side that is retaining me." 5/17/23 NDI Tr., 38:14-22.[5] Mr. Shefftz's position, to rely on positions provided by Complainants' counsel, would be

[5] Ms. Koch's testimony provides a clear contrast. Her own economic-benefit calculations were based on an assessment of remediation projects that had been reviewed for effectiveness and cost by MWG's groundwater experts from Weaver Consulting Group. 6/15/23 NDI Tr.., 68:13-17. She noted that she had prior experience preparing similar cost estimates, and had past experience exercising judgment of the sort of remediation projects that would be appropriate under the general circumstances here. *Id.* at 68:21-24. As such, she was in a position to independently determine whether the Weaver consultants were providing costs assessments that were substantially high or low. *Id.*, at 69:1-3. Similarly, when she needed to gather relevant data from a MWG employee to assess ash-liner costs, she contacted the employee directly, rather relying on counsel as an intermediary. *Id.*, at 71:13-18.

somewhat acceptable if counsel had any evidence in the record to support the "positions." But they do not.

Mr. Shefftz has no independent knowledge or expertise that would give him the ability to rely upon the assumptions fed him by Complainants' counsel or on Table 6 of Kunkel's report. *People v. Negron*, 2012 IL App (1st) 101194, ¶ 13, 368 Ill. Dec. 545, 548, 984 N.E.2d 491, 494, (Expert allowed to testify because assumptions were founded in the same subject as her expertise.). Mr. Shefftz readily admitted that he is not an engineer and cannot testify as to the accuracy of any of the assumptions he is relying upon. Ex. 1202, Shefftz Jan. 2021 Rpt., p. 22, 5/16/23 NDI Tr., p. 97:1-10, ("*As I am an economist, not an engineer, I have no independent expert opinion on the cost estimates that were prepared in that report*."). He similarly testified that as he is an economist, not an engineer, …"it's beyond my expertise to come up with those sort of cost basis." 5/17/23 NDI Tr. p. 13:19-20. He also stated, "***…I'm not an engineer. I'm not a lawyer. So I have no opinion on the information that plaintiff – that complainants' counsel provided to me.***" 5/16/23 NDI Tr. p. 62:3-5. (emphasis added). He agreed that he had no independent opinion on the duration of the remedy, the start date of the remedy, whether the proposed remedy costs by MWG's experts, MWG's mitigation efforts and groundwater sampling would have prevented or achieved compliance. 5/16/23 NDI Tr., pp. 62:10-63:1, 97:1-10, 115:11-14, 117:14-16. Because he has no expertise in these topics, he could not (nor did he) use his own expertise or knowledge to interpret the data and make the resulting assumptions. Nor was any other expert able to provide that support.

Mr. Shefftz does not rely upon any facts, documents, testimony, or any evidence at all – direct or circumstantial. As a result, Mr. Shefftz's opinions lack factual support and fail to follow established standards. The Board should reverse the Hearing Officer and order that the Shefftz opinions be excluded. *Musburger*, 394 Ill. App. 3d at 802.

b. Mr. Shefftz Did Not Provide Foundation for His Claim That His Parroting of a Non-Testifying Expert's Report Is "Typical."

While experts may sometimes rely on the opinions of other experts, they bear the burden of establishing that doing so is customary. *McKinney v. Hobart Bros. Co.*, 2018 IL App (4th) 170333, ¶47. Complainants' token efforts to lay the foundation for Mr. Shefftz's parroting of Mr. Kunkel's cost estimates do not bring the former's opinion into compliance with Rule 703.

Rule 703 allows a testifying expert to rely on a non-testifying expert when the testifying expert's knowledge overlaps with the expertise of the non-testifying expert: For instance, a medical professional relying on the opinion of a colleague on the same care team. *See Walker v. Soo Line R.R. Co.*, 208 F.3d 581 (7th Cir. 2000).Where the testifying expert admits that he has no insight into the validity of the non-testifying expert's conclusions, then the proffered opinions exceed what Rule 703 allows. For example, a Court found that a corporate-finance auditor cannot parrot the opinions of health-care specialists, even if they all work together at the same consulting firm. *Citibank, N.A. v. McGladrey & Pullen, LLP*, 2011 IL App (1st) 102427, ¶¶ 6, 18-19. Similarly, the Seventh Circuit upheld the trial ruling that Fed. R. Evid. 703 did not permit a hydrologist to parrot findings of other groundwater modelers. *Dura Automotive Systems of Indiana, Inc. v. CTS Corp*., 285 F.3d 609, 613-14 (7th Cir. 2002).

According to Mr. Shefftz, there would be nothing uncontroversial about a case where one expert establishes groundwater flows, then another expert determines a remedy based on the first expert's findings, then a third develops the cost estimate based on the second expert's remedy. 5/17/23 NDI Tr., 14:13-19. But that is only the case when the second and third experts testify and support their individual opinions. *Dura Automotive* involved almost the same scenario, and because the groundwater modelers did not testify at trial, a testifying hydrologist could not rely on the opinions of the non-testifying experts. 285 F.3d at 613-14, *cited with approval by Citibank,*

N.A., 2011 IL App (1st) 102427, ¶¶18-19. *See also in re James Wilson Associates*, 965 F.2d 160, 172-73 (7th Cir. 1992) (testifying architect not qualified to parrot opinions of structural engineer regarding physical condition of building).

Here, Mr. Shefftz offered the vague assurance that "typically in these cases" there is a "relay race" where an environmental engineer's "outputs serve as the inputs to my analysis." 5/16/23 Tr., 24:17-24. This is inadequate. He does not specify whether this is "typical" of cases where *he* testifies, or whether it is typical of other matters. To the extent that he was implying that the latter is true, he provides no explanation of how he reached that assessment (e.g., reviewing testimony from other proceedings, discussions with colleagues, etc.). And, most importantly, he neglects to say whether in the "typical case" he describes, members of the "relay team" are allowed to avoid testifying or are unavailable. That is why Mr. Shefftz's metaphor makes no sense here: In a relay race, all the runners are on the same track, equally subject to challenge if they deviate from the rules. No one would ever accept a result where only one member runs at the competition, but the timekeeper uses recordings of his teammates running their legs in a closed practice the previous day to determine the time. In any event, it is hard to see how the litigation strategies Mr. Shefftz describes *could* be typical when they are contrary to Rules of Evidence.

c. It is also not "Typical" for an Expert to Rely Solely on Counsel for Information.

Mr. Shefftz extended his "baton" analogy to conclusions fed to him by Complainants' legal team, stating that it is appropriate to rely on representations from Complainants' counsel and they are part of the relay of information towards his conclusion. 5/17/23 NDI Tr., p. 12:21-14:24. Mr. Shefftz provided no basis for that conclusion and, again, did not explain if other evidence in those cases was admitted to support the claims made by counsel.

MWG's expert, Ms. Koch, testified that this was *not* typical. She stated that the purpose of an expert is to "assist the judge, in this case the Board, with issues that are within [her] expertise." 6/15/2023 NDI Tr., p. 11:12-14. Thus, in preparing her opinion she relied upon documents related to the matter, documents from the previous hearing, accessed publicly available information, spoke with MWG individuals, and consulted and relied upon the opinions from Weaver Consultants – all of which is documented in her report. *Id.*, pp. 12:9-20 & 14:10-22. Ms. Koch's work to collect the relevant factual information is documented in emails between her and MWG counsel. Exs. 1904, 1905, 1906. As she testified, the correspondence reflects that she was asking for documentation as evidence, stating that "that's more reliable than numbers that counsel would give me. And I would not have relied on the numbers coming from counsel."6/15/2023 NDI Tr., p. 136:14-22, *see also* p. 141:4-6 ("I do see that I'm asking for documentation, again, because I need documentation as evidence, not what an attorney says."), 144:1-3 ("But, again, I'm asking for more documentation."). Ms. Koch's efforts to rely on evidence are reflected in her report, which specifies each of her sources. Ex. 1901. Nowhere in her report does she state that she relied upon information "from counsel." By comparison, Mr. Shefftz notes it repeatedly in all three of his opinions. *Compare* Ex. 1901 and Ex. 1202, p. 22 ("The associated dates for all four sites are all based on information that Petitioners' Counsel provided to me…"; "This schedule is based on information that Petitioners' Counsel provided to me…", *see also* pp. 23, 27; Ex. 1203, p. 14 ("…"which Petitioners have informed me is inadequate…"; "…"but with Petitioners have informed me would have needed to be taken…"; "…Petitioners have informed me that the ash liners…"; "…but which Petitioners once again inform me would have needed to be undertaken…"), *see also*, pp. 2, 15, 16, 25; and Ex. 1207, p. 1.

Ms. Koch testified that she would not accept information solely from counsel, without any other citation to a document or expert opinion, because then she would become an advocate, which reduces an expert's credibility. *Id.* 12:21-13:8. She found Mr. Shefftz's reliance on statements from Complainants' counsel concerning. *Id.*, p. 13:19. She stated that:

> "the problem is Mr. Shefftz obtained virtually all of his information from counsel without validating it, without reaching out to other experts that were in the field related to the information he was using. So all of the information going into his model were advocacy pieces of information, and therefore everything that came out of his model was an advocacy piece. And I find that concerning. It's no longer expert testimony. It's advocacy testimony. *Id.*, p. 13:23-14:9.

And she later noted that she would not do the same, stating that she had never relied on counsel for that type of information. *Id.*, p. 29:20. Instead, she requests documentary or other sources of the information because otherwise the person is "no longer an expert then. You can no longer sponsor your analysis. It's now an advocacy piece." *Id.*, p. 29:20-30:5.

III. It is Error to Accept the Shefftz Opinions When MWG Was Precluded from Cross-Examining Any of the Assumptions Shefftz Uses.

i. The Complainants Are Cheating the Rules of Evidence by Introducing Remedy Cost Estimates from a "Former" Expert (Mr. Kunkel) that MWG Could Not Cross-Examine.

Perhaps most importantly, MWG's opportunity to cross-examine Mr. Shefftz was not even a remote equivalent to an opportunity to subject Mr. Kunkel's opinions to the "crucible of cross-examination." *Williams v. Illinois*, 567 U.S. 50, 66 (2012) (internal quote omitted). The Board's December 15, 2022 Order held out hope that cross-examination of Mr. Shefftz could meaningfully test the validity of Mr. Kunkel's opinions in absentia. Board Order Dec. 15, 2022, at 17.[6] Neither

[6] The Board also incorrectly implied in its Dec. 15, 2022 Order that most of the questions MWG would have presented at the remedies-phase hearing were questions that MWG already had an opportunity to pose at the liabilities-phase hearing, where Mr. Kunkel testified in October 2017 and January 2018. *Id* at 17. That is not true. While Mr. Kunkel may have testified "at length," his testimony was limited to his opinion related to liability (Comp. Ex. 401). MWG was barred from cross-examining Mr. Kunkel on his Remedy Report because, as the Board points out in its Order, "remedy was not a part of the testimony or evidence at the liability hearing." *Id.* at 7.

of the parties here agree. The Complainants' position is that, since neither they, nor Mr. Shefftz, take the position that "anything" in the Kunkel Remedy Report is true, the only valid cross-examination questions were whether Mr. Shefftz "is lying or confused and did not in fact rely on the Kunkel Report." (Comp. Resp. Mot. Exclude Kunkel Report, at p. 2 (May 12, 2023)).

And MWG basically agrees that Mr. Shefftz would not say much more than that, no matter how aggressively he was interrogated. He was acting "as a screen against cross-examination" of Mr. Kunkel. *In re James Wilson Assocs.*, 965 F.2d 160, 173 (7th Cir. 1992). The Hearing Transcript shows that Complainants' strategy has worked, at least so far. Mr. Shefftz confirms that he is continuing to follow Complainants' counsel's instructions to do no more than parrot Mr. Kunkel's cost estimates for a site-wide excavation remedy. And Mr. Shefftz admitted that his expertise does not overlap with Mr. Kunkel's at all. As such he could not respond to any of the questions MWG would have raised about Mr. Kunkel's opinions, had Mr. Kunkel been available to testify:

- How Mr. Kunkel's proposed removal remedy comports with the Board's findings at each Station.
- Whether Mr. Kunkel's analysis of the location of removals is appropriate in light of the Board's findings at each Station.
- Whether Mr. Kunkel's estimates are reliable for the costs of excavation and backfilling for the removal project he is recommending?
- How far Mr. Kunkel's potential ash disposal locations are from the MWG Stations and whether estimated disposal costs reflect that distance?
- Whether Mr. Kunkel investigated landfills that would accept the CCR?
- If so, what landfills and what was the result of his investigation?
- Whether a landfill's refusal to accept the CCR would change the cost estimates?
- Whether Mr. Kunkel's cost estimated accounted for the costs of tipping fees for disposal at a landfill?
- What was the source of the material to be used to backfill following the extensive, proposed excavation?

- How far away was the source of the backfill material?

Indeed, during cross-examination of Mr. Shefftz, MWG's counsel ran through dozens of facts from the Kunkel Remedy Report (facts ostensibly supporting the Table 6 cost estimates). 5/16/23 Tr., pp. 101-108. Each time, Mr. Shefftz admitted that he had no independent knowledge of where any of Mr. Kunkel's facts had come from or how he had used them to form his cost estimates. (*Id.*)

This is the "improper" shielding that the Seventh Circuit (applying an evidentiary rule embraced by the Illinois Supreme Court) warned of in *James Wilson Associates*. This inability to cross-examine is the reason that Illinois courts (and this Board's order) require that any new expert be limited to expounding and adding to the opinions of the former expert – so that there is a witness available to be examined. *People v. Pruim*, PCB 04-207 (Sept. 24, 2008) (Hearing Officer allowed substitution of expert witness because the new expert worked to develop the supplemental opinion, indicating that there was little difference between the old and new expert opinions.) The Board's confidence that it will not be snowed by the kinds of games Rule 703 prohibits is not a substitute for enforcing Rule 703 and the Board's rules in a textbook example of the rules being violated.

ii. <u>MWG Was Blocked from Cross-Examining the Assumptions Fed to Mr. Shefftz by Complainants' Counsel and, in Any Event, Counsel Failed to Lay Foundation Supporting Those Assumptions.</u>

A year ago, Complainants' counsel advised the Board that the "10-year removal timeline represents a reasonable hypothetical time for Mr. Shefftz to employ as an input" because it was based on "Complainants' Counsel's knowledge of how long similar cleanup projects have taken at other sites and in other states." Comp. Resp. to Appeal of Motion in Limine to Exclude Shefftz Opinions, at p. 8 (Aug. 10, 2022). But in the many months between that representation and the hearings, Complainants' counsel took no steps to lay a foundation for that assumption. This inaction was fatal in the wake of the Board's warning that the assumptions presented to experts must be connected to "direct or circumstantial evidence." (Board Order at 16)

As admitted by Complainants, Mr. Shefftz relied upon Complainants' counsel for very specific assumptions that formed the basis for his conclusions about economic benefit to MWG. In fact, without those assumptions from counsel to use as input into his "model", Mr. Shefftz's entire process for calculating economic benefit fails. Despite claiming that the Kunkel remedy was "not offered for the truth of anything in the report," (Comp. Resp. Mot. Exclude Kunkel Report, at p. 2 (May 12, 2023),) Counsel fed to Mr. Shefftz how long the (withdrawn) Kunkel remedy would take and told Mr. Shefftz to assume that the violations are "continuing." Ex. 1202, p. 14. As the Board is aware, this assumption of continuing violations was reconsidered by the Board in its Revised Interim Order. Board Feb. 6, 2020 Order, p. 13 (Holding that the groundwater management zones continue to be applicable). Again, it cannot possibly be held that such assumptions made by counsel, and not a from witness that can be challenged under oath, are reliable facts for expert testimony: Even Mr. Shefftz admits that these assumptions are not "facts." 5/17/23 NDI Tr., 37:24.

Because Complainants presented no testimony on the duration of the Kunkel remedy nor whether those violations are "continuing," MWG could not interrogate those bold assumptions at the hearing. MWG was prejudiced by having no ability to ask:

- What "similar projects" are Complainants' counsel referring to for their alleged knowledge? What states? What sites? How are the sites "similar"? Do the sites contain CCR? If not – what did the sites contain? How big were the sites? What was the remedy? Where were the disposal locations that the waste went to and how far was the transportation? What other remedies were considered?

- The basis for the assumption that a remedy project would begin within one month after the first round of sampling occurred at the MWG Stations?

- How counsel's assumptions comport with requirements (timing, permitting, assessments etc.) of 35 Ill. Adm. Code 845 ("Illinois CCR Rule")?

- How counsel's assumptions fit within the rules and practices of the Illinois EPA and the Illinois Site Remediation Program ("SRP") process under 35 Ill. Adm. Code Part 740?

- The basis for counsel's statements that the violations are continuing in light of the Board's interim opinions, including the Board's opinions concerning groundwater management zones.

iii. Mr. Shefftz's Opinions do not Aid the Board Because They are Wholly Lacking in Basis

Mr. Shefftz's opinions in his reports and testimony, based upon nothing more than assumptions, do not meet the basic tenet that an expert's testimony must aid the Board. *Johns Manville v. IDOT*, (PCB 14-3, April 26, 2016, B. Halloran), slip op. p. 2, *citing Thompson v. Gordon*, 221 Ill. 2d 414, 428-429 ("A person will be allowed to testify as an expert …where his testimony will aid the trier of fact in reaching its decision."); Ill. R. Evid. 702. Limiting the expert opinions to only those that assist the Board, acts as a gatekeeper of useless opinions. Just like Illinois circuit courts, the Board has a responsibility for expert "gatekeeping" when the circumstances require it. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 147, 245 Ill. Dec. 769, 776 (2nd Dist. 2000) (Court found trial court abused its discretion allowing unreliable expert testimony stating "[a]s the gatekeeper of expert opinions disseminated to the jury, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability"); *Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum,* 348 Ill. App. 3d 398, 401, 284 Ill. Dec. 164, 167, 809 N.E.2d 730, 733 (5th Dist. 2004) (Court approved trial court, as "gatekeeper," striking of the defendant's expert opinion because it was based upon speculative information).

Here, Mr. Shefftz simply accepted each of the assumptions he relied upon without question. Mr. Shefftz specifically stated that he ***only*** used the cost figures that appeared in a single table of Mr. Kunkel's report, and the date of the report, (5/16/23 p. 17:6-9), and otherwise relied upon the information solely from Complainants' counsel. Mr. Shefftz also admits that he is just as agnostic about the credibility of the assumptions. Using his own relay race analogy he stated that if inputs he receives from the other experts and legal team (*i.e.* the "batons") are incorrect or found to be

invalid "then all of my work has kind have been in vain." 5/17/23 NDI Tr. 14:3-15:7. Further explaining "Even if my methodology and all my steps were correct, using the relay race an analogy, it's like I was handed the wrong baton or the runner before me veered off track or committed some other violation that disqualifies the entire time." *Id.* 15:8-13. As the phrase goes - "garbage in, garbage out," and an opinion that contains no judgment on the inputs but is merely a calculator, is of no use to the Board and should be stricken.

IV. Conclusion

The Hearing Officer was faced with opinions presented by an expert that are based on assumptions from counsel and a withdrawn and unavailable expert, and there was no witness or evidence available to allow the assumptions to be questioned for their relative weight. It was clear error for the Hearing Officer to accept opinions and testimony that violate *Illinois Evidence Rule* 703 and Board rules and orders. MWG is materially prejudiced by the admission of his opinions because they fail to comply with the fundamental evidentiary requirements. MWG requests that the Board reverse the Hearing Officer's order, and strike/exclude the testimony of Complainants' expert, Jonathan Shefftz, and his reports (Exhibits 1202, 1203, and 1207). Even if the Board declines to reverse the Hearing Officer's decision, the Board should give Mr. Shefftz's reports and testimony no weight.

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 3400
Chicago, IL 60603
312-251-5255

EXHIBIT 1

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Motion *In Limine* to Exclude Jonathan Shefftz Opinions without the Non-Disclosable Exhibits, a copy of which is hereby served upon you. The Motion and Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: February 4, 2022

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

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
Brad.Halloran@illinois.gov

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
CJones@elpc.org
KCourtney@elpc.org

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Greg.wannier@sierraclub.org

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 Jonathan Shefftz Opinions without the Non-Disclosable 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 Jonathan Shefftz Opinions with the Non-Disclosable Exhibits were emailed on February 4, 2022 to the parties listed on the foregoing Service List. The Motion and Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

/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 JONATHAN SHEFFTZ 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 Opinions of Jonathan Shefftz because: (1) his economic benefit opinion is not based upon reliable evidence or evidence reasonably relied upon by economic experts; rather, it is predicated on speculative information provided by Petitioners' attorneys and information rejected by Petitioners' groundwater expert and therefore lacks foundation and is otherwise irrelevant; (2) his deterrence opinion wrongly attempts to opine on how the Board should interpret its own regulations and conflicts with Board precedent. Because his economic benefits analysis and deterrence opinions must be excluded, his opinion on MWG's ability to pay for his suggested penalty must also be excluded.

In support of its Motion, MWG states as follows:

1. Petitioners identified Mr. Shefftz as their economic expert and he issued three reports: Expert Opinion, Economic Benefit of Noncompliance and Economic Impact of Penalty

Payment and Compliance Costs, January 25, 2021 ("Expert Opinion"); Supplemental and Rebuttal Expert Opinion, Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, July 16, 2021 ("Supplemental Opinion); and, Second Supplemental and Rebuttal Expert Opinion, Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, October 26, 2021, ("Second Supplemental Opinion."), attached as Exhibits 1, 2 and 3 respectively.[1]

2. In these Reports and at deposition, Mr. Shefftz offered three affirmative opinions:

> (1) "[b]ased upon my analysis of the remedy cost estimates that Petitioner's counsel provided to me in response to my requests, Respondent's economic benefit from failing to implement these measures in a timely manner is approximately $41.6 million." July 16, 2021"Supplemental and Rebuttal Expert Opinion," pp. 1-3; October 26, 2021, "Second Supplemental and Rebuttal Expert Opinion," p. 2;[2]
>
> (2) "for civil penalties to achieve financial deterrence, their value must exceed the economic benefit the companies realize by delaying and/or avoiding adequate pollution control. Because not all violations are …penalized, in order to achieve adequate deterrence, a civil penalty should be adjusted by probability of detection, prosecution and ultimate payment. . . . This is necessary to achieve the Board's goal to, 'deter further violations by the respondent and to otherwise aid in enhancing voluntary compliance with this Act by the respondent and other persons similarly subject to the Act.'" Expert Opinion, p. 2, Supplemental Opinion, p. 3*;* and
>
> (3) "the standard essentially applied by the U.S. EPA ABEL ability-to-pay model is merely that the sum of compliance costs and penalty be less than the cash flow. From this comparison, my conclusion is that both the compliance costs and a penalty based on the full economic benefit amount would be affordable." Second Supplemental Opinion, p. 1.)

[1] Pursuant to Hearing Officer's April 13, 2021 Order and upheld by the Board on Sept. 9, 2021, Exhibits 1, 2 and 3 are modified to exclude references to MWG's indirect parent company, NRG Energy, Inc. Additionally, because the opinions are marked "Non-Disclosable Information", the Exhibits were filed with the Board and mailed to the Board's Clerk pursuant to Subpart 130 of the Board Rules. The information in this motion (without exhibits) does not fall within Non-Disclosable Information.

[2] Mr. Shefftz's Expert Opinion had a similar statement, but it concluded that the economic benefit was $66 million, which was based upon data he had in January 2021.

A. Mr. Shefftz's Economic Benefit Opinion Must Be Stricken Because it is Based Upon Unreliable Information and Lacks Factual Support

3. Mr. Shefftz's first opinion on the economic benefit of noncompliance to MWG must be excluded because it lacks adequate foundation. The information used to reach the opinion is unreliable, is inaccurate, is not the type of information reasonably relied upon by economic experts and is speculative. As a result, the opinion also is irrelevant.

4. It is well established that, "For expert testimony to be admissible, an adequate foundation must be laid establishing that the information that the expert bases the opinion upon is reliable." *Taylor v. Cnty. of Cook*, 2011 IL App (1st) 093085, ¶ 32; *Kruzek v. Estate of Kruzek*, 2012 IL App (1st) 121239-U, ¶ 31 (limiting testimony based on lack of reliable foundation); ILL. R. EVID. 703. It is the burden of the proponent of expert testimony to lay this foundation. *People v. Safford*, 392 Ill. App. 3d 212, 221 (1st Dist. 2009) (trial court erred when it allowed proposed expert examiner to testify to conclusions without providing evidentiary foundation for his opinion). A tribunal "is not required to blindly accept the expert's assertion that his testimony has analyzed the adequacy of the foundation." *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2d Dist. 2000). After all, an "expert's opinion is only as valid as the reasons for the opinion." *Perona v.Volkswagen of America, Inc*., 2014 IL App (1st) 130748, ¶ 51; *Todd W. Musburger, Ltd. v.Meier*, 394 Ill. App. 3d 781 (1st Dist. 2009). In other words, if an expert's opinion lacks factual support or fails to follow established standards, it should not be received. *Musburger*, 394 Ill. App. 3d at 802 (affirming barring expert opinion that lacked factual basis); *In re Marriage of Cutler*, 334 Ill. App. 3d 731, 736–37 (5th Dist. 2002) (expert opinion should not have been received because it lacked a proper foundation).

5. To lay an adequate foundation for expert testimony, "it must be shown that the facts or data relied upon by the expert are of a type *reasonably relied upon* by [experts] in that particular

field in forming opinions or inferences." *People v. Burhans*, 2016 IL App (3d) 140462, ¶ 30. (emphasis added); see also Ill. R. Evid 703; Fed. R. Evid. 703.[3] Moreover, even if the opinion passes the reasonable reliance test, the testimony can still be inadmissible if it "runs afoul of other evidentiary requirements." *Modelski v. Navistar Int'l Transp. Corp.*, 302 Ill. App. 3d 879, 885, 707 N.E.2d 239, 244 (1st Dist. 1999). For example, "testimony grounded in guess, surmise, or conjecture, not being regarded as proof of a fact, is irrelevant as it has no tendency to make the existence of a fact more or less probable. From this conclusion follows the rule that expert opinions based upon the witness's guess, speculation, or conjecture as to what he believed might have happened are inadmissible." *Id*. at 886. Moreover, "[t]he party calling the expert witness must lay a foundation sufficient to establish that the information upon which the expert bases his opinion is reliable." *Turner v. Williams*, 326 Ill. App. 3d 541 (2d Dist. 2001).

6. Mr. Shefftz's economic benefit opinion is based upon his version of an economic benefits analysis. Ex. 4, Deposition of Jonathan Shefftz, October 28, 2021 at pp., 49:8-18. As he states, an economic benefit analysis calculates financial gains that accrue through delayed and/or avoided expenditures of capital equipment and/or incurring other costs for compliance with environmental requirements. Ex. 1, p. 7.

7. Mr. Shefftz's economic benefits analysis relies on a number of data inputs, including the capital investment for a remedy, the date of initial noncompliance, dates for when the remedy costs should have been expended, and the date compliance will be achieved. Mr. Shefftz admittedly did not know or try to form opinions as to these inputs. As he acknowledges, "he is not an engineer" and has no independent opinion on the nature of the proposed remedy, its

[3] In *Wilson v. Clark*, 84 Ill. 2d 186, 192-96, 417 N.E.2d 1322, 49 Ill. Dec. 308 (1981), the Illinois Supreme Court adopted Federal Rules of Evidence 703.

cost, its timeline or the dates of initial noncompliance or compliance. Ex. 4, pp., 61:3-15; 73:12-75:19).

8. Consequently, he gathered the information needed for these inputs from two sources. First, he obtained the critical inputs of date of noncompliance, dates of compliance and length of remedy solely from statements made by Petitioners' attorneys. Second, he determined his capital investment/cost of remedy from the report of a previous expert, James Kunkel.[4] Ex. 4, p., 60:7-17; Ex. 1, p. 22.

9. Of utmost importance, Mr. Shefftz sourced almost all of his economic benefit analysis inputs (the date of noncompliance, date of compliance, length of remedy, and the correct remedy) solely from statements made by Petitioners' counsel. As his Report states, "Table 3 provides the dates for when the various remedy costs should have been expended and can reasonably be anticipated to be expended eventually based on a 10-year cleanup schedule at each of the four sites. This *schedule* is based upon *information that Petitioner's counsel provided to me in response to my requests."* Ex. 1, p. 22.

10. When asked during his deposition what he meant by this "schedule," Mr. Shefftz replied, "both the number of years of the schedule and when the start date should be for each schedule." Ex. 4, pp., 73:15-74:4. He explained that while Mr. Kunkel provided the total remedy cost, he needed the information related to "expenditure pattern and timing" of the remedy to run the model, which he obtained solely from Petitioners' attorneys. Ex. 4, p., 74:15-23. In his deposition, Mr. Shefftz stated that when he asked counsel for this information, "I was told ten years, and here are the start dates for both the one-time scenario and the delayed-compliance

[4] On Table 6 of his report, Mr. Kunkel estimates the total cost for the removal remedy at the four stations to be $346,158,190. Mr. Shefftz relies upon the estimates in Table 6 of Mr. Kunkel's Report, Ex. 1, p. 22, 25, and Ex. 4, p. 60:7-17. However, as discussed herein, Complainants appear to be attempting to withdraw Mr. Kunkel's opinions.

scenario." *Id*. Petitioners' counsel also informed Mr. Shefftz that the violations were "continuing," a factor in setting the date of compliance. Ex. 4, p., 107:16-19. In other words, Petitioners' counsel served as Mr. Shefftz's sole source for these critical model inputs. Ex. 4, pp., 74:21-23; 75:2-14 (explaining he had no opinion on the ten-year schedule "both in number of years and timing of it.")

11. This reliance on counsel's statements was improper. *Ross v. City of Rockford*, 2018 U.S. Dist. LEXIS 51398, *9 (stating that "improper expert reports subject to being stricken include reports . . . that merely express the opinions of the lawyers who hired the expert."). There is nothing in the record supporting the dates chosen by Petitioners' counsel or the length of the remedy. Rather, these inputs appear to be plucked from thin air. For instance, Mr. Shefftz's Reports state the remedy should have begun in January 2011, about one month after the groundwater sampling began at the Stations. There is neither evidence in the record nor an expert opinion stating that CCR should have been removed one month after the groundwater sampling began. This would make no sense because at that time there would have been only an initial round of limited sampling data (sampling just began in the fourth quarter 2010). Moreover, neither Mr. Quarles nor Mr. Kunkel provide any opinion as to the start date or end date of any purported removal remedy. Without any evidence in the record nor any expert opinion to support that a removal action would take ten years or that a compliance should be reached by January 1, 2020, Mr. Shefftz's opinion and his calculations have no basis.

12. Mr. Shefftz also relied solely on the word of Petitioners' counsel to select a remedy for insertion into his calculations. He reviewed Mr. Kunkel's remedy report, which he discussed with Petitioners' counsel. Ex. 4, p. 66:12-13. He further states in his Rebuttal Opinion that Petitioner's counsel informed him that the costs for the pond liners MWG installed would have

been expended anyway. Ex. 2, p. 14, Ex. 4, 100:10-101:18. There is nothing in the record to support this statement. Similarly, Petitioners' counsel told Mr. Shefftz that the groundwater monitoring MWG conducted would have needed to be conducted in any case (Ex. 2, p. 14, Ex. 4, p. 101:23-102:9), which has not been established. In fact, the opposite is true – MWG, unlike other companies, voluntarily agreed to conduct sampling. 1/29/18 Tr. p. 245:12-15 (Testimony of Race). It was under no obligation to do so in December 2010. Finally, Petitioners' counsel told Mr. Shefftz that the alleged violations were ongoing (Ex. 2, p. 15, Ex. 4 p. 110:10-22), which is purely a legal conclusion. He cites to no other basis for these conclusions.

13. Mr. Shefftz's opinion also relies on a remedy that Petitioners are apparently trying to withdraw. On November 16, 2020, Petitioners replaced Mr. Kunkel with a new remediation expert, Mark Quarles. *See* Complainants' Notice of Expert Witnesses for Remedy Phase, Nov. 16, 2020. Mr. Quarles completely ignores Mr. Kunkel's removal remedy, recommending instead that MWG conduct a "nature and extent" investigation.[5] Hence, Mr. Kunkel's removal remedy, relied upon by Mr. Shefftz to inflate his economic benefit analysis, is apparently not the remedy Petitioners are recommending to the Board. If so, the cost of Mr. Kunkel's remedy has absolutely nothing to do with this case anymore and Mr. Shefftz's reliance on those costs is patently irrelevant. Even more odd, Mr. Shefftz did not rely upon any opinions made by Mr. Quarles. In fact, he admitted at his deposition that he did not even recognize Mr. Quarles's name. Ex. 4 p., 61:19-21.

14. In cases like this one, where the capital expenditure is some sort of ongoing remediation (as opposed to the installation of known pollution control equipment) and the Board must determine the economic benefit of noncompliance, the Board has found that it lacks sufficient

[5] See also MWG's Motion in Limine to Exclude Quarles Opinions, filed on this date.

data in the record because no remedy has yet been ordered. *People v. Poland, et seq.*, 2003 Ill. ENV LEXIS 457, *32 (Ill. Pollution Cont. Bd. August 7, 2003) (complainant acknowledging "it would be unreasonable to expect a precise quantification of the economic benefit in a case such"); *People v. Null*, 2011 Ill. ENV LEXIS 451, *32 (Ill. Pollution Cont. Bd. October 6, 2011) ("The record here does not quantify the amount of any economic benefit under Section 42(h)(3) that the respondent has accrued as a result of avoiding proper disposal of the waste.") That is the situation here. The purpose of this Hearing involves the determination of a potential active remedy, but, as stated above, not even Petitioners can determine what that may be.

15. As the phrase goes, "garbage in, garbage out." The accuracy of Mr. Shefftz's economic benefits analysis depends upon the accuracy of the inputs. But Mr. Shefftz's noncompliance start date, remedy timeline, compliance start date, and correct remedy are not grounded in fact. Instead they are pure fiction, made up by Petitioners' counsel for advocacy purposes. This alone is fatal to his opinion. Similarly, because Petitioners' purported remedy has apparently changed, the costs, timing, and scope of the "capital expenditure"/remedy are unknown, rendering Mr. Shefftz's results baseless.

16. Because Mr. Shefftz uses a remedy apparently rejected by Petitioners and their new groundwater expert and because all of the other inputs are fabrications of counsel, the inputs used in his economic benefits analysis are inherently unreliable and are neither the type of facts and data "reasonably relied upon" by economic experts employing an economic benefits analysis. Nor are they relevant. Accordingly, the opinion and any related testimony must be excluded. *See Modelski*, 302 Ill. App. 3d at 886 (excluding expert testimony as irrelevant when based on "fictional musings as to what might have happened"); *Hiscott v. Peters*, 324 Ill. App. 3d 114, 123 ("For reconstruction testimony to be admissible, there must be sufficient data about the accident

in evidence to provide a reasonable basis for the expert's opinion"); *Abramson v. Levinson*, 112 Ill. App. 2d 42 (1st Dist. 1969) (holding that the admissibility of opinion testimony is "limited by whether or not there is sufficient undisputed physical evidence to provide the basic data needed for the application of principles of physics, engineering or science. Absent such basic and essential facts, the opinion of any expert is as much speculation, guesswork and conjecture as would be a jury's verdict based on the absence of basic and necessary facts.")

B. Mr. Shefftz's Opinion on Financial Deterrence Must Be Excluded Because it Usurps the Board's Role to Interpret the Law

17. Under Illinois Rule of Evidence 702, expert witness testimony is admissible only where the expert's "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." The Board and Illinois courts have repeatedly held that interpretations of the law by experts do not meet this standard. *See Illinois v. Panhandle Eastern Pipeline Co*., PCB No. 99-191, 2000 Ill. ENV LEXIS 414 at *2-*5 (June 22, 2000) (Board granting motion *in limine* when expert attempted to opine before the Board on penalties previously imposed by the Board in administrative environmental cases, including statistical data about penalties, because the Board deemed the information unnecessary); *Lid Assocs. v. Dolan*, 324 Ill. App. 3d 1047, 1058 (1st Dist. 2001) ("An expert witness is not competent to give testimony amounting to statutory interpretation"). Legal conclusions infringe both on the role of the trier of law in interpreting the applicable law, and on the role of the trier of fact in applying that law to the facts before it." *Lid Assocs.*, 324 Ill. App. 3d at 1058.

18. Mr. Shefftz's opinion regarding financial deterrence under Section 42(h)(4) of the Illinois Environmental Protection Act ("Act") usurps the role of the Board to interpret its laws and regulations. Mr. Shefftz tells the Board that in order to "deter further violations" and enhance "voluntary compliance with this Act," "a civil penalty should be adjusted by probability of

detection, prosecution and ultimate payment." Ex. 1, p. 2, 28 and Ex. 2, pp. 3, 23-25. Mr. Shefftz is improperly treading on the Board's role and obligation to apply the penalty provisions in Section 42(h)(4) of the Act.

19. Notably absent from Section 42(h)(4) of the Act is *any* requirement to adjust a penalty by probability of detection, prosecution, or ultimate payment. 415 ILCS 5/42(h)(4). In fact, the Board's application of 42(h)(4) conflicts with this directive. The Board recognizes that no formula exists to determine how to adjust for deterrence. *See IEPA vs. Barry*, 1990 WL 271319, at *25, PCB 1988-71. In many cases, the Board looks to good faith and other Section 42(h) factors to determine if an increase is needed to deter. *See Wasteland, Inc. v. PCB*, 118 Ill. App. 3d 1041, 1055 (3d Dist. 1983) (Wasteland handled three times the amount of waste allowed by permit and was a "case of continuing blatant disregard for requirements…"); *IEPA v. Barry*, 1990 WL 271319, at *20, PCB 1988-41 ("In such a case of recalcitrance and bad faith, the need to aid compliance by deterring this violator, as well as others, becomes very important."). Though a penalty might be aggravated by a violator's lack of due diligence or good faith, "[m]onetary penalties must not be imposed solely to set an example." *Trilla Steel Drum Corp. v. PCB*, 180 Ill. App. 3d 1010, 1013 (1st Dist. 1989). The penalty must be "commensurate with the seriousness of the infraction." *Id.* at 1013.

20. Because Mr. Shefftz's legal interpretation of Section 42(h)(4) of the Act does not aid the Board and actually contradicts Board precedent, it should be excluded.

21. Finally, Mr. Shefftz opines that his recommended $41.6 million in economic benefit penalty is "affordable" to MWG. Ex. 3, p. 2. Obviously, if his opinion on MWG's economic benefit is stricken due to lack of supporting data and improper reliance on counsel, this third opinion should likewise be stricken as it would be moot. Moreover, MWG has not made an

inability to pay claim, so his opinion that his economic benefit penalty is "affordable" is irrelevant. In any case, economic reasonableness under the Act does not consider the financial capacity of the defendant, making his opinion even more irrelevant. *Allaert Rendering, Inc. v. Illinois Pollution Control Board*, 91 Ill. App. 3d 153, 158 (3rd Dist. 1980) (Court found that the plain text of Section 33(c) shows that "factors *other than a corporation's income* . . . are singled out as being determinative of economic reasonableness.")(emphasis added); *see also Hoffman v. City of Columbia*, PCB 94-146, 1996 Ill. ENV LEXIS 716, *47-*48 (1996) (Board rejected complainant's request for more expensive remedy, without any reference to the financial situation of the respondent.)

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order excluding Mr. Shefftz's economic benefit opinion, his deterrence opinion and his affordability opinion in his Expert Opinion, Supplemental Opinion, and Second Supplemental Opinion.

Respectfully submitted,

Midwest Generation, LLC

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

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

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion in Limine to Exclude Jonathan Shefftz Opinion, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 18, 2022

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

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
100 West Randolph Street
Suite 11-500
Chicago, IL 60601
Brad.Halloran@illinois.gov

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
CJones@elpc.org
KCourtney@elpc.org

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Greg.wannier@sierraclub.org

Peter Morgan
Sierra Club
1536 Wynkoop St., Ste. 200
Denver, CO 80202
Peter.morgan@sierraclub.org

CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service and Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion in Limine to Exclude Jonathan Shefftz Opinion, a copy of which is hereby served upon you was filed on March 18, 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 and Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion in Limine to Exclude Jonathan Shefftz Opinion were emailed on March 18, 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 FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINION

Respondent, Midwest Generation, LLC ("MWG"), requests that the Hearing Officer grant this Motion for Leave to File, *Instanter*, its Reply (to Complainants' Response) in support of MWG's Motion *In Limine* to Exclude Jonathan Shefftz Opinions, pursuant to Sections 101.500 and 101.514 of the Illinois Pollution Control Board's ("Board") Procedural Rules. 35 Ill. Adm. Code 101.500(e), 101.514. A reply brief is warranted because Complainants raised new claims in its Response concerning the ability to challenge Mr. Shefftz' opinions, and MWG will be materially prejudiced if it is not allowed to reply. In support of its motion seeking leave to file, *instanter*, MWG submits its Reply and states:

1. In their response to MWG's Motion *in limine* to exclude Jonathan Shefftz Opinion ("Response"), Complainants wrongly claim that that the assumptions relied on by Mr. Shefftz are based upon evidence in the record and that MWG will be able to "challenge the assumptions" in the hearing. The opposite is true. Each of the assumptions Mr. Shefftz relies upon for his opinion

are either from a former expert's report that Complainants have asserted is *not* a part of the record, or from statements made to Mr. Shefftz by *Complainants' attorneys*. Because neither the former expert (Mr. Kunkel) nor Complainants' counsel will be testifying at the hearing, MWG has no ability to challenge any of Mr. Shefftz's assumptions at the hearing.

2. On February 4, 2022, MWG filed its Motion *in Limine* to exclude the opinions of Jonathan Shefftz because his opinions are (i) based upon speculative information provided by Complainants' counsel and (ii) based on information from their prior expert's report that was never reviewed or relied on by their new groundwater expert.

3. On March 4, 2022, Complainants filed their Response to MWG's Motion *In Limine* to Exclude Jonathan Shefftz Opinions. Complainants' Response incorrectly claims that the assumptions Mr. Shefftz relies upon are in the record and that MWG can challenge the assumptions during the hearing.

4. Complainants' claim that MWG can challenge Mr. Shefftz's assumptions is inaccurate and MWG will suffer material prejudice if it is not permitted to explain, in its reply, that there is no expert or other witness being produced by Complainants who can or will testify to or even discuss the assumptions made by Mr. Shefftz.

5. Complainants first suggest that the Board should allow Mr. Shefftz to rely on remedy cost estimates provided by their former expert, Mr. Kunkel. Yet Complainants withdrew Mr. Kunkel as a witness, over MWG's objections, and replaced him with Mr. Quarles.[1] MWG cannot cross examine Mr. Kunkel about his remedy estimates, process, or proposal because he is no longer a witness in this case, and cannot be compelled to appear due to his distance from

[1] *Sierra Club v. Midwest Generation, LLC*, PCB13-15, Complainants' Motion for Leave to Designate Substitute Expert Witnesses and Memorandum in Support of Motion (April 1, 2020), and Complainants' Notice of Expert Witnesses for Remedy Phase (Nov. 16, 2020), attached as Ex. 1.

Illinois. *Hulsey v. Scheidt*, 258 Ill. App. 3d 567, 576, 196 Ill. Dec. 740, 746 (1st Dist. 1994) (Court found that out of state witnesses could not be compelled to testify because a subpoena is not enforceable unless issued by a court which had *in personam* jurisdiction over the individual). MWG 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, and he did not review Kunkel's deposition or even Mr. Kunkel's hearing testimony. Ex. 2, Quarles Dep., p. 53:24-54:20. MWG also cannot cross examine Mr. Shefftz about the basis for the remedy cost estimates because Mr. Shefftz repeatedly stated he had no opinion on the estimates that form the basis of his entire opinion, and was simply told to use them. Ex. 3, Shefftz Jan. 2021 Rpt. p. 22, Ex. 4, Shefftz Rebuttal Rpt. p. 14, Shefftz Dep, Ex. 5, pp., 61:3-15; 73:12-75:19; 110:18-22.

6. This inability to cross-examine the underlying assumptions is precisely the reason that Illinois Courts, and the Hearing Officer in this case, require that any new expert in a case be limited to expounding and adding to the opinions of the former expert – so that there is a witness available to be examined.

7. Complainants then suggest that Mr. Shefftz should be allowed to rely on statements made by Complainants' counsel because of "*counsel's knowledge*" in similar situations. Comp. Resp. p. 7. Presumedly, Complainants' counsel is not offering to be a witness in this case. MWG cannot cross examine the basis for each of the assumptions Complainants' counsel provided to Mr. Shefftz. As such, it would be arbitrary and capricious to allow an expert to rely on unsupported statements from counsel, without factual basis in the record and without a witness to examine.

8. Contrary to Complainants' statements, none of the assumptions Mr. Shefftz relies upon are in the record. Complainants affirmatively state, in their response to MWG's motion in *limine* to exclude opinions by Mr. Quarles, that Kunkel's Remedy Report, "is not a part of the record in the liability phase proceeding…" Comp. Quarles Resp. p. 5 (emphasis added), and excerpt attached as Ex. 2. Similarly, the remaining statements -- made by Complainants' counsel to Mr. Shefftz -- concerning the timeframe for a removal remedy, when it should have commenced, whether the alleged violations are continuing, and whether MWG would have had to reline the ponds, are solely assumptions from Complainants' attorneys and either based on "*counsel's knowledge*" or unrelated to facts in the record.

9. MWG will suffer material prejudice if Mr. Shefftz's opinion, which is premised on assumptions that MWG cannot challenge, is admitted. MWG is unable to even establish the weight that could be given to Mr. Shefftz's opinions because there is no one available to question. Complainants' statement that it is somehow MWG's burden to offer witnesses to counter each of their expert's assumptions improperly shifts the burden of proof. Comp. Rep. p. 7. It is not MWG's burden to estimate the duration, cost, start time or duration of a purported remedy that MWG contends is not required, not technically practicable, and not reasonable. It is Complainants' burden to prove their case, including the details for the remedy Complainants' expert relies on (at least for the purposes of Mr. Shefftz's opinion; though Complainants reverse course, when convenient, for Mr. Quarles). Complainants' attempts to shift the burdens of proof in this matter are baseless.

10. MWG has prepared its Reply in support of its Motion *in Limine* which is attached hereto.

11. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by disputing the new arguments by Complainants that Mr. Shefftz's assumptions "can be challenged" or are "in the record."

12. This Motion is timely filed on March 18, 2022, within fourteen (14) days after service of Complainants' Response on MWG, in accordance with 35 Ill. Admin. Code §101.500(e).

WHEREFORE, MWG respectfully requests that the Board grant Respondent's Motion for Leave to File Instanter, its Reply (to Complainants' Response) in support of its Motion *In Limine* to Exclude Jonathan Shefftz Opinions, and accept the attached Reply as filed on this date.

Respectfully submitted,

MIDWEST GENERATION, LLC

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

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

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 REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINIONS

Mr. Shefftz's opinion is built upon a house of cards of assumptions, and if MWG could cross examine those assumptions, the entire "house" would fall. But because the assumptions are from non-testifying witnesses (such as Complainants' counsel themselves), MWG has no way to interrogate the basis for or reliability of the assumptions. For that reason alone, it would be arbitrary and capricious to admit Mr. Shefftz's opinion and MWG will suffer material prejudice. An expert "opinion" without reliable inputs that can be properly examined is just a spreadsheet, and does not help the Illinois Pollution Control Board ("Board"). Because MWG cannot cross-examine the assumptions Mr. Shefftz relies upon and because Mr. Shefftz's opinion is of no help to the Board, Mr. Shefftz's opinion must be excluded.

A. MWG is Precluded from Cross Examining Any of Mr. Shefftz's Assumptions

Complainants' cursory dismissal of MWG's objection on the grounds that MWG can somehow "challenge those assumptions in the course of a hearing" is false. Comp. Resp. p. 9. The assumptions Mr. Shefftz relies on are from sources that MWG has no way to challenge at the

hearing. The assumptions are either from Complainants' attorneys or from the non-testifying former expert the Complainants withdrew. It is arbitrary and capricious to allow the admission of expert testimony based solely on assumptions that the opposing party has no way to cross-examine or interrogate.

1. MWG Cannot Cross-Examine Remedy Cost Estimates Presented by Complainants' Former Expert (Mr. Kunkel)

Complainants simply ignore the fact that Mr. Shefftz relies upon an expert opinion (by Mr. Kunkel) that Complainants have rejected in another response brief and that is based on a remedy that Complainants will not be presenting at the hearing. Complainants are playing hide the ball -- they want to rely on Mr. Kunkel's remedy estimates for the purpose of this motion, reject Mr. Kunkel's remedy for the purposes of their Response to MWG's motion to exclude the opinions of their new expert (Mr. Quarles),[1] and ultimately preclude MWG from cross examining anyone on the basis for Mr. Shefftz's opinions.

Complainants suggest that the Board should allow Mr. Shefftz to rely on remedy estimates provided by their former expert, Mr. Kunkel. Yet Complainants have withdrawn Mr. Kunkel as a witness, over MWG's objections, and replaced him with Mr. Quarles. *Sierra Club v. Midwest Generation, LLC*, PCB13-15, Complainants' Motion for Leave to Designate Substitute Expert Witnesses and Memorandum in Support of Motion (April 1, 2020), and Complainants' Notice of Expert Witnesses for Remedy Phase (Nov. 16, 2020), attached as Ex. 1. MWG cannot cross examine Mr. Kunkel about his remedy estimates, process, or proposal because he is no longer a witness in this case, and cannot be compelled to appear because he does not live in Illinois.[2] *Hulsey v. Scheidt*, 258 Ill. App. 3d 567, 576, 196 Ill. Dec. 740, 746 (1st Dist. 1994) (Court found that out

[1] *See* Comp. Quarles Resp. pp. 4-5, and excerpt attached as Ex. 2. (Dr. Kunkel's Remedy Report "is not a part of the record in the liability phase proceeding…"
[2] Mr. Kunkel testified he lives in Colorado. 1/29/2018 Hearing Tr. p. 94:21.

of state witnesses could not be compelled to testify because a subpoena is not enforceable unless issued by a court which had *in personam* jurisdiction over the individual). MWG 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. Quarles Dep., Ex. 3, p. 53:24-54:20. MWG also cannot cross examine Mr. Shefftz about the basis for the remedy cost estimates because Mr. Shefftz repeatedly stated he had no opinion on the estimates that form the basis of his entire opinion, and was simply told to use them. Ex. 4, Shefftz Jan. 2021 Rpt. p. 22, Ex. 5, Shefftz Rebuttal Rpt. p. 14,[3] Shefftz Dep, Ex. 6, pp., 61:3-15; 73:12-75:19; 110:18-22. This inability to cross-examine is the exact reason that Illinois Courts, and the Hearing Officer in this case, require that any new expert be limited to expounding and adding to the opinions of the former expert – so that there is a witness available to be examined. *Sierra Club v. Midwest Generation, LLC*, PCB13-15, H.O. Order (Sept. 14, 2020); *People v. Pruim*, PCB 04-207 (Sept. 24, 2008) (Hearing Officer allowed substitution of expert witness because the new expert worked to develop the supplemental opinion, indicating that there was little difference between the old and new expert opinions.)

In fact, when MWG asked Mr. Kunkel about his cost estimates during Mr. Kunkel's sworn deposition, the cost estimates completely fell apart. Mr. Kunkel admitted that both his high and low unit costs were inaccurate and not representative of the actual costs. Ex. 7, Kunkel Dep. pp. 190:19-197:16. Because Mr. Kunkel will not be testifying at the hearing, and no other witness has reviewed his remedy or cost estimates, MWG has no ability to challenge the testimony, or explain to the Board why no weight should be given to it.

[3] While Mr. Shefftz Report is marked as Non-Disclosable Information ("NDI"), the excerpted pages are not NDI and do not needed to be treated as NDI.

For example, in addition to being unable to challenge the appropriateness of a "removal" remedy in the first place (because Complainants' new expert Mr. Quarles does not adopt a removal remedy), there is no witness available to ask:

- How Mr. Kunkel's proposed removal remedy comports with the Board's findings at each Station.
- Whether Mr. Kunkel's analysis of the location of removals is appropriate in light of the Board's findings at each Station.
- Why Mr. Kunkel's excavation and backfilling estimates for a municipality are reliable estimates for the removal project he is recommending?
- How far Mr. Kunkel's potential ash disposal locations are from the MWG Stations and whether estimated disposal costs reflect that distance?
- Whether Mr. Kunkel investigated landfills that would accept the CCR?
- If so, what landfills and what was the result of his investigation?
- Whether a landfill's refusal to accept the CCR would change the cost estimates?
- Whether alternative transportation methods were investigated, and if so, the results?
- Whether Mr. Kunkel's cost estimated accounted for the costs of tipping fees for disposal at a landfill?
- What was the source of the material to be used to backfill following the extensive, proposed excavation?
- How far away was the source of the backfill material?
- What was the estimated cost of the backfill material and the costs for transportation?
- Whether Mr. Kunkel's costs fail to include the disposal costs?
- Whether Mr. Kunkel's estimates fail to include the costs of excavation and backfilling?

And there are many more questions that *could* go to the weight of Mr. Shefftz's opinions *if* there were a witness available. In a shocking statement, Complainants assert that Mr. Kunkel's estimates can be "defended easily" because they are "drawn directly from an expert report that was submitted by Complainants' expert Mr. Kunkel, and which is heavily supported by extensive documentation

and expert analysis." Comp Resp. p 6. But Complainants specifically withdrew Mr. Kunkel as a witness in this case (apparently out of concern about his opinions) and replaced him. Complainants also ignore Mr. Kunkel's deposition testimony to the contrary, and completely ignore the fact that there is *nobody* who can or will "defend easily" these cost estimates at the hearing. Every subsequent expert for Complainants denies any knowledge. MWG is not required to accept Mr. Kunkel's opinion AS IS without cross examination, and allowing Mr. Shefftz to rely on it, without challenge, does not allow MWG to demonstrate the lack of any weight that should be given to these estimates.

2. MWG Cannot Cross-Examine Complainants' Counsel's Assumptions

In another astounding statement, Complainants state that the Board should allow Mr. Shefftz to rely on Complainants' counsel's assumptions because of "*Complainants' Counsel's knowledge of how long similar cleanup projects have taken*." (Comp. Resp. p. 7). Presumedly, Complainants' counsel is not offering to be a witness in this case. Complainants' counsel readily admit that they are the sole source of Mr. Shefftz's assumptions, without a source in the record. MWG cannot cross examine Complainants' counsel on the basis for each of the assumptions provided to Mr. Shefftz. As such, it would be arbitrary and capricious to allow an expert to rely on unsupported assumptions, without factual basis in the record, as the basis for expert opinions.

In addition to the statement about "*counsel's knowledge*" of how long similar cleanups take to conduct, and counsel's statement to Mr. Shefftz that violations are "continuing" *according to counsel*, Complainants state in their Response that Mr. Shefftz "assumed that the coal ash removal should have begun when MWG first began GW sampling," *based upon information from Complainants' counsel*. (Comp. Resp. p. 6-7). In order to challenge these bold assumptions, MWG is entitled to know, and to explain to the Board, among other questions:

- What "similar projects" are they referring to? What states? What sites? How are the sites "similar"? Did the sites contain CCR? If not – what did the sites contain? How big were the sites? What was the remedy? Where were the disposal locations that the waste went to and how far was the transportation? What other remedies were considered?

- The basis for the assumption that ash removal would occur within one month after the first round of sampling occurred at the MWG Stations?

- How counsel's assumptions comport with requirements (timing, permitting, assessments etc.) of 35 Ill. Adm. Code 845 ("Illinois CCR Rule")?

- How counsel's assumptions fit within the rules and practices of the Illinois EPA and the Illinois Site Remediation Program ("SRP") process under 35 Ill. Adm. Code Part 740?

- The basis for counsel's statements that the violations are continuing in light of the Board's interim opinions, including the Board's opinions concerning groundwater management zones.

Many more questions would serve to challenge *counsel's* assumptions, and MWG is highly prejudiced if it is required to accept the Shefftz assumptions AS IS. Complainants' statement that it is somehow MWG's burden to offer how long it would take to conduct a removal action, or when it should begin, is beyond the pale. Comp. Rep. p. 7. It is not MWG's burden to estimate the duration or other details of a purported remedy that MWG contends is not required, not technically practicable, and not reasonable. It is Complainants' burden to prove their case, including the details for the removal project their expert relies on (at least for the purposes of Mr. Shefftz's opinion; though Complainants reverse course, when convenient, for Mr. Quarles). Complainants' attempts to shift the burdens of proof in this matter are baseless.

Complainants' counsel next attempts to justify Mr. Shefftz's reliance on *counsel*'s explanation that MWG would have had to reline its ponds in any case. Comp. Resp. p.8. Again, *counsel's* explanation is not enough, and it is patently incorrect. First, counsel assumes that the removal of ash suggested by their former expert Mr. Kunkel simply referred to removing ash from ponds, and that the ponds would then be relined and reused. Comp. Resp. p. 7-8. That is purely fictional and

is *not* the basis Mr. Kunkel's proposed remedy. Mr. Kunkel repeatedly referred to the "removal, hauling and backfilling of the existing ash ponds" – *not* simply removing the ash from the ponds so that they could be relined and used again. Kunkel Remedy Rpt. p. 2, attached as Ex. 8. Counsel's statement is yet another assumption, without basis. In fact, Mr. Kunkel opined that all liners leak, and made no suggestion that the ponds should or could be relined or reused following the ash removal. 10/27/2017 Hr. Tr. p. 35:1; 10/27/2017 Hr. Tr. p. 171:4-5.

Second, *counsel's* assumption, relied on by Mr. Shefftz, that the ponds would have been relined anyway after a removal is directly contrary to the evidence. As Complainants well know, the routine process of removing ash from a pond that will be reused is completely different from a complete removal. 10/24/17 Hearing Tr. pp. 131:3-16, 224:3-9, 1/31/18 Hearing Tr. p. 236:16-20. Routine removals only remove CCR from the sides of the ponds, to prevent damaging the liners. To suggest that the removal on the scale stated by Mr. Kunkel is the same as a routine cleanout is contrary to the record in this case, and false. *Id*. Complainants' further assumption that MWG would have had to reline the ponds because MWG had to continue to manage ash wet ash is also baseless. There are other methods to manage CCR, including a submerged scrapper conveyer for offsite removal, or managing ash via a dry system.[4]

But the key, repeated concern with Mr. Shefftz's opinions is that there is no one to testify as to any of these assumptions upon assumptions. Mr. Kunkel is not available to explain what he meant by "pond removal", or whether he assumed the ponds would be relined and reused. Mr. Quarles, the replacement for Mr. Kunkel, never reviewed the Kunkel reports, depositions, or

[4] See Ex. 9 (submerged scrapper conveyer) and Ex. 10 (dry management system). In fact, MWG's Alternative Closure Demonstrations for Will County and Waukegan stated that MWG intended to use a submerged scrapper conveyer system. The Alternative Closure Demonstrations are each approximately 450 pages, and can be found at MWG's publicly available website: https://midwestgenerationllc.com/illinois-ccr-rule-compliance-data-and-information/#title2.

hearing testimony and has no opinions about them. Ex. 3, Quarles Dep, p. 53:19-54:20. Counsel, presumedly, is not agreeing to be a witness to have counsel's assumptions challenged. In fact, Complainants' counsel even denies that the Kunkel reports are part of the record in this case. Complainants specifically state in their Response to MWG's Motion *in Limine* to exclude Mr. Quarles's report that Mr. Kunkel's Remedy Report is ***not*** in the record. Comp. Quarles Resp. p. 4, and excerpt attached as Ex. 2.[5] And Mr. Shefftz simply accepted the assumptions without question. Mr. Shefftz specifically stated that he ***only*** used the cost figures in a single table of Mr. Kunkel's report, and the date of the report. Ex. 6, Shefftz Dep. p. 60:7-23.

While the Board may generally prefer to allow testimony and assess its weight, this situation is particularly egregious and a clear exception. Just like the courts in Illinois, the Hearing Officer and ultimately the Board has a responsibility for expert "gatekeeping" when the circumstances require it. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 147, 245 Ill. Dec. 769, 776 (2nd Dist. 2000) (Court found trial court abused its discretion allowing unreliable expert testimony stating "[a]s the gatekeeper of expert opinions disseminated to the jury, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability"); *Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum*, 348 Ill. App. 3d 398, 401, 284 Ill. Dec. 164, 167, 809 N.E.2d 730, 733 (5th Dist. 2004) (Court approved trial court, as "gatekeeper," striking of the defendant's expert opinion because it was based upon speculative information). Here, the Board is faced with opinions presented by an expert that are based on *assumptions from counsel or a withdrawn and unavailable expert*, and there is no witness available to allow the assumptions to be questioned for their relative weight. The Board cannot allow the testimony to proceed.

3. None of the Assumptions Are Supported by Evidence in the Record

[5] Complainants' Response to MWG's Motion *in Limine* Regarding Quarles is difficult to cite because Complainants fail to sequentially number the pages, in violation of 35 Ill. Adm. Code 101.302.

None of Mr. Shefftz's assumptions are supported by the record. An expert may make assumptions, but they must be reliable and based on evidence in the record. *Carter v. Johnson*, 247 Ill. App. 3d 291 (1st Dist. 1993) (Court found that the expert's assumptions were based upon three facts in the record, which supported the expert's assumptions). But, when an expert opinion is "totally lacking in factual support, it is nothing more than conjecture and guess and should not be admitted as evidence." *Harris Tr. & Sav. Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 393, 231 Ill. Dec. 401, 696 N.E.2d 697, 705 (1998). For example, in *Modelski v. Navistar Int'l Transp. Corp.*, 302 Ill. App. 3d 879, 236 Ill. Dec. 394 (1st Dist. 1999), the defendant's expert speculated on the sequence of events that caused the decedent's death with no factual basis. The court found that the expert's factually baseless opinion "should have been stricken as unreliable and totally irrelevant." *Id.* at 886. Because admission of the opinion was not harmless error, the court ordered a new trial.

Here, none of the assumptions fed to Mr. Shefftz are supported by evidence "in the record" and totally lack factual support. On the one hand, Complainants attempt to specifically exclude Mr. Kunkel's Remedy Report from the record, and state in their brief in response to the Quarles motion in *limine* that the Kunkel Remedy Report "*is not part of the liability phase record*." Comp. Quarles Resp. p. 4 (emphasis added), and excerpt attached as Ex. 2. They repeat that Kunkel's Remedy Report, "*is not a part of the record in the liability phase proceeding*…" *Id*. at 5.

On the other hand, Complainants argue that Mr. Shefftz may blindly accept the costs provided in Mr. Kunkel's Remedy Report for Mr. Shefftz's opinions, and imply that because it was relied on it is "in the record." As MWG has repeatedly stated, Complainants want to have their cake and eat it too. Either Mr. Kunkel's Remedy Report is "in the record" and Mr. Quarles must only elaborate from it (so he can be cross examined), *OR* Mr. Kunkel's Remedy Report is not "in the

record" and Mr. Shefftz cannot make opinions based upon it. But Complainants cannot have it both ways. Allowing Complainants to continue pursue this diametrically opposed position is arbitrary and capricious.

Similarly, the assumptions from Complainants' counsel are also not based on facts "in the record." In fact, Complainants do not even cite to any document or testimony in the record for the assumption that the removal action should have begun one month after the initial sampling event or that the removal action would take 10 years. Comp. Resp. pp. 6-7. There are no facts to support these assumptions. Complainants' counsel's additional assumption that MWG would have had to reline the ponds is only a statement made by counsel in their brief, and is disputed by the record. Comp. Resp. p. 8. Certainly, Complainants cite to no part of the record that assumes that if MWG was going to continue to manage the wet ash, it would have continued to use the CCR surface impoundments. *Id.* As MWG has demonstrated, there are alternative methods to manage bottom ash, and there is no evidence in the record that MWG would not have pursued the alternative ash management methods.

4. Complainants' Authorities Are of No Avail

The cases Complainants cite -- in an effort to support the notion that Mr. Shefftz may rely on Mr. Kunkel's remedy estimates and statements from Complainants' counsel -- are entirely inapplicable. In each case cited, the assumptions the expert was making were founded in the same subject as the expert's expertise. For example, in *People v. Negron*, 2012 IL App (1st) 101194, ¶ 13, 368 Ill. Dec. 545, 548, 984 N.E.2d 491, 494, the testifying expert was the former director and technical leader of the lab that conducted the DNA test at issue. *Id.* While she did not conduct the actual test, she performed the technical review of the analysis and the final data. *Id.* at ¶14. Thus, even though she did not conduct the DNA test, she had direct knowledge and experience with the

methodology and the results. *Id.* Similarly, in *People v. Williams*, 38 Ill. 2d 125, 131, 345 Ill. Dec. 425, 428, 939 N.E.2d 268, 271 (2010) (upheld by U.S.S.Ct. on other grounds), the testifying expert was an expert in forensic biology and forensic DNA analysis. The court allowed the expert to rely upon the DNA analysis conducted by a third party, because the expert reviewed the DNA data, "used her own expertise to compare the two [DNA] profiles before her," and made her own visual and interpretive comparisons of the data. *Id*. at 138-139.

Here, Mr. Shefftz states often that he is not an engineer and cannot testify as to the accuracy of any of the assumptions he is relying upon. Ex. 4, Shefftz Jan. 2021 Rpt., p. 22, Ex. 6, Dep p. 61:6-8 ("*As I am an economist, not an engineer, I have no independent expert opinion on the cost estimates that were prepared in that report*."). He similarly stated that "*I am an economist, not an engineer, I have no independent expert opinion on the cost estimates prepared in that report. So, same thing here regarding the ten-year schedule, both number of years and the timing of it*." Ex. 6 p. 75:2-8. He also stated, "*I'm relying upon petitioners' counsel. I'm not forming any independent expert opinion on the legal issues here or the engineering aspects, monitoring issues or whatever*." Ex. 6, p. 110:19-22 (emphasis added). He has no direct knowledge or expertise in corrective actions, large scale removal actions, the duration the removal action should take, the date the removal action should have occurred, and the legal expertise to distinguish whether the violations are continuing. Because he has no expertise in these topics, he cannot (nor did he) use his own expertise or knowledge to interpret the data and make the resulting assumptions.

Even *Nelson v. Speed Fastener, Inc.*, 101 Ill. App. 3d 539 is of no help to Complainants. There, the court stated that the better course of was to allow extensive cross examination of *the expert* for the basis of his opinion. That is not the case here. Mr. Shefftz admittedly knows nothing about the assumptions, MWG will have no opportunity to cross examine Mr. Kunkel (or any other witness)

on Kunkel's calculations of the remedy cost estimates, and MWG has no ability to cross examine Complainants' counsel on their assumptions.

B. Complainants' Cannot Feed Mr. Shefftz a Remedy Cost that Complainants' Expert (Mr. Quarles) does Not Support

Complainants have asked their expert, Mr. Shefftz, to submit an opinion about a remedy that Complainants do not present or justify to the Board. Complainants admit that they are not presenting a "remedy" at the remedy hearing and state that there is not sufficient data to determine an economic benefit. Complainants state that the timeline of a remedy depends "…on the Board's future decisions in this proceeding and the length of time it takes to begin remedial action…." Comp. Resp. p. 11. Complainants specifically state, in their response to MWG's Motion *in Limine* regarding Mr. Quarles's opinion, that Mr. Quarles is *not* providing an opinion on a remedy. Rather they state that Mr. Quarles is recommending a remedial process and the first step is an investigation. Comp. Quarles Resp., p. 9. Because Mr. Quarles is not presenting a remedy, they state that "the Board could order Mr. Shefftz to update his calculations to account for new or updated inputs." Comp. Resp. p. 11. It appears that Complainants want the Board to make a decision on remedy (even though they do not present a remedy for the Board to consider), and then have Mr. Shefftz return to apply his "methodology", only for the hearing to be reopened to allow MWG to challenge his opinions yet again? Mr. Shefftz specifies that he is making opinions about costs and purported economic benefit based on his assumed cost inputs, and he reaches total recommended alleged "benefit" figures that he opines the Board should apply. Ex. 4, Shefftz Jan 2021 Rpt., p. 1. He does not state that he is only presenting a methodology.

In sum, what is the point of Mr. Shefftz's opinion? If he has no opinion on the type of remedy required, no opinion on the estimated cost of that remedy, no opinion on its duration, no opinion

on when the remedy should have begun – then he is not providing testimony to aid the Board; he is merely providing an unsupported excel spreadsheet.

Fundamentally, Complainants' Response suggests that they foresee no end to this matter. They admit that they are not proposing a remedy for the remedy hearing, and that they will instead seek to return to the Board again and again – which is of no help to the Board. Because Mr. Shefftz's opinion is premised on baseless assumptions and does not help the Board, the opinion must be excluded. [6]

CONCLUSION

MWG respectfully requests that the Hearing Officer exclude Mr. Shefftz's report because it is solely based on assumptions not in the record and information MWG cannot interrogate or cross examine, and because the report will not assist the Board in its decision.

Respectfully submitted,

MIDWEST GENERATION, LLC

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

Jennifer T. Nijman
Susan M. Franzetti
Kristen L. Gale
Nijman Franzetti, LLP
10 S. LaSalle Street, Suite 3600
Chicago, IL 60603
312-251-5255

[6] In comparison, MWG's expert, Gayle Koch, provided an economic benefit opinion based upon the Weaver Opinion, which included their estimated costs of the remediation. Ms. Koch included in her analysis consideration MWG's history of compliance and financial history. Ms. Koch's opinion on MWG will be helpful to the Board because it is based upon facts that will be in the record, based upon a recommended remedy by testifying experts, and provides the Board context of MWG's history to determine the economic reasonableness of a remedy and penalty.

EXHIBIT 3

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

Attached Service List

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC's Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions without Non-Disclosable Exhibits and Memorandum in Support of Midwest Generation, LLC's Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions without Non-Disclosable Exhibits, a copy of which is hereby served upon you. The Appeal and Memorandum in Support of the Appeal with Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: July 27, 2022

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

SERVICE LIST

Bradley P. Halloran, Hearing Officer
Illinois Pollution Control Board
60 E. Van Buren St., Ste. 630
Chicago, Illinois 60605
Brad.Halloran@illinois.gov

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 East Wacker Drive, Suite 1600
Chicago, IL 60601
CJones@elpc.org
KCourtney@elpc.org

Keith Harley
Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
Kharley@kentlaw.edu

Abel Russ
For Prairie Rivers Network
Environmental Integrity Project
1000 Vermont Avenue, Suite 1100
Washington, DC 20005
aruss@environmentalintegrity.org

Faith E. Bugel
Attorney at Law
Sierra Club
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Greg Wannier, Associate Attorney
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
Greg.wannier@sierraclub.org

Peter Morgan
Sierra Club
1536 Wynkoop St., Ste. 200
Denver, CO 80202
Peter.morgan@sierraclub.org

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 Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions without Non-Disclosable Exhibits and Memorandum in Support of Midwest Generation, LLC's Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions without Non-Disclosable Exhibits, a copy of which is hereby served upon you was filed on July 27, 2022 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 Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions and Memorandum in Support of Midwest Generation, LLC's Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions without the Non-Disclosable Exhibits and the Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions and Memorandum in Support of Midwest Generation, LLC's Appeal of the Hearing Officer's Ruling Denying its Motion in Limine to Exclude Jonathan Shefftz's Opinions along with the Non-Disclosable Exhibits were emailed on July 27, 2022 to the parties listed on the foregoing Service List. The Appeal and Memorandum in Support with Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

/s/ Jennifer T. Nijman

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
	)	
SIERRA CLUB, ENVIRONMENTAL LAW AND POLICY CENTER, PRAIRIERIVERS NETWORK, and CITIZENS AGAINST RUINING THE ENVIRONMENT	)	
	)	**PCB 2013-015**
Complainants,	)	**(Enforcement – Water)**
	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ'S OPINIONS

Respondent Midwest Generation, LLC ("MWG"), appeals the Hearing Officer's ruling denying MWG's motion *in limine* to exclude opinions of Complainants' expert, Jonathan Shefftz. (35 Ill. Adm. Code 101.518). None of the assumptions Mr. Shefftz relies on to formulate his opinions are based upon direct or circumstantial evidence, as required by applicable law and by the Hearing Officer's own order. Mr. Shefftz relies upon cost estimates in a remedy report that the Complainants disavow, written by Complainants' former expert who Complainants replaced (over MWG's objection) and who will not testify at the hearing. All of Mr. Shefftz's other assumptions are exclusively from information given to him by Complainants' counsel, without factual basis, and who are similarly unavailable for cross-examination. Finally, the Hearing Officer's suggestion that MWG is speculating about whether Complainants' new expert (Mark Quarles) can support the Shefftz opinions at the hearing is incorrect. Experts are required to identify their opinions pursuant to Illinois Supreme Court Rule 213, and MWG is fully aware that Mr. Quarles has no

expert opinions in his report to support Mr. Shefftz, as confirmed by his expert deposition. The Illinois Pollution Control Board ("Board") should reverse the Hearing Officer's decision and exclude Mr. Shefftz from testifying at the hearing to any opinions that are not based on evidence. 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' groundwater expert, Mark Quarles.

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

I. Background

a. Original Expert Discovery

1. On June 9, 2014, the Hearing Officer set a discovery schedule, including a schedule for expert discovery. The case had not been bifurcated and the schedule did not indicate that the expert reports or the issues to be litigated were to be split between liability and damages.

2. On July 1, 2015, Complainants submitted expert reports by a groundwater expert, James Kunkel ("Kunkel") and an economic expert, David Schlissel. Mr. Kunkel submitted two reports "Expert Report on Groundwater Contamination" (Hearing Ex. 401) and an "*Expert Report on Remedy for Groundwater Contamination*." Ex. 1, attached to MWG's Memorandum in Support. In his report on Remedy, Mr. Kunkel opined on a removal remedy for each of the four MWG stations,[1] and included an analysis of the estimated costs for the removal. Mr. Kunkel submitted three subsequent reports, including two Rebuttal Reports that clarified his removal remedy and opined that his removal remedy was economically reasonable. (Hearing Exs. 407 & 412).

[1] The four stations are the MWG stations that are subject to this matter: Joliet 29 Station in Joliet, IL, Powerton Station in Pekin, IL, Waukegan Station in Waukegan, IL, and Will County Station in Romeoville, IL.

3. On February 9, 2017, without a request by either party or any input from either party, the Hearing Officer bifurcated the case ordering that the initial hearing would address liability only.

4. In October 2017 and continuing to January 2018, the parties participated in a lengthy and extensive hearing regarding Complainants' allegations that MWG violated the Illinois Environmental Protection Act ("Act").

5. On June 20, 2019, the Board issued an Interim Order regarding liability, which it reconsidered and modified in part on February 6, 2020.

b. Complainants Sought and Were Granted Leave to Replace Experts

6. On April 1, 2020, Complainants moved for leave to designate substitute expert witnesses claiming that their previously disclosed and testifying expert, Mr. 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.

7. MWG objected to Complainants' motion because the parties had already presented expert opinions on all elements of the litigation, including remedy, and it would be highly prejudiced by the substitution because it conducted its litigation strategy based upon the completed expert opinions of both parties. MWG's Response to Complainants' Motion to Designate Substitute Expert Witnesses, April 15, 2020, p 14.

8. 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 (like illnesss), but it is not an opportunity to "introduce new and different theories in this case." *Id., citing Ind. Ins. Co. v. Valmont Elec., Inc.,* 2011 U.S. Dist. LEXIS 23256, *4 (S.D. Ind. 2001).

9. On September 14, 2020, the Hearing Officer allowed the parties to name new expert witnesses, but with conditions consistent with Illinois law -- that the testimony already given stands and the parties must build on that information. The order states, "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.

c. Expert Discovery with Replacement Experts

10. On January 25, 2021 and July 16, 2021, Complainants submitted their expert reports and rebuttal reports of their new groundwater expert, Mark Quarles,[2] and their new economic expert, Jonathan Shefftz.

11. In his expert opinion, Mr. Quarles ignored and disregarded opinions made by Complainants' first expert (a/k/a Kunkel's opinion) for complete removal at each of the MWG four stations. Instead, he suggested a "nature and extent" evaluation which may or may not lead to other remedies. Mr. Quarles admitted that he did not review the Kunkel reports, deposition, or even Mr. Kunkel's testimony during the first hearing. Ex. 2, p. 53:24-54:20, attached to the Memorandum in Support.

12. Mr. Shefftz opined on the economic benefit MWG purportedly gained for its alleged violations (relevant excerpts attached to the Memorandum in Support as Exhibits 3, 4, and 5.) To prepare his opinion, Mr. Shefftz did not rely upon the new Quarles remedy opinion, admitting he did not even recognize Mr. Quarles's name, but instead relied upon the former Kunkel remedy opinion and the cost estimates it contained. Ex. 6, p., 61:19-21.

[2] The Quarles Reports are attached as Exhibits 1 and 2 to MWG's Objection to and Motion for Interlocutory Appeal of the Hearing Officer's Denial of MWG's Motion to Exclude the Expert Opinion of Mark Quarles filed on July 27, 2022.

13. Mr. Shefftz also based his opinions on information given to him by Complainants' counsel including:

a. The start date of the Kunkel remedy Ex. 6, pp., 73:15-74:4
b. The duration of the Kunkel remedy Ex. 6, pp., 73:15-74:4
c. Expenditure pattern and timing, Ex. 6, p., 74:15-23.
d. That the violations were "continuing" Ex. 6, p., 107:16-19
e. That the costs MWG spent to originally reline the ponds and conduct the groundwater would have had to been expended anyway. Ex. 4, p. 14, Ex. 6, 100:10-102:9.

14. Mr. Shefftz cited to no other direct or circumstantial evidence for these conclusions, and relied on the Kunkel remedy even though it has apparently been replaced by the Quarles opinions.

d. MWG's Motions *in Limine* to Exclude the Replacement Experts

15. On February 4, 2022, MWG filed a motion to exclude Mr. Shefftz's opinions because they rely on cost estimates for a removal remedy that Complainants have withdrawn, and because they are based on assumptions fed to him by Complainants' counsel that are not direct or circumstantial evidence. *See* MWG's Motion *in* Limine for Shefftz Opinions, Feb. 4, 2022.[3]

16. On July 13, 2022, the Hearing Officer issued his decisions on the parties' motions *in limine*. The Hearing Officer denied MWG's motion *in limine* to exclude Mr. Shefftz's opinions in a brief three-paragraph discussion.

II. The Hearing Officer's Denial of MWG's Motion to Exclude the Opinions of Jonathan Shefftz is in Error and causes Material Prejudice to MWG.

17. The Hearing Officer states that an expert may rely on assumptions "*if* based on direct or circumstantial evidence." But here, there *is no direct or circumstantial evidence* – which is the key problem with Mr. Shefftz's opinions. Complainants have withdrawn the Kunkel Remedy opinion on which Mr. Shefftz relies, and issued an entirely new opinion. Similarly, Mr. Shefftz's reliance

[3] MWG also filed a motion to exclude the opinions of Quarles because they violate Illinois law on replacement experts, and violate the Hearing Officer's order. That decision is being separately appealed to the Board.

on statements made by Complainants' counsel cannot stand because counsel's statements have no basis in fact, and no direct or circumstantial evidence to support them.

18. Each of Mr. Shefftz's assumptions are based upon information from unavailable witnesses that MWG has no ability to cross-examine.

19. Even though Mr. Shefftz developed his economic opinions based on the disavowed Kunkel Remedy Report, Complainants will not present Mr. Kunkel to testify. Because Mr. Kunkel does not live in Illinois, MWG cannot subpoena him to appear at the hearing.

20. MWG also cannot cross-examine Complainants' new expert Mr. Quarles about Kunkel's remedy cost estimates, relied on by Mr. Shefftz, because Mr. Quarles did not review the Kunkel report, deposition testimony, nor hearing testimony. Quarles Dep., Ex. 2, p. 53:24-54:20

21. Mr. Shefftz himself stated that he had no opinion on the quality or validity of the estimates that form the basis of his entire opinion, and was simply told to use them. Ex. 3, Shefftz Jan. 2021 Rpt. p. 22, Ex. 4, Shefftz Rebuttal Rpt. p. 14, Shefftz Dep, Ex. 6, pp., 61:3-15; 73:12-75:19; 110:18-22.

22. All of the other information Mr. Shefftz relies on is from Complainants' counsel, who also are not available to cross-examine. Because Complainants will have no one to testify on the duration of the Kunkel remedy, the start date of the remedy, whether those violations are continuing, or whether MWG's previous compliance measures should be accounted for, MWG has no way to challenge those assumptions.

23. While the Board may generally prefer to allow testimony and assess its weight, this situation is particularly egregious and a clear exception. As the Hearing Officer stated, an expert must still rely on evidence, be it direct or circumstantial, and it must be evidence that is reasonably relied on by experts. Just like the courts in Illinois, the Board has a responsibility for expert

"gatekeeping" when the circumstances require it. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 147, 245 Ill. Dec. 769, 776 (2nd Dist. 2000) (Court found trial court abused its discretion allowing unreliable expert testimony stating "[a]s the gatekeeper of expert opinions disseminated to the jury, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability"); *Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum*, 348 Ill. App. 3d 398, 401, 284 Ill. Dec. 164, 167, 809 N.E.2d 730, 733 (5th Dist. 2004) (Court approved trial court, as "gatekeeper," striking of the defendant's expert opinion because it was based upon speculative information).

24. Here, the Board is faced with opinions presented by an expert that are based on *assumptions from counsel or a withdrawn and unavailable expert*, and there is no witness available to allow the assumptions to be questioned for their relative weight. It would be arbitrary and capricious if the Board were to allow the testimony to proceed.

25. Also, the Hearing Officer's claim that MWG's argument "is speculative as to what Mr. Quarles will testify to," and that MWG may address its concerns during its cross-examination, disregards fundamental Illinois law for expert opinions. MWG is not "speculating" as to what Mr. Quarles will testify to – he stated it in his reports and deposition testimony. Mr. Quarles stated in his deposition that he had no knowledge of the Kunkel Remedy on which Mr. Shefftz relies, and that he did not elaborate or amplify Mr. Kunkel's opinions. Ex. 2, p. 53:19-55:5. The Hearing Officer's statement suggests that experts are not bound by the opinions in their reports and depositions. That is antithetical to the long-standing boundaries established Rule 213.

26. The Board should follow standard Illinois procedural and evidentiary law and reverse the Hearing Officer's decision.

WHEREFORE, for the reasons stated above, MWG requests that the Board reverse the Hearing Officer's order, and exclude the opinions by Complainants' expert Jonathan Shefftz that have no basis.

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

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.	)	

MEMORANDUM IN SUPPORT OF MIDWEST GENERATION, LLC'S APPEAL OF THE HEARING OFFICER'S RULING DENYING ITS MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ'S OPINIONS

Midwest Generation, LLC ("MWG") submits this Memorandum in Support of its Appeal from the Hearing Officer's Ruling denying MWG's motion *in limine* to exclude the opinions of Complainants' expert, Jonathan Shefftz. The Hearing Officer's refusal to exclude Mr. Shefftz's opinions materially prejudices MWG, is based upon a misstatement of the facts, and violates the foundations of Illinois procedural law and the Hearing Officer's own order.

The morass the Board now faces is due to Complainants' demand to replace their original experts long after discovery had closed. That change of experts, coupled with the Hearing Officer's denial of MWG's motion *in limine,* allows Complainants to have their cake and eat it too. Despite the Hearing Officer stating that any new experts must build upon the testimony of the original experts (as required by Illinois law), Complainants ignored that directive. Now, Complainants will present at the hearing entirely new and opposing opinions, which they want their experts to rely on in one hand, and disavow in another. If the Hearing Officer's Order stands, Complainants will

have their replacement economic expert (Mr. Shefftz) rely on Complainants' original groundwater expert's remedy (the Kunkel Remedy), along with information fed to Mr. Shefftz by Complainants' counsel that have no basis in direct or circumstantial evidence. At the same time, Complainants have their new technical expert (Mr. Quarles) completely ignoring the Kunkel Remedy and recommending a different approach. MWG cannot cross examine the original expert (Mr Kunkel) nor Complainants' counsel to investigate whether there is any basis for the information on which Mr. Shefftz relies because neither of them can be compelled to testify.

MWG is faced with a hearing in which it is barred from cross examining the facts and evidence on which Mr. Shefftz bases his opinions, and also a new remedy opinion by Mr. Quarles that has no connection to the original opinion, nor to the Shefftz economic opinion. Surely, it cannot be deemed reasonable for an expert, Mr. Shefftz, to rely on a withdrawn, changed technical opinion or on unsupported statements from counsel, and at the same time allow a new expert to ignore that very same technical opinion. While the Board may not be strictly bound by Illinois Supreme Court rules, it is not ungoverned by any rules at all. Due process and fairness require that the Board reverse the Hearing Officer's decision. Either Complainants are bound to their first remedy report (by Kunkel) because it is "in the record" and their second remedy expert must only elaborate from it (so he can be cross examined), ***OR*** their first expert's remedy report is not "in the record" and Complainants' economic expert Mr. Shefftz cannot make opinions based upon it.[4] Allowing Complainants to have it both ways, holding diametrically opposed positions, is fundamentally unfair, materially prejudices MWG at the hearing, and is arbitrary and capricious. Accordingly, the Hearing Officer's decision must be reversed.

[4] MWG moved to exclude Complainants' replacement remedy expert opinion, which the Hearing Officer denied. *See* MWG's Motion *in Limine* to Exclude Quarles Opinions, Feb. 4, 2022 and Hearing Officer Order, July 13, 2022. MWG appealed the Hearing Officer's order on July 27, 2022.

I. Brief Background

Due to the size and scope of this matter, discovery and related issues have been lengthy, intensive, and extensive. In addition to the numerous dispositive and discovery motions, the parties have exchanged approximately 200,000 pages of documents, and conducted eleven depositions of fact witness (some more than once). Because Complainants sought to replace their original experts, Complainants produced eleven expert reports: six by the original experts and five by the replacement experts.

a. Original Expert Discovery

Up 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 may be imposed. Accordingly, both parties identified and submitted expert reports addressing all elements of the ligation, including the condition of the groundwater, the constituents in the groundwater, proposed remedies, the economic reasonableness of the proposed remedies, and the factors the Board considers for its opinions in Section 33(c) and 42(h) of the Illinois Environmental Protection Act ("Act").

Complainants presented two experts and multiple reports:

- Groundwater expert, James Kunkel ("Kunkel"), prepared a total of five expert reports.
    - Two initial expert reports – an "Expert Report on Groundwater Contamination" (Hearing Ex. 401) and an "*Expert Report on Remedy for Groundwater Contamination*" both dated July 1, 2015, attached as Ex. 1 (Remedy Report). In his report on Remedy, Mr. Kunkel concluded that removal was the remedy required for each of the four MWG stations,[5] and included an analysis of costs and site impacts. *Id*.
    - A Rebuttal Expert Report, Dec. 8, 2015 (Hearing Ex. 407), later supplemented – March 9, 2016 (Hearing Ex. 412), both admitted as evidence. Kunkel's Rebuttal Reports restated and referenced his removal remedy opinion and added

[5] The four MWG stations are the stations that are subject to this matter: Joliet 29 Station in Joliet, IL, Powerton Station in Pekin, IL, Waukegan Station in Waukegan, IL, and Will County Station in Romeoville, IL.

that the removal remedy he proposed in his Remedy Report was economically reasonable. (Hearing Ex. 407, p. 11).

- A specific rebuttal opinion responding to MWG's expert's statistical trend testing in support of MWG's opinions, March 16, 2016 (Hearing Ex. 408).

- Economic Expert, David Schlissel prepared a report, dated July 1, 2015, on the economic reasonableness of the remedies proposed by Mr. Kunkel and the availability of economic resources of MWG's parent company for the remedy.

MWG also presented two experts in response to Complainants' original experts. Each party had an opportunity to depose the experts, evaluating each of the opinions stated in their reports. The depositions were not limited to liability and each party questioned the experts about their evaluation of the proposed remedies at the stations, the proper remedial actions that should be taken, and the Section 33(c) and 42(h) factors.

After all discovery was completed, and substantive motions filed, the Hearing Officer, on his own action, bifurcated the case, ordering that the first hearing would address liability, with a later hearing regarding a potential remedy or penalty. Hearing Officer Order, Feb. 9, 2017. Accordingly, the Hearing Officer conducted a hearing on liability over ten days in 2017 and 2018. On June 20, 2019, the Board issued an Interim Order regarding liability, which it reconsidered and modified in part on February 6, 2020.

b. Replacement Expert Discovery

On April 1, 2020, Complainants requested leave to designate replacement expert witnesses, claiming that their previously disclosed and testifying expert, Mr. 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. MWG objected to Complainants' motion because the parties had already presented expert opinions on all elements of the litigation, including remedy, and it would be highly prejudiced by the substitution because it conducted its discovery and litigation based upon the complete expert opinions of both

parties. MWG's Response to Complainants' Motion to Designate Substitute Expert Witnesses, April 15, 2020, p 14.

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." *Id., citing Ind. Ins. Co. v. Valmont Elec., Inc.*, 2011 U.S. Dist. LEXIS 23256, *4 (S.D. Ind. 2001). Over MWG's objection, on September 14, 2020, the Hearing Officer allowed the parties to name new expert witnesses, but the Hearing Officer correctly, and in accordance with Illinois law, added the condition that the testimony already given by the prior experts stands and the parties must build on that information. "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.

Subsequent to the Hearing Officer's Order, Complainants identified two new experts:

- Groundwater expert, Mark Quarles ("Quarles"), to replace Mr. Kunkel. He prepared two opinions:
  - Expert Opinion, January 25, 2021.
  - Rebuttal opinion, July 16, 2021.[6]
- Economic Benefit Expert, Jonathon Shefftz, to replace Mr. Schlissel. He issued three reports:
  - Expert Opinion, Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, January 25, 2021, attached as Exhibit 3.
  - Supplemental and Rebuttal Expert Opinion, Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, July 16, 2021, attached as Exhibit 4.

[6] Both reports are attached as exhibits 1 and 2 to MWG's Motion for Interlocutory Appeal of the Hearing Officer's Denial of MWG's Motion *in Limine* to Exclude Quarles Opinions.

- Second Supplemental and Rebuttal Expert Opinion, Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, October 26, 2021, relevant excerpt attached as Exhibit 5.

i. Quarles Opinions

Complainants' new expert, Mr. Quarles, completely ignored the Kunkel removal remedy. Instead, he put forth a new and different theory and recommended in his expert reports that MWG conduct a "nature and extent" investigation at the MWG Stations. Mr. Quarles also admitted that he did not build upon, elaborate or amplify the opinions of the prior expert. In fact, Mr. Quarles did not review Mr. Kunkel's reports, and was not even aware that Mr. Kunkel had written three reports for this matter that included opinions on remedy. Ex. 2, p. 53:24-55:5. Mr. Quarles also did not review Mr. Kunkel's deposition, nor even Mr. Kunkel's testimony during the first hearing. Ex. 2, p. 54:15-20. Further discussion of Mr. Quarles's opinions is in MWG's Motion in Limine to Exclude Quarles Opinions, filed on February 4, 2022, and its Motion for Interlocutory Appeal from the Hearing Officer Order, filed on July 27, 2022.

ii. Shefftz Opinions

Complainants' second new expert, Mr. Shefftz, prepared an opinion on the economic benefit Complainants claim MWG allegedly gained. To prepare the opinion, Mr. Shefftz required certain information to insert into his economic benefit analysis, including the alleged cost of a recommended remediation, the date of noncompliance, duration of remedy, and absence of lower cost alternatives. Rather than using facts and opinions provided by Complainants' new expert, Mr. Quarles, Mr. Shefftz relied on the remedy opinions made by the withdrawn expert, Mr. Kunkel. Even though Mr. Quarles is the new testifying expert and Mr. Quarles rejected the Kunkel removal remedy, Mr. Shefftz used Kunkel's cost estimates and remedy proposal. Ex. 6, p. 66:12-13. Mr.

Shefftz did not rely on any opinions made by the new expert Mr. Quarles, admitting that he did not even recognize Mr. Quarles's name. Ex. 6, p., 61:19-21.

The remainder of the economic benefit inputs Mr. Shefftz uses (the date of noncompliance, date of compliance, and length of remedy) are based solely on statements made by Complainants' counsel, without any independent support. As the Shefftz Report states, "Table 3 provides the dates for when the various remedy costs should have been expended and can reasonably be anticipated to be expended eventually based on a 10-year cleanup schedule at each of the four sites. This *schedule* is based upon *information that Petitioner's counsel provided to me in response to my requests."* Ex. 3, p. 22. When asked during his deposition what he meant by this "schedule," Mr. Shefftz replied, "both the number of years of the schedule and when the start date should be for each schedule." Ex. 6, pp., 73:15-74:4. He explained that while Mr. Kunkel's reports provided the total remedy cost, he needed the information related to "expenditure pattern and timing" of the remedy to run the model, which he obtained solely from Petitioners' attorneys. Ex. 6, p., 74:15-23. He further stated that when he asked counsel for this information, "I was told ten years, and here are the start dates for both the one-time scenario and the delayed-compliance scenario." *Id*. Petitioners' counsel also informed Mr. Shefftz that the violations were "continuing," a factor in setting the date of compliance. Ex. 4, p. 15, Ex. 6, p. 107:16-19; 110:10-22. Mr. Shefftz admitted he had no opinion on the schedule, and had no other source for this information. Ex. 6, pp., 74:21-23; 75:2-14 (explaining he had no opinion on the ten-year schedule "both in number of years and timing of it.")

Mr. Shefftz also relies solely on Complainants' counsel for additional factors in his analysis, including that costs of the pond liners MWG installed could be disregarded because they would have been expended regardless of any remedy. Ex. 4, p. 14, Ex. 6, 100:10-101:18. Similarly,

Petitioners' counsel told Mr. Shefftz that the groundwater monitoring MWG conducted would have needed to be conducted in any case (Ex. 4, p. 14, Ex. 6, p. 101:23-102:9), which has not been established. In fact, the opposite is true – MWG would not have relined ponds that would later be removed under Mr. Kunkel's remedy proposal. Moreover, MWG, unlike other companies, voluntarily agreed to conduct sampling in 2010 when it was under no obligation to do so. 1/29/18 Tr. p. 245:12-15 (Testimony of Race). Mr. Shefftz has no other basis for these conclusions other than blind adherence to statements from Complainants' counsel.

c. MWG's Motions *in Limine*

On February 4, 2022, MWG filed its motions *in limine*, including a motion to exclude the Shefftz opinions and a motion to exclude the Quarles opinions. MWG moved to exclude the Shefftz opinions in part because the opinions rely on cost estimates for a removal remedy that Complainants have withdrawn and rely upon assumptions fed to him by Complainants' counsel that are not based on direct or circumstantial evidence. *See* MWG's Motion *in* Limine Shefftz Opinions, Feb. 4, 2022. MWG moved to exclude Mr. Quarles's opinions because he made no attempt to elaborate or amplify Mr. Kunkel's opinions as required by Illinois law for a replacement expert, and as required by the Hearing Officer's order. *See* MWG's Motion *in* Limine Quarles Opinions, Feb. 4, 2022; *See also* Ex. 2, p. 54:21-55:5.

d. Hearing Officer's Decision on MWG's Motion *in Limine* to Exclude Shefftz Opinion

On July 13, 2022, the Hearing Officer issued his decisions on the parties' motions *in limine*. In denying MWG's motion to exclude the Shefftz opinions, the Hearing Officer's issued two key opinions:

1) "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."

2) "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."

H.O. July 13, 2022 Order, p. 9-10. The Hearing Officer denied MWG's request to file its reply, *instanter*, in support of its motion. *Id.* at 9-10.

In the lead-in comments to finding (2) above, the Hearing Officer's decision misstates the facts, suggesting confusion as to the basis of MWG's motion to exclude Mr. Shefftz's opinions. The Hearing Officer states: "*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.*" H.O. July 13, 2022 Order, p. 9. This is incorrect. Mr. Shefftz replaced Mr. Schlissel as Complainants' economic expert. Mr. Kunkel was replaced by Mr. Quarles and his testimony did not involve any economic benefit analysis. This confusion on which experts replaced which is certainly understandable given the internally inconsistent positions Complainants have pursued and the morass now before the Board.

II. The Hearing Officer's Decision Fails to Apply Illinois law and Materially Prejudices MWG

The Hearing Officer's conclusion that MWG can address its concerns regarding Mr. Shefftz's opinions during its cross-examination is incorrect and results in a violation of Illinois Rule 213. None of the assumptions Mr. Shefftz relies on to formulate his opinion are based on direct or circumstantial evidence, or even his own independent knowledge and expertise. Instead, they are from sources that MWG has no way to challenge at the hearing. The assumptions are either from Complainants' attorneys or from the non-testifying former expert the Complainants withdrew. It is arbitrary and capricious to allow the admission of expert testimony based solely on assumptions that the opposing party has no way to cross-examine or interrogate and are not based upon any direct or circumstantial evidence.

Also, the Hearing Officer's suggestion that MWG's description of Mr. Quarles's opinion is "speculative" and that his opinions may be addressed during cross examination suggests that MWG does not know what those opinions are. In fact, Mr. Quarles made his opinions perfectly clear, as required, in his expert reports and during his deposition. The Hearing Officer cannot possibly be suggesting that Complainants' experts are entitled to withhold their opinions and bases therefore from discovery before the hearing, *or* that Mr. Quarles, and even Mr. Shefftz, could make different opinions at the hearing that were not previously disclosed. That would be directly contrary to the requirements of Illinois Supreme Court Rule 213, which requires parties to disclose the subject matter, conclusions, and opinions of an expert, "in order to prevent unfair surprise at trial." Rule 213; Committee Comment to Ill. Sup. Ct. R. 213(f). In fact, in this matter, the Hearing Officer quoted that Committee Comment in his decision on MWG's Motion *in limine* before the first hearing. H.O. Order, July 18, 2017. It would be arbitrary and capricious for the Hearing Officer to now disregard Illinois procedural rules and his own precedence. Mr. Quarles's opinions are limited to what he previously disclosed, and MWG knows what those opinions are. There is no speculation involved.

a. None of Mr. Shefftz's Assumptions Are Based on Direct or Circumstantial Evidence or His Own Expertise

The Hearing Officer is correct that an expert may rely on counsel's assumptions or hypotheticals "*if* [they are] based on direct or circumstantial evidence." H.O. July 13, 2022 Order, p. 9 (emphasis added). But here, none of the assumptions Mr. Shefftz relies on to formulate his opinion are based upon direct or circumstantial evidence or even his own expertise and experience.

When an expert opinion is "totally lacking in factual support, it is nothing more than conjecture and guess and should not be admitted as evidence." *Harris Tr. & Sav. Bank v. Otis Elevator Co.*, 297 Ill. App. 3d 383, 393, 231 Ill. Dec. 401, 696 N.E.2d 697, 705 (1998). It is well established

that, "For expert testimony to be admissible, an adequate foundation must be laid establishing that the information that the expert bases the opinion upon is reliable." *Taylor v. Cnty. of Cook*, 2011 IL App (1st) 093085, ¶ 32; *Kruzek v. Estate of Kruzek*, 2012 IL App (1st) 121239-U, ¶ 31 (limiting testimony based on lack of reliable foundation); ILL. R. EVID. 703. It is the burden of the proponent of expert testimony to lay this foundation. *People v. Safford*, 392 Ill. App. 3d 212, 221 (1st Dist. 2009) (trial court erred when it allowed proposed expert examiner to testify to conclusions without providing evidentiary foundation for his opinion). A tribunal "is not required to blindly accept the expert's assertion that his testimony has analyzed the adequacy of the foundation." *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2d Dist. 2000). After all, an "expert's opinion is only as valid as the reasons for the opinion." *Perona v. Volkswagen of America, Inc*., 2014 IL App (1st) 130748, ¶ 51; *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781 (1st Dist. 2009). In other words, if an expert's opinion lacks factual support or fails to follow established standards, it should not be received. *Musburger*, 394 Ill. App. 3d at 802 (affirming barring expert opinion that lacked factual basis); *In re Marriage of Cutler*, 334 Ill. App. 3d 731, 736–37 (5th Dist. 2002) (expert opinion should not have been received because it lacked a proper foundation).

To lay an adequate foundation for expert testimony, "it must be shown that the facts or data relied upon by the expert are of a type *reasonably relied upon* by [experts] in that particular field in forming opinions or inferences." *People v. Burhans*, 2016 IL App (3d) 140462, ¶ 30. (emphasis added); see also Ill. R. Evid 703; Fed. R. Evid. 703.[7] Moreover, even if the opinion passes the reasonable reliance test, the testimony can still be inadmissible if it "runs afoul of other evidentiary requirements." *Modelski v. Navistar Int'l Transp. Corp.*, 302 Ill. App. 3d 879, 885, 707 N.E.2d 239, 244 (1st Dist. 1999). For example, "testimony grounded in guess, surmise, or conjecture, not

[7] In *Wilson v. Clark*, 84 Ill. 2d 186, 192-96, 417 N.E.2d 1322, 49 Ill. Dec. 308 (1981), the Illinois Supreme Court adopted Federal Rules of Evidence 703.

being regarded as proof of a fact, is irrelevant as it has no tendency to make the existence of a fact more or less probable. From this conclusion follows the rule that expert opinions based upon the witness's guess, speculation, or conjecture as to what he believed might have happened are inadmissible." *Id*. at 886. Moreover, "[t]he party calling the expert witness must lay a foundation sufficient to establish that the information upon which the expert bases his opinion is reliable." *Turner v. Williams*, 326 Ill. App. 3d 541 (2d Dist. 2001).

Here, Mr. Shefftz's expert opinion is totally lacking in factual support and none of the assumptions fed to Mr. Shefftz are supported by direct or circumstantial evidence. As explained throughout this appeal, Mr. Shefftz's opinion is based upon prior expert opinions that Complainants have clearly withdrawn – the Kunkel remedy opinions. In fact, in attempting to justify why their new technical expert, Mr. Quarles, ignored the Kunkel remedy, Complainants stated in their response to MWG's motion in *limine* to exclude Quarles that the Kunkel Remedy Report "*is not part of the liability phase record*." Comp. Quarles Resp. p. 4, March 4, 2022 (emphasis added).[8] They repeat that Kunkel's Remedy Report, "*is not a part of the record in the liability phase proceeding*…" *Id*. at 5. And yet, and despite essentially disavowing its existence through their new expert Mr. Quarles, Complainants provide the Kunkel remedy report to Mr. Shefftz for him to rely on. The result is that Mr. Shefftz relies on opinions about a previously proposed remedy that Complainants' new expert has no opinion about (and he has never heard of Mr. Kunkel). Mr. Shefftz's opinions from a former expert have no foundation, no validity, and no basis because neither Mr. Shefftz, nor the former expert (Mr. Kunkel), nor Mr. Quarles, nor any other witness can support or even testify about the underlying facts. Complainants simply cannot

[8] Complainants' Response to MWG's Motion *in Limine* Regarding Quarles is difficult to cite because Complainants fail to sequentially number the pages, in violation of 35 Ill. Adm. Code 101.302.

establish that the information upon which Mr. Shefftz bases his opinion is reliable, contrary to Illinois law.

Similarly, the assumptions from Complainants' counsel, on which Mr. Shefftz specifically relies, are also not based on facts nor on any direct or circumstantial evidence. There is no document, fact, evidence, or testimony in the record supporting the assumptions counsel told Mr. Shefftz to rely on -- that a removal action should have begun one month after the initial sampling event or that a removal action would take ten years. There is also no document, evidence, or testimony that, as counsel told Mr. Shefftz, MWG would have had to reline the pond nor that MWG would have even continued to manage the wet ash in the CCR surface impoundments.[9] These facts form the basis of Mr. Shefftz's conclusions about the amount of economic benefit MWG allegedly obtained and are unsupported and patently unreliable.

Mr. Shefftz has no independent knowledge or expertise that would give him the ability to rely upon the assumptions fed him by Complainants' counsel or Kunkel's report. *People v. Negron*, 2012 IL App (1st) 101194, ¶ 13, 368 Ill. Dec. 545, 548, 984 N.E.2d 491, 494, (Expert allowed to testify because assumptions were founded in the same subject as her expertise.). Mr. Shefftz readily admitted that he is not an engineer and cannot testify as to the accuracy of any of the assumptions he is relying upon. Ex. 4, Shefftz Jan. 2021 Rpt., p. 22, Ex. 6, Dep p. 61:6-8 ("*As I am an economist, not an engineer, I have no independent expert opinion on the cost estimates that were prepared in that report.*"). He similarly stated that "*I am an economist, not an engineer, I have no independent expert opinion on the cost estimates prepared in that report. So, same thing here regarding the ten-year schedule, both number of years and the timing of it.*" Ex. 6 p. 75:2-8.

[9] For example, CCR may be managed by using a submerged scraper conveyor system, which continuously conveys the CCR to an outlet via a scrapper – an entirely different than the passive system in a CCR surface impoundment. *See* https://global.kawasaki.com/en/energy/solutions/energy_plants/ash/seal.html (last visited July 18, 2022).

He also stated, "***I'm relying upon petitioners' counsel. I'm not forming any independent expert opinion on the legal issues here or the engineering aspects, monitoring issues or whatever***." Ex. 6, p. 110:19-22 (emphasis added). He has no direct knowledge or expertise in corrective actions, large scale removal actions, the duration the removal action should take, the date the removal action should have occurred, and the legal expertise to distinguish whether the violations are continuing. Because he has no expertise in these topics, he cannot (nor did he) use his own expertise or knowledge to interpret the data and make the resulting assumptions.

The single case the Hearing Officer relies upon in his decision denying MWG's motion actually supports the fact that assumptions experts rely on must be based on facts. *Timber Creek Homes, Inc. v. Village of Round Lake Park, Round Lake Village Board and Groot Industries, Inc.* concerns a request by a home association to review a village's decision to grant siting for a waste transfer station. PCB 14-99 slip at 18, (Aug. 21, 2014), p. 1. The home association, village, and waste transfer station each engaged expert appraisers to opine on the potential impact to property values. *Id.* p. 19-20. The Board accepted the village's and waste transfer station's expert opinions because they were based upon evidence. The Board, however, specifically rejected the home association's expert opinion because it was solely based upon assumptions. *Id*. at 72. While the Board reached that conclusion after the hearing, that was simply because no one in that case filed a motion *in limine* to strike the home association's expert testimony based solely on assumptions.

Because Mr. Shefftz does not rely upon any facts, documents, testimony, or any evidence at all – direct, circumstantial, or otherwise – Mr. Shefftz's opinions lack factual support and fail to follow established standards. Accordingly, the Board should reverse the Hearing Officer and order that the Shefftz opinions be excluded. *Musburger*, 394 Ill. App. 3d at 802

b. It is Error to Accept the Shefftz Opinions when MWG is Precluded from Cross-Examining Any of the Assumptions Shefftz Relies on.

The Hearing Officer makes no mention of the fact that MWG cannot even challenge Mr. Shefftz's assumptions because there is no witness to be cross-examined. Mr. Shefftz relies on an expert opinion by Complainants' original expert, Mr. Kunkel, which is based on a remedy that Complainants will not be presenting at the hearing and Complainants have now rejected. Mr. Shefftz also relies on assumptions given to him by Complainants' counsel with no other basis in fact. None of the parties providing the assumptions can be compelled to testify at the hearing, and, in addition to a lack of any foundation, MWG is materially prejudiced because it has no ability to cross-examine those assumptions.

i. MWG Cannot Cross-Examine Remedy Cost Estimates Presented by Complainants' Former Expert (Mr. Kunkel)

The Hearing Officer's decision explicitly allows Complainants to hide the ball -- they may now rely on the withdrawn Kunkel remedy estimates to support their economic expert's analysis by Mr. Shefftz, and at the same time are allowed to reject the Kunkel remedy and state an entirely new approach by Mr. Quarles. Ultimately MWG is precluded from cross examining anyone on the basis for the cost estimates that underlying Mr. Shefftz's opinions. To that end, MWG has also appealed the Hearing Officer's denial of MWG's motion *in limine* to exclude Complainants' replacement expert on remedy, Mark Quarles.

Because the Hearing Officer allowed Complainants to replace Mr. Kunkel as their expert, MWG cannot cross examine him at the hearing about his remedy estimates, process, or proposal, on which Mr. Shefftz now relies, because Mr. Kunkel is no longer a witness in this case. Moreover, Mr. Kunkel cannot be compelled to appear because he does not live in Illinois.[10] *Hulsey v. Scheidt*,

[10] Mr. Kunkel testified he lives in Colorado. 1/29/2018 Hearing Tr. p. 94:21.

258 Ill. App. 3d 567, 576, 196 Ill. Dec. 740, 746 (1st Dist. 1994) (Court found that out of state witnesses could not be compelled to testify because a subpoena is not enforceable unless issued by a court which had *in personam* jurisdiction over the individual). MWG also cannot cross examine Complainants' new expert, Mr. Quarles, about the Kunkel remedy cost estimates (relied on by Mr. Shefftz) because Mr. Quarles made it very clear that he neither reviewed nor relied on the Kunkel reports in any way, he did not review Mr. Kunkel's deposition testimony, and nor did he review Mr. Kunkel's hearing testimony. Quarles Dep., Ex. 2, p. 53:24-54:20. MWG also cannot cross examine Mr. Shefftz about the basis for the remedy cost estimates that Mr. Shefftz himself uses because he repeatedly stated he had no opinion on the estimates that form the basis of his entire opinion, and was simply told to use them. Ex. 3, Shefftz Jan. 2021 Rpt. p. 22, Ex. 4, Shefftz Rebuttal Rpt. p. 14, Shefftz Dep, Ex. 6, pp., 61:3-15; 73:12-75:19; 110:18-22. This inability to cross-examine is the exact reason that Illinois Courts require that any new expert be limited to expounding and adding to the opinions of the former expert – so that there is a witness available to be examined. *People v. Pruim*, PCB 04-207 (Sept. 24, 2008) (Hearing Officer allowed substitution of expert witness because the new expert worked to develop the supplemental opinion, indicating that there was little difference between the old and new expert opinions.)

In fact, when MWG cross-examined Mr. Kunkel about his cost estimates during his sworn deposition, the cost estimates completely fell apart. Mr. Kunkel admitted that both his high and low unit costs were inaccurate and not representative of the actual costs. Ex. 7, Kunkel Dep. pp. 190:19-197:16. Because Mr. Kunkel will not be testifying at the hearing, and no other witness for Complainants has reviewed his remedy or cost estimates, MWG has no ability to further challenge the testimony based on the Board's Interim Order, or explain to the Board why no weight should be given to it.

Now, in addition to being unable to challenge the appropriateness of a "removal" remedy in the first place (because Complainants' new expert Quarles does not adopt a removal remedy), there is no witness who has any information and may answer on cross-examination the following questions:

- How Mr. Kunkel's proposed removal remedy comports with the Board's findings at each Station.
- Whether Mr. Kunkel's analysis of the location of removals is appropriate in light of the Board's findings at each Station.
- Why Mr. Kunkel's excavation and backfilling estimates for a municipality are reliable estimates for the removal project he is recommending?
- How far Mr. Kunkel's potential ash disposal locations are from the MWG Stations and whether estimated disposal costs reflect that distance?
- Whether Mr. Kunkel investigated landfills that would accept the CCR?
- If so, what landfills and what was the result of his investigation?
- Whether a landfill's refusal to accept the CCR would change the cost estimates?
- Whether alternative transportation methods were investigated, and if so, the results?
- Whether Mr. Kunkel's cost estimated accounted for the costs of tipping fees for disposal at a landfill?
- What was the source of the material to be used to backfill following the extensive, proposed excavation?
- How far away was the source of the backfill material?
- What was the estimated cost of the backfill material and the costs for transportation?
- Whether Mr. Kunkel's costs fail to include the disposal costs?
- Whether Mr. Kunkel's estimates fail to include the costs of excavation and backfilling?

And there are many more questions that *could* go to the weight of Mr. Shefftz's purported economic benefit analysis *if* there were a witness available.

In sum, there is *nobody* who can or will defend the cost estimates relied upon by Mr. Shefftz at the hearing because every subsequent expert for Complainants denies any knowledge. MWG is materially prejudiced if it is required to accept the Kunkel cost estimates AS IS without cross examination, and also accept Mr. Shefftz's reliance upon the cost estimates, without challenge. It is arbitrary and capricious to allow the unsubstantiated cost estimates in as evidence and the Hearing Officer's decision should be reversed.

ii. MWG Cannot Cross-Examine Assumptions Fed to Mr. Shefftz by Complainants' Counsel

The Hearing Officer also made no mention of and appears to have disregarded MWG's objections to Mr. Shefftz's reliance on assumptions solely from Complainants' counsel. Complainants' counsel readily admitted that they are the sole source of Mr. Shefftz's assumptions, without any evidentiary basis, direct or circumstantial. As Complainants' counsel have not offered themselves up as witnesses, MWG cannot cross examine them on the basis for each of the assumptions provided to Mr. Shefftz. As such, it would be arbitrary and capricious to allow an expert to rely on unsupported assumptions, without direct or circumstantial basis in the record, as the basis for expert opinions.

As admitted by Complainants, Mr. Shefftz relied upon Complainants' counsel for very specific assumptions that formed the basis for his conclusions about economic benefit to MWG. In fact, without those assumptions from counsel to use as input into his "model", Mr. Shefftz's entire process for calculating economic benefit fails. Counsel fed to Mr. Shefftz how long the (withdrawn) Kunkel remedy would take and told Mr. Shefftz to assume that the violations are "continuing." Ex. 4, p. 14. As the Board is aware, this assumption of continuing violations was reconsidered by the Board in its Revised Interim Order. Board Feb. 6, 2020 Order, p. 13 (Holding that the groundwater management zones continue to be applicable). In fact, Complainants' counsel

even stated that Mr. Shefftz should be allowed to rely on Complainants' counsel's assumptions because of "*Complainants' Counsel's knowledge* of how long similar cleanup projects have taken." Complainants' Response to MWG's Motion p. 6-7, emphasis added and excerpt attached as Ex. 8. Again, it cannot possibly be held that such assumptions made by counsel, and not a from witness that can be challenged under oath, are reliable evidence for expert testimony. Because Complainants will have *no one* to testify on the duration of the Kunkel remedy nor whether those violations are "continuing, MWG cannot challenge those bold assumptions at the hearing. MWG is forced to go to hearing without being able to assess or cross examine:

- What "similar projects" are Complainants' counsel referring to for their alleged knowledge? What states? What sites? How are the sites "similar"? Did the sites contain CCR? If not – what did the sites contain? How big were the sites? What was the remedy? Where were the disposal locations that the waste went to and how far was the transportation? What other remedies were considered?

- The basis for the assumption that an ash removal project would begin within one month after the first round of sampling occurred at the MWG Stations?

- How counsel's assumptions comport with requirements (timing, permitting, assessments etc.) of 35 Ill. Adm. Code 845 ("Illinois CCR Rule")?

- How counsel's assumptions fit within the rules and practices of the Illinois EPA and the Illinois Site Remediation Program ("SRP") process under 35 Ill. Adm. Code Part 740?

- The basis for counsel's statements that the violations are continuing in light of the Board's interim opinions, including the Board's opinions concerning groundwater management zones.

Similarly, Counsel simply told Mr. Shefftz not to offset his economic benefit calculation with costs MWG had already expended to reline its CCR ponds as part of a remedy in MWG's Compliance Commitment Agreements. Mr. Shefftz relied solely on Complainants' *counsel*'s suggestion that MWG would have had to reline its ponds in any case. Ex. 4, p. 14, Ex. 6, 100:10-101:18. But, that is not correct. First, in his remedy opinion, Mr. Kunkel made it clear that his ash removal remedy was not merely removing the ash from inside the ponds for a relining. Instead, his

recommended removal included a complete removal project, and completely backfilling the ponds with clean fill. Certainly, MWG would not have relined a pond that was going to be backfilled. Mr. Kunkel repeatedly referred to the "removal, hauling and backfilling of the existing ash ponds" – *not* simply removing the ash from the ponds so that they could be relined and used again. Ex. 1, p. 2. In fact, Mr. Kunkel made no suggestion that the ponds should or could be relined or reused following the ash removal. 10/27/2017 Hr. Tr. p. 35:1; 10/27/2017 Hr. Tr. p. 171:4-5. However, because Mr. Kunkel will not be a witness, and because Complainants counsel will not testify, MWG has no method to interrogate or cross examine the assumption that the ponds would have to be relined – an assumption that Mr. Shefftz relies on for his calculations.

Second, *counsel's* assumption that the ponds would have been relined anyway after a removal is directly contrary to the evidence. As Complainants and the Board well know, the routine process of removing ash from a pond that will be reused is completely different from a complete removal. 10/24/17 Hearing Tr. pp. 131:3-16, 224:3-9, 1/31/18 Hearing Tr. p. 236:16-20. Routine removals remove CCR from the middle of the ponds, to prevent damaging the liners. To suggest that the removal on the scale stated by Mr. Kunkel is the same as a routine cleanout is contrary to the record in this case, and false. *Id*. Many more questions would serve to challenge *counsel's* assumptions, and MWG is highly prejudiced if it is required to accept the Shefftz assumptions AS IS.

iii. <u>The Board Has a Responsibility for Gatekeeping Expert Opinions that are Wholly Lacking in Basis</u>

The Hearing Officer's decision failed to address the key problem with Mr. Shefftz's opinions; that there is no one to testify as to any of these assumptions upon assumptions. Mr. Kunkel is not available to explain what he meant or how he reached the remedy costs he reached. Mr. Quarles, Kunkel's replacement, never reviewed the Kunkel reports, depositions, or hearing testimony and

has no opinions about them. Ex. 2, p. 53:19-54:20. Complainants' counsel is not agreeing to be a witness to have counsel's assumptions challenged. And Mr. Shefftz simply accepted the assumptions without question. Mr. Shefftz specifically stated that he ***only*** used the cost figures that appeared in a single table of Mr. Kunkel's report, and the date of the report. Ex. 6, Shefftz Dep. p. 60:7-23.

While the Board may generally prefer to allow testimony to be presented and to then assess its weight, this situation is particularly egregious and a clear exception. Just like the courts in Illinois, the Board has a responsibility for expert "gatekeeping" when the circumstances require it. *Soto v. Gaytan*, 313 Ill. App. 3d 137, 147, 245 Ill. Dec. 769, 776 (2nd Dist. 2000) (Court found trial court abused its discretion allowing unreliable expert testimony stating "[a]s the gatekeeper of expert opinions disseminated to the jury, the trial court plays a critical role in excluding testimony that does not bear an adequate foundation of reliability"); *Sw. Ill. Dev. Auth. v. Masjid Al-Muhajirum*, 348 Ill. App. 3d 398, 401, 284 Ill. Dec. 164, 167, 809 N.E.2d 730, 733 (5th Dist. 2004) (Court approved trial court, as "gatekeeper," striking of the defendant's expert opinion because it was based upon speculative information). Here, the Board is faced with opinions presented by an expert that are based on *assumptions from counsel and a withdrawn and unavailable expert*, and there is no witness available to allow the assumptions to be questioned for their relative weight. It would be clear error for the Board to allow the testimony to proceed.

c. Allowing an Unsupported Expert Opinion Violates Illinois Supreme Court Rule 213

Allowing Mr. Shefftz's unreliable opinions to proceed is a clear violation of Illinois procedural and evidentiary law. Given the number of motions before the Hearing Officer, and the complexity and intertwining of Mr. Shefftz, Mr. Kunkel and Mr. Quarles, it is not surprising that errors exist. For example, the Hearing Officer mistakenly stated that Mr. Shefftz replaced Mr. Kunkel and that

Mr. Kunkel's testimony included an economic benefit analysis – neither of which is accurate. H.O. July 13, 2022 Order, p. 9.

In another questionable finding, the Hearing Officer's decision states that MWG's argument "in its motion *in limine* is speculative as to what Mr. Quarles will testify to," referring to whether Mr. Quarles might, at hearing, provide support for the Kunkel remedy opinions on which Mr. Schlissel relies. The Hearing Officer's decision went on to suggest that MWG may address its concerns during its cross-examination. Hearing Officer July 13, 2022 Order, p. 9. As stated above, there is no witness to testify about the basis for Mr. Shefftz' assumptions (and certainly not the assumptions made by Complainants' counsel). We already know exactly what Mr. Quarles will and may say at hearing – his reports and his deposition define his opinions. In fact, Mr. Quarles agreed in his deposition that all of his opinions appear in his two reports. Quarles Dep, Oct 12, 2021, p. 11, lines 10-14. Certainly, the Hearing Officer's decision is not suggesting that an expert's opinion, as described in his own reports, is mere speculation, or that the parties don't already know the expert's opinions *before the hearing*. Any suggestion that an expert would be entitled to create new theories or newly support materials previously ignored would violate Illinois Supreme Court Rule 213 and would violate the requirement for a fair hearing. 35 Ill. Adm. Code 101.610.

The applicable rule requiring disclosure of expert opinions in Illinois is Illinois Supreme Court Rule 213. The purpose of discovery rules governing the "disclosure of expert witnesses, their opinions, and the bases for those opinions[,] is to avoid surprise and to discourage strategic gamesmanship." *Thomas v. Johnson Controls Inc.*, 344 Ill. App. 3d 1026, 1032, 801 N.E.2d 90, (1st Dist. 2003). Supreme Court Rule 213 disclosures are mandatory and strict compliance is required and furthers the administration of justice by providing a degree of certainty in the trial process and eliminating a trial by "ambush." *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 381,

805 N.E.2d 222, 281 Ill. Dec. 854 (2003); *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109, 806 N.E.2d 645 (2004). Supreme Court Rule 213(f)(3) requires parties to furnish, among other things, the subject matter, conclusions, and opinions of controlled expert witnesses who will testify at trial. Supreme Court Rule 213(g) limits expert opinions at trial to "[t]he information disclosed in answer to a Rule 213(f) interrogatory, or at deposition." ILSC 213(g). The committee comments to Rule 213 explain that, "in order to avoid surprise, the subject matter of all opinions must be disclosed pursuant to this rule… and that no new or additional opinions will be allowed unless the interests of justice require otherwise." 177 Ill. 2d R. 213 (g), Committee Comments. Accordingly, pursuant to Rule 213, parties' expert opinions are limited to the opinions expressed in the written report and depositions and no new opinions are allowed.

The Hearing Officer has previously stated in this matter that the intent behind Supreme Court Rule 213 "provides general guidance: the rule is intended 'to prevent unfair surprise at trial, without creating an undue burden on the parties before trial.'" H.O. July 18, 2017 Order, *quoting* Committee Comment to Ill. Sup. Ct. R. 213(f). But implying that Mr. Quarles might be allowed to provide new testimony at the hearing that is not in his expert reports, not in his deposition, and would go to an issue that he specifically disregarded (Kunkel's remedy reports), is certainly "unfair surprise" and "trial by ambush" at its best. MWG's motion does not include "speculations" about Mr. Quarles's testimony. MWG merely repeated the opinions Mr. Quarles provided in his written reports and deposition. The Hearing Officer does not explain how MWG could cross examine Mr. Quarles in light of the fact that he ignored Mr. Kunkel's report and had never even heard of Mr. Kunkel. It would be clear error to state that rules and standards that all Illinois Courts, including the Illinois Supreme Court, must adhere to, may be disregarded without fully analyzing and addressing the impact of the decision to do so.

III. Conclusion

For the reasons stated above, MWG requests that the Board reverse the Hearing Officer's order and exclude the opinions by Complainants' expert Jonathan Shefftz that are solely based on a withdrawn expert, statements made by counsel, and assumptions and information MWG cannot interrogate or cross examine.

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