

ILLINOIS POLLUTION CONTROL BOARD
October 5, 2023

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

ORDER OF THE BOARD (by B.F. Currie):

On June 20, 2019, the Board found that Midwest Generation, LLC (MWG or Midwest) violated the Environmental Protection Act (Act) and Board regulations based on a complaint filed by Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment (collectively, Environmental Groups). The matter has been split into a liability and remedy phase. The liability phase has concluded and the matter is currently in the remedy phase.

The hearings for the remedy phase of this matter were held in May and June of 2023. At issue are five appeals of hearing officer orders made during the remedy phase hearings. The Environmental Groups filed a motion for interlocutory appeal of the hearing officer’s orders regarding economic impact testimony as well as Exhibits 1331 and 1332. Midwest filed appeals of the hearing officer’s order to admit Mark Quarles’ opinions and reports; the hearing officer’s denial of Midwest’s objection to Jonathan Shefftz’s opinions; and an objection and appeal from the hearing officer’s ruling to admit Exhibit 1408. Today, the Board denies the four interlocutory appeals and grants one appeal.

In this order, the Board first provides a brief procedural history relevant to the appeals and rules on procedural motions. Next, the Board summarizes the filings regarding the appeals, after which the Board analyzes and provides the reasons for denying four of the interlocutory appeals and for granting one of the appeals.

PROCEDURAL BACKGROUND

Procedural History

The majority of the procedural history in this case is described in detail in the June 20, 2019, Board order. *See* Sierra Club, et al. v. Midwest Generation, LLC, PCB 13-15, slip op. at 4 (June 20, 2019) (Interim Order). Within that Interim Order, the Board held that MWG violated

Sections 12(a), 12(d), and 21(a) of the Act (415 ILCS 5/12(a), 12(d), 21(a) (2022)), as well as Sections 620.115, 620.301(a), and 620.405 of the Board groundwater quality regulations (35 Ill. Adm. Code 620.115, 620.301(a), 620.405). Following a Midwest motion to reconsider and clarify the Interim Order, on February 6, 2020, the Board issued an order granting in part and denying in part MWG's motion. The Board did not alter the substance of the previous Interim Order ruling which found MWG violated the above-mentioned sections of the Act and regulations. However, the Board found that groundwater management zones at three of the Stations are still in operation and therefore violations of 35 Ill. Adm. Code Sections 620.115, 620.301(a) and 620.405 were stayed since the creation of the GMZs in 2013.

The Board held hearings from on May 15-19 and June 12-15, 2023. During the hearings, the hearing officer issued verbal orders on a range of evidentiary motions and objections.

A July 11, 2023, hearing officer order set the schedule for simultaneous filings of appeals and responses to the appeals. On July 26, 2023, the Environmental Groups filed a motion for interlocutory appeal of the hearing officer's orders regarding economic impact testimony (Env. Group Appeal Econ.). The Environmental Groups also filed a motion for interlocutory appeal of the hearing officer's order on Midwest Generation's objection to Exhibits 1331 and 1332 (Env. Groups Appeal Exhibits), and attached to that motion was a memorandum (Env. Groups Memo).

On July 26, 2023, Midwest filed an appeal of the hearing officer's decision to admit Mark Quarles' opinions and reports (Midwest Appeal Quarles), an appeal of the hearing officer's ruling denying its objection to Jonathan Shefftz's opinions (Midwest Appeal Shefftz) including an attached memorandum (Shefftz Memo), and an objection to and appeal from the hearing officer's ruling to admit Complainant's Exhibit 1408 as evidence (Midwest Appeal 1408).

Both participants timely filed responses to the appeals. On August 16, 2023, the Environmental Groups filed three responses, a response to Midwest's objection and appeal from the hearing officer's ruling to admit Complainant's Exhibit 1408 as evidence (Env. Group Resp. 1408), a response to Midwest's motion for interlocutory appeal of the hearing officer's decision to admit Mark Quarles' opinions and reports (Env. Group Resp. Quarles), and a response to Midwest's appeal of the hearing officer's ruling denying its objection to Jonathan Shefftz's opinions (Env. Group Resp. Shefftz). Midwest filed a response to Complainants' motion for interlocutory appeal of the hearing officer's order regarding economic impact testimony (Midwest Resp. Econ. Impact), and a response to Complainants' motion for interlocutory appeal of the hearing officer's order on Exhibits 1331 and 1332 (Midwest Resp. 1331 & 1332).

On September 13, 2023, Midwest filed an objection to the Environmental Group's request for leave to file a reply, *instanter*, on the subject of economic impact testimony. Also on September 13, 2023, the Environmental Groups filed an objection to Midwest's request for leave to file its reply on the subject of Mr. Shefftz's opinion. On the same day, the Environmental Groups filed a response to Midwest's request for leave to file a reply on the subject of Mr. Quarles' opinion and reports. Finally, also on September 13, 2023, the Environmental Groups filed both a response and a sur-reply to Midwest's motion for leave to file a reply on the subject of Exhibit 1408.

Procedural Motions

On July 26, 2023, Midwest filed a motion for leave to file, *instanter*, MWG's amended list of exhibits offered for admission. In the motion, Midwest says that when it filed its list of exhibits on June 29, 2023, it had inadvertently failed to include Exhibits 1106 and 1107. Both exhibits were presented to the Board and admitted without objection during the hearing on May 16, 2023. Midwest now asks to file its amended list of exhibits that include Exhibits 1106 and 1107 and has included copies of both exhibits with its filing. The Board grants Midwest's motion to amend its list of exhibits.

Both parties submitted motions to correct various transcripts. The Board grants Midwest's June 12, July 11 and July 26, 2023 motions. The Board also grants the Environmental Groups' June 12 and July 11, 2023 motions.

On August 30, 2023, the parties filed motions to reply. The Environmental Groups filed a motion to file a reply, *instanter*, and a reply to Midwest's response to Complainant's motion for interlocutory appeal of the hearing officer's orders regarding economic impact testimony (Env. Groups Reply). Midwest filed three motions to reply: (1) a motion for leave to file, *instanter*, and a reply in support of its appeal of the hearing officer's decision to admit Mark Quarles' opinion and reports (Midwest Reply Quarles), (2) a motion for leave to file, *instanter*, Midwest's reply in support of its appeal of the hearing officer denying its objection to Jonathan Shefftz's opinion (Midwest Reply Shefftz), and (3) a motion for leave to file, *instanter*, Midwest's reply in support of its appeal of the hearing officer's ruling to admit Complainants' Exhibit 1408 (Midwest Reply 1408).

The Board's procedural rules provide that the moving party, "will not have the right to reply, except as the Board or hearing officer permits to prevent material prejudice. A motion for permission to file a reply must be filed with the Board within 14 days after service of the response." 35 Ill. Adm. Code 101.500(e).

In its motion, the Environmental Groups list "new arguments that are extremely prejudicial to Complainants" made by Midwest in its response. Env. Groups Mot. Reply at 2. "Complainants would be prejudiced if they were not allowed to address these new, fallacious, and harmful arguments." *Id.* The Board finds that the filing of the reply will allow the Environmental Groups to address new arguments and prejudice and grants the motion to file the reply, *instanter*.

In its motion and reply on the subject of Mr. Quarles' testimony, Midwest says that a reply is warranted, "because Complainants raised new arguments and admissions in its response." Midwest Mot. Reply Quarles at 1. "For the first time, Complainants attempt to equate Mr. Quarles's reliance on the Board's Interim Order with the Hearing Officer's Order requiring Mr. Quarles to build on the testimony of Complainants prior expert. MWG will be materially prejudiced if it is not permitted to reply." *Id.* The Board finds that the filing of this reply will allow Midwest to address new arguments and grants Midwest's motion to file its reply, *instanter*.

In its motion and reply on the subject of Mr. Shefftz’s opinion, Midwest says that a reply is warranted, “because Complainants’ Response Brief presents new and specious arguments that MWG could not have anticipated when drafting its appeal.” Midwest Mot. Reply Shefftz at 1. “Midwest will be materially prejudiced if it is not allowed to provide the Board with an accurate outline of and reply to the Response Brief’s new arguments.” *Id.* The Board finds that the filing of this reply will prevent material prejudice and grants Midwest’s motion to file its reply, *instanter*.

In its motion and reply on the subject of Exhibit 1408, Midwest says that a reply is warranted because it speculates that, “Complainants then plan to use other information – never discussed – from the exhibit to support their post-hearing brief positions.” Midwest Mot. Reply at 1. The Board finds that Midwest’s position on the admission of Exhibit 1408 has been fully presented to the Board through the appeal and response. Midwest presented its opposition to the admission of Exhibit 1408 in detail at hearing and in its appeal. The Board can find no material prejudice incurred, nor any new arguments made by the Environmental Groups in their Response, and therefore denies Midwest’s motion to file its reply on this subject.

The Board denies Midwest’s motion to file an objection to the Environmental Groups’ request for leave to file a reply on the subject of economic impact testimony. The Board finds the subject fully briefed and finds no evidence of material prejudice that would require additional filings. The Board denies the Environmental Groups’ three objections and one sur-reply on the subjects of Mr. Shefftz’s opinion, Mr. Quarles’ opinion and reports and Exhibit 1408. The Board finds the subjects fully briefed and finds no evidence of material prejudice that would require additional filings.

On September 21, 2023, Midwest filed an objection to Complainants’ sur-reply regarding Complainants’ Exhibit 1408. The Board declines to accept this filing as it was rendered moot by denying the Environmental Groups’ sur-reply.

Legal Standards

The Board’s rules on the admission of evidence at hearing are, in part, as follows:

Section 101.626 Information Produced at Hearing

In compliance with Section 10-40 of the IAPA [Illinois Administrative Procedure Act], the hearing officer will admit evidence that is admissible under the rules of evidence as applied in the civil courts of Illinois, except as otherwise provided in this Part or 35 Ill. Adm. Code 105.

- a) Evidence. The hearing officer may admit evidence that is material, relevant, and would be relied upon by prudent persons in the conduct of serious affairs, unless the evidence is privileged.

- e) Admission of Business Records. A writing or record, whether in the form of any entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence, or event, may be admissible as evidence of the act, transaction, occurrence, or event. To be admissible, the writing or record must have been made in the regular course of business, if it was the regular course of business to make the memorandum or record at the time of the act, transaction, occurrence, or event, or within a reasonable time afterwards. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be admitted to affect the weight of the evidence, but will not affect admissibility. The term “business,” as used in this subsection (e), includes businesses, professions, occupations, and callings of every kind.

The Board may turn to the Illinois Rules of Evidence in instances where its own rules do not fully address the issues. Section 101.626 above allows the Board to look to the rules of evidence as applied to civil courts in Illinois. Similarly, Section 101.100(b) of the Board’s procedural rules provides, in part, as follows, “the Board may look to the Code of Civil Procedure and Supreme Court Rules for guidance when the Board’s procedural rules are silent.” See 35 Ill. Adm. Code 101.100(b). The Board’s rules do not cover hearsay and the exceptions to hearsay, so in looking to the Illinois Rules of Evidence on the subject of hearsay and hearsay exceptions it provides as follows:

Hearsay is not admissible except as provided by these rules, by other rules prescribed by the Supreme Court, or by statute as provided in Rule 101. Ill. R. Evid. 802

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(8) Public Records and Reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and matters observed by police officers and other law enforcement personnel, or (C) in a civil case or against the State in a criminal case, factual findings from a legally authorized investigation, but not findings containing expressions of opinions or the drawing of conclusions. This rule applies unless the opposing party shows that the sources of information or other circumstances indicate lack of trustworthiness. Ill. R. Evid. 803

The Board has previously ruled on the public record exception to the hearsay rules in Castellari, et. al. v. John Prior, PCB 86-79, (May 28, 1987). “At common law it has long been settled as an exception to the hearsay rule that records kept by persons in public office, which they are required either by statute or the nature of their office to maintain in connection with the performance of their official duties, are admissible in evidence and are evidence of those matters which are properly required to be maintained and recorded therein.” *Id.* at 13, *citing People ex rel. Wenzel v. Chicago and North Western Railway*, 28 Ill. 2d 203 (1963). The custody and

authenticity of public records is determinative when deciding their admissibility. *Id.*, citing, Bell v. Bankers Life & Casualty Co., 327 Ill. App. 321 (1st Dist. 1945).

APPEALS OF HEARING OFFICER ORDERS

Environmental Group Appeals

Economic Impact Testimony

The Environmental Groups ask that the Board strike two pages of the expert report of Midwest's economic expert, Ms. Gale Koch. Env. Group Appeal Econ. at 3. Those are pages 28 and 29 of Exhibit 1901.

On two previous occasions, the Board has decided that the financial information of Midwest's indirect parent company, NRG, is not relevant as Midwest has not made an inability to pay argument. *See* PCB 13-15, slip op. Sept. 9, 2021 at 8; slip op. Dec. 15, 2022 at 11. In both of those orders, the Board held that if, at some point during this proceeding, Midwest makes an inability to pay argument, the Board will allow evidence of NRG's financial information.

During these second hearings, Midwest objected to the entry into evidence a document of the Environmental Groups' expert economic witness, Jonathan Shefftz's Second Supplemental and Rebuttal Report (Shefftz Rebuttal). "During the hearing that took place between May 15-19 and June 12-15 of 2023... the Hearing Officer refused to allow admission of Exhibit 1207, Mr. Shefftz's Second Supplemental and Rebuttal Report, because it contained Mr. Shefftz's opinions regarding the economic impact of a remedy or penalty on MWG." Env. Group Appeal Econ. at 4. Mr. Shefftz's testimony at trial was held during a closed session due to discussion of non-disclosable information. Similarly, the appeal, response, and reply on this issue contain non-disclosable information that appears redacted in publicly available filings. The Board has reviewed and considered the redacted portions, though does not discuss them in this order.

During the Environmental Groups' cross examination of Midwest's expert economic witness, Gayle Koch, the Environmental Groups asked the hearing officer to exclude a portion of Exhibit 1901 that contained Ms. Koch's opinions regarding the economic impact of a remedy or penalty on Midwest. TR 10 at 121-125.¹ This cross examination of Ms. Koch occurred during an offer of proof, and as such are not part of the official record. "Conversely, during Complainants' examination of Ms. Koch, the Hearing Officer denied Complainants' complementary request to exclude the portion of Exhibit 1901 containing Ms. Koch's opinions regarding the economic impact matters occurred within an offer of proof and are therefore not part of the official record." Env. Group Appeal Econ. At 5.

¹ The transcripts for the second set of hearings – all held in 2023 – are abbreviated as follows: May 15, 2023 is "TR 1"; May 16 is "TR 2"; May 17 is "TR 3"; May 17 confidential is "TR 4"; May 18 is "TR 5"; May 19 is TR 6"; June 12 is "TR 7"; June 13 is "TR 8"; June 14 is "TR 9"; June 15 is "TR 10"; and June 15 confidential is "TR 11."

The Environmental Groups ask the Board to reverse the hearing officer's order overruling their objection to the inclusion of the section of Ms. Koch's report that addresses economic impact concerns and strike such discussion from her report, specifically pages 28 and 29 of Exhibit 1901. The Environmental Groups assert that "the Hearing Officer, and by extension the Board, has an obligation to apply the rules of evidence equally and fairly to all parties. It would unduly bias the remedy proceeding to allow MWG to offer an expert report that includes discussion of the economic impact of a remedy or penalty determination on MWG, while refusing to allow Complainants to offer such expert testimony. Thus, the portions of Exhibit 1901 containing such argumentation should be stricken from the record." Motion at 6, internal citation omitted.

Midwest's response to the Environmental Groups' appeal was filed as non-disclosable in its entirety. The Board has reviewed it and considered it in this ruling.

Board Discussion and Findings. The Board finds that pages 28 and 29 of Exhibit 1901 are responsive to statements made by Mr. Shefftz, the Environmental Groups witness. The Board's previous rulings on economic impact held that information regarding Midwest's indirect parent company, NRG, could not be admitted as Midwest had not made an inability to pay argument. Pages 28 and 29 of Exhibit 1901 similarly do not make an inability to pay argument. Additionally, the Environmental Groups did not object to the admission of Exhibit 1901 at hearing, which resulted in the Environmental Groups waiving their right to appeal the hearing officer's decision to admit the exhibit. Therefore, the Board denies the Environmental Groups' appeal to strike pages 28 and 29 of Exhibit 1901.

Exhibits 1331 and 1332

Exhibit 1331 is an application for an initial operating permit for the Waukegan Generating Station from October 29, 2021. Exhibit 1332 is the application for an initial operating permit for ponds one north and one south for Will County Station from March 31, 2022. The documents were prepared for Midwest by KPRG and Associates, Inc., an environmental consulting firm hired by Midwest and with the assistance of other environmental consultants. TR 3 at 9 and 125-126.

During the remedy hearing, the Environmental Groups moved to admit both exhibits and Midwest objected to the admission as to relevance. Midwest argued that both exhibits were large and the witness, Mr. Richard Gnat, only testified to certain pages of each exhibit during the hearing. TR 3 at 132-133 and 150-151.

At hearing, the hearing officer admitted Exhibit 1331 as follows, "I would direct the Board to take note of Mr. Gnat's testimony and what he has knowledge of and what he can speak to and disregard the remainder of this exhibit... And I would ask the Board to disregard any kind of duplicative or cumulative information in Exhibit 1331." TR 5 at 67-68. Exhibit 1332 was admitted with similar limitations. *Id.* at 106-107.

The Environmental Groups argue that the hearing officer erred in this ruling by applying too stringent a standard to the admissibility of Exhibits 1331 and 1332 and, "his ruling created a

lack of clarity around what exactly is admitted from Exhibits 1331 and 1332.” Env. Groups Memo at 2. Additionally, they argue the exhibits should be admitted with no limitations because they are relevant, admissible business records. *Id.* at 3.

Using Mr. Gnat’s testimony at hearing, the Environmental Groups argue that both permit applications are relevant to the case as a whole. In describing the Waukegan operating permit application, Exhibit 1332, Mr. Gnat said that it covered the history of construction, the type of CCR, and surface impoundment, the closure priority characterization, the hydrogeologic site characterization, the closure plan, the post-closure plan, a summary of possible exceedances under the proposed groundwater standards, tables, figures and attachments. Env. Groups Memo at 4.

Mr. Gnat is a professional geologist who is principal and part-owner of KPRG. KPRG was hired by Midwest to assist in developing the permit applications and KPRG staff, supervised by Mr. Gnat, assisted in preparing the two permit applications. TR 3 at 125-126. In describing the Will County operating permit, Mr. Gnat said that his firm, KPRG, was involved in developing parts of the application involving the history of construction, some of the location standards, the permanent markers, the Emergency Action Plan, the Fugitive Dust Control Plan, the groundwater monitoring information, and the history of known exceedances. Env. Groups Memo at 5. During his testimony at hearing, Mr. Gnat provided information as to the hydrogeologic site characterization, the groundwater monitoring system design and construction plans, the groundwater sampling and analysis program, the analytical methods, the preliminary closure plan for two of the ponds, the liner certificate, the history of known exceedances at Will County, and the tables, figures and attachments associated with the groundwater monitoring section of the operating permit. *Id.*

The Environmental Groups ask the Board to overturn the hearing officer’s decision on Exhibits 1331 and 1332 and admit the exhibits as a business record pursuant to 35 Ill. Adm. Code 101.626(e). “Since KPRG routinely – in other words, in the regular course of business – prepared permit applications for MWG, the permit applications are admissible as business records.” Env. Groups Memo at 7. “Even though Mr. Gnat’s personal knowledge of every page of the exhibits does not affect admissibility, it is important to note that Mr. Gnat was the single best person to testify about the documents’ authenticity and relevance.” Env. Groups Memo at 7-8.

The Environmental Groups argue that upholding the hearing officer’s decision on these two exhibits would be inconsistent with past practice. Env. Groups Memo at 10. The Groups further argue, “[t]he Hearing Officer’s approach suggests that the only admissible sections of such documents are those that a testifying witness wrote or was involved in the preparation of. This means that for a document to be admitted in its entirety, the movant would have to produce testimony from everyone who contributed to the document.” *Id.*

Midwest argues that the hearing officer’s decision was correct and to reverse it would unfairly prejudice Midwest. Midwest Resp. 1331 & 1332 at 1. “In this case, because Exhibits 1331 and 1332 are so large and contain so many subparts, the Hearing Officer correctly concluded that it was not fair to the Board to admit them in their entirety, without testimony or

explanation.” *Id.* at 5. Further, Midwest says that, “[w]ithout limiting the Exhibits to the portions addressed during testimony, the Board would be provided with little understanding of the documents which could lead to inadvertent errors, and MWG would be prejudiced by the incorrect conclusions.” *Id.*

Board Discussion and Findings. Exhibits 1331 and 1332 are initial operating permit applications related to two of the four stations at issue in this matter – Waukegan and Will County. Part 845 of the Board’s regulations and Part 257 of the federal rules require coal fired generating stations to maintain public-facing websites that include such things as: weekly and monthly inspection reports, emergency action plans, safety and health plans, operating permit applications, construction permit applications and closure plans. *See* 35 Ill. Adm. Code 845.810; 40 CFR §257.107. Both Exhibit 1331 and 1332 are available in their entirety on Midwest’s public website for the stations.²

Business records may be admitted if the party has demonstrated that the records are relevant and reliable. The Board finds both Exhibits 1331 and 1332 to be relevant as the operation of the stations, and violations of the Act and Board regulations are the heart of this case. The exhibits are also reliable. Identical documents are posted on Midwest’s public-facing, Part 845 website and Mr. Gnat testified as to the portions of the documents he worked on or assisted developing.

The Board is a technically qualified body and permit applications are documents the Board regularly considers. Indeed, the facilities at issue in this appeal – Waukegan and Will County – are the subject of various other matters before the Board. Currently, proceedings before the Board involving the Waukegan Station include AS 21-3 (a petition for an adjusted standard from Part 845), involving the Will County Station include PCB 2006-60, PCB 2010-98, PCB 1008-22, PCB 2008-09, PCB 2006-156, PCB 2005-58 (permit appeals), and involving multiple Midwest stations in Illinois include AS 24-06 (a petition for adjusted standard from Parts 202 and 212) and Midwest Generation, LLC, et. al v. Illinois Pollution Control Board, Nos. 4-21-0304, 4-21-0309, 4-21-0310 (consol.) (4th Dist.) (an appeal of the Board’s final order adopting Part 845 rules). The Board, as a technical body, regularly reads and interprets permit applications. Midwest is concerned that the Environmental Groups might misinterpret the data and information in the two exhibits. *Resp.* at 5. However, the remedy would be to present an argument for why data or information has been misinterpreted in the form of the post-hearing brief. The Board itself is able to read and interpret these permit applications.

In the first set of hearings in this matter, the liability phase, a similar issue arose. The Environmental Groups asked to admit Exhibits 17D, 18D, 19D, 20D, and 21. After objection from Midwest, the hearing officer allowed the admission of the exhibits under the business records exception in Section 101.626, however limited the use of the exhibits by the Environmental Groups in their briefs to the sections of the exhibits the witness had been questioned on. 10/23/17 TR 126:23-127:9. In a written hearing officer order following the hearing, the hearing officer affirmed his decision on the exhibits. HOO January 11, 2018 p. 2.

² Midwest’s Illinois CCR Compliance Data and Information website is: <https://midwestgenerationllc.com/illinois-ccr-rule-compliance-data-and-information/>.

The Board finds a similar approach is appropriate in this instance. The Board directs both parties to cite to only the portions of the applications that Mr. Gnat testified to at hearing. The Board grants the Environmental Groups' appeal of the hearing officer's decision for Exhibits 1331 and 1332 and the exhibits are admitted in their entirety. However, the Board will use its technical expertise to determine the relevant portions of both documents in its final order in this case.

Midwest Appeals

Mark Quarles' Opinions and Reports

Midwest appeals the hearing officer's decision to admit the opinions and reports of the Environmental Groups' expert witness, Mark Quarles. Mr. Quarles testified on behalf of the Environmental Groups on the subject of groundwater during the second set of hearings in this case. The first set of hearings were held in October of 2017 and January and February of 2018, and were limited to the subject of liability. During those hearings, the Environmental Groups' expert witness was James Kunkel³. On April 1, 2020, the Environmental Groups asked to name a substitute for Mr. Kunkel as their expert for the second set of hearings. Midwest objected to the request for substitution of witnesses. The hearing officer granted the Environmental Groups' request, however, subjected the approval to the following limitation: that subsequent expert witnesses were to "build upon" Mr. Kunkel's reports. PCB 13-15, slip op. at 17 (Dec. 15, 2022). The Environmental Groups identified two expert witnesses, Mr. Quarles and Mr. Shefftz for the remedy portion of the hearings. Midwest filed a motion to exclude the opinions of Mr. Quarles because he, "failed to build upon, elaborate, or amplify Mr. Kunkel's expert reports and testimony." Midwest Appeal Quarles at 3. The December 15, 2022 Board order denied Midwest's appeal.

Midwest renewed its objections to Mr. Quarles' testimony and reports during the second set of hearings. TR 1 at 118. Over objection, the hearing officer admitted Mr. Quarles' testimony and reports. TR 1 at 68, 101.

During cross-examination, Midwest asked Mr. Quarles whether he attempted to elaborate or amplify Mr. Kunkel's opinions. Below are two excerpts from the May 15 and 16, 2023, hearing transcripts wherein Mr. Quarles is asked on cross examination about any reliance on Mr. Kunkel's prior opinions and reports.

[MS. NIJMAN]: We have established on your examination this morning that you wrote two reports in this case, Exhibits 1101 and 1102, correct?

A. Yes, ma'am.

³ In the December 15, 2022, Board order in this case, Mr. Kunkel's name was mistakenly spelled as "Kunkle".

Q. And for those reports you listed the documents you relied on for your opinion, correct?

A. I did.

Q. And are you familiar with the name, Mr. Kunkel or Dr. Kunkel, as he is sometimes known?

A. It doesn't ring a bell.

Q. So you did not list -- all right. You are not aware that Mr. Kunkel was the prior expert for Complainants in this case?

A. I don't remember the names of the prior experts in the case.

Q. And you didn't review any opinions or reports by Mr. Kunkel in this case?

A. I can't say that I did. I looked at a couple of reports very early on, but I can't say if Mr. Kunkel was one of the reports and what degree I would have reviewed it.

Q. And, in fact, in October in 2021 in your deposition you told me that you were never even aware that Mr. Kunkel wrote three reports. Is that a fair statement?

A. Yes, that's a fair statement.

Q. So you have not attempted to elaborate upon Mr. Kunkel's opinions, correct?

A. That's correct.

Q. And you have not attempted to amplify Mr. Kunkel's opinions, correct?

A. That's right.

MS. NIJMAN: Again, renew our motion to strike the opinions of Mr. Quarles.

TR 1 at 153-154.

[MS. NIJMAN]: You spoke a little bit with Ms. Bugel about not having identified the quantities of ash that would be required for a theoretical removal project, correct?

A. Yes.

Q. And you did not review Mr. Kunkel's expert report, correct?

A. Correct.

Q. And you're not aware of whether Mr. Kunkel identified quantities of ash for a potential removal?

A. I'm not.

TR 2 at 113.

Following the examination on May 15, 2023, Midwest renewed its motion to exclude Mr. Quarles' opinion and reports. The hearing officer noted Midwest's objection. TR 1 at 156. Midwest appeals the hearing officer's decision to allow Mr. Quarles' testimony and the admission of his reports, saying, "because Mr. Quarles had no idea who Mr. Kunkel was, his role, nor even reviewed his reports there is no way he could have 'sufficiently relied' upon Mr. Kunkel's previous opinions as required by the Board." Midwest Appeal Quarles at 5.

The Environmental Groups argue that Midwest's appeal fails to show it experienced surprise and prejudice with Mr. Quarles' testimony and opinions. "MWG seeks to have Mr. Quarles's testimony completely stricken from the record (in essence, retroactively barred); this is an extreme measure used in only the most egregious cases of surprise and prejudice." Env. Groups Quarles Resp. at 3. The Environmental Groups argue that Midwest was not surprised or prejudiced by Mr. Quarles' testimony because, "MWG was on notice of exactly what Complainant's expert witness testimony would be: MWG received Complainants' expert reports from Mr. Quarles, deposed him many months before the scheduled hearing, and had the opportunity to prepare and did prepare both responsive reports and expert opinions... Mr. Quarles' hearing testimony was completely consistent with his reports and deposition." *Id.*

Citing Appelgren v. Walsh, the Environmental Groups argue that Illinois courts have found that barring a party's designated witness is an action used only in extreme circumstances and not, "imposed in cases where there was no surprise, or the surprise was minimal, or where the surprise and the harm caused by it were alleviated by giving the adverse party an opportunity to talk to the witness prior to his testifying." Resp. at 3, *citing Appelgren v. Walsh*, 136 Ill. App. 3d 700 (Ill. App. Ct. 2d Dist., 1985) *citing Rosales v. Marquez*, 55 Ill. App. 2d (Ill. App. Ct. 1st Dist., 1965); Miksatka v. Ill. N. Ry. Co., 49 Ill. App. 2d 258 (Ill. App. Ct. 1st Dist. 1964).

Further, the Environmental Groups argue that Mr. Quarles did adhere to the Board's December 15, 2022, order, saying that "Mr. Quarles's testimony and reports show that he built on the testimony, exhibits, and evidence from the liability phase." Env. Groups Resp. Quarles at 4-5.

Board Discussion and Findings. The issues surrounding a replacement expert witness have been extensively briefed before the hearing officer and the Board. In each ruling, the hearing officer and the Board directed the Environmental Groups to have its replacement expert rely, amplify, elaborate or build upon the opinions and reports already produced by the prior expert, Mr. Kunkel. Since this proceeding was split into two parts – a liability portion and a remedy portion – there have been some overlap on the issues contained within the expert witness testimony and opinions. In order to minimize the surprise to Midwest, the Board allowed the

Environmental Groups to present new witnesses at this second set of hearings, the remedy portion of the case, but only if the experts built upon Kunkel's previous opinions and testimony.

It is clear from Mr. Quarles' testimony that he had not read Mr. Kunkel's reports nor reviewed his testimony from the previous hearings. The Board finds it impossible to conclude that Mr. Quarles relied upon Mr. Kunkel's opinions in presenting his expert testimony to the Board. Rather, the Environmental Groups argue that Mr. Quarles relied upon the Board's Interim Order from June 20, 2019, in order to develop his opinions during the remedy phase of this case. While the Board's Interim Order did cite and refer to Kunkel's opinions and testimony, the purpose of the Interim Order was to determine liability.

In balancing the need of the Environmental Groups to find a replacement for an unavailable expert witness, and the common law requirement that Midwest not be taken by surprise or expend a significant amount of time and effort examining a new expert witness at this late stage in the proceedings, the Board's December 15, 2022, Board order directed the parties as follows:

When presented at hearing, the Board will determine whether Mr. Quarles's opinion sufficiently relies upon Mr. Kunkel's previous opinions. Similarly, the Board will be able to weigh Mr. Quarles's opinions on MWG's Weaver Experts based on its technical ability. MWG will be able to cross-examine Mr. Quarles at hearing. If MWG finds Mr. Quarles's responses during cross-examination insufficient, that can be addressed by the hearing officer at hearing or MWG can explain to the Board in post-hearing briefs why Mr. Quarles's responses are insufficient. PCB 13-15, slip op. at 14 (Dec. 15, 2022).

The Board now performs the calculations described in the December 15, 2022, order and finds that Mr. Quarles' opinions do not sufficiently rely upon Mr. Kunkel's previous opinions. Midwest was able to depose and subsequently cross-examine Mr. Quarles at length during the second set of hearings. Midwest has identified the ways in which Mr. Quarles' responses during cross-examination were insufficient and may continue to do so in post-hearing briefs. The Board denies Midwest's appeal of the hearing officer's order to strike the opinions of Mr. Quarles completely, but will consider his opinions and testimony only to the extent they are consistent with the Board's orders when determining the appropriate remedy for the four facilities.

Johnathan Shefftz's Opinions

Midwest seeks to strike the opinions and reports of the Environmental Groups' expert witness, Mr. Shefftz. Those reports are Exhibits 1201, 1203, and 1207 and were admitted, over objection, at hearing. Midwest renews an objection to Mr. Shefftz's testimony and opinions, arguing that the opinions, "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." Midwest Appeal Shefftz at 3. At issue is data from Table 6 of a prior report from Mr. Kunkel. The data was used as input values in Mr. Shefftz's economic model, however Midwest argues that Table 6, "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." Shefftz Memo. at 4.

The Environmental Groups argue that Midwest has not objected to the economic model Mr. Shefftz used in calculating the economic benefit. “MWG has not objected to the admissibility or utility of any element of the model itself or its underlying formulas.” Env. Groups Shefftz Resp. at 3. The inputs Mr. Shefftz used in his economic model were based on estimates of, “remedy costs, dates of initial non-compliance, dates of compliance, length of remedy, and anticipated penalty payment dates.” *Id.* As those inputs are fact-specific to this case, they were not within Mr. Shefftz’s realm of expertise and were supplied to him by counsel and by data found in prior reports in this case. *Id.* at 4.

Board Discussion and Findings. The Board has previously ruled upon this issue. On December 15, 2022, the Board found that the Illinois Rules of Evidence addressed the issue at hand.

Rule 703 – Bases of an Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Ill. R. Evid. 703.

Midwest did not then and does not now challenge Mr. Shefftz’s qualifications as an expert witness in the field of economics. In the Board’s prior ruling on this very issue, the Board held that:

The Board is persuaded by the Environmental Groups’ argument that Mr. Shefftz’s opinion relies upon reasonable assumptions arising from the factual evidence. “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 Moreover, the facts suggested in hypothetical questions need not be undisputed but only supported by the record.” Carter v. Johnson, 247 Ill. App. 3d 291, 297 (1993) (internal citations omitted). Any specific issue MWG wishes to raise regarding the basis of Mr. Shefftz’s testimony can be raised at hearing. MWG will be able to cross-examine Mr. Shefftz at hearing.

The Illinois Supreme Court has held that, “the weight to be assigned to an expert opinion is for the jury to determine in light of the expert’s credentials and the factual basis of his opinion.” Noakes v. AMTRAK, 363 Ill. App. 3d 851, 858-859 (1st Dis. 2006), *citing Snelson*, 204 Ill. 2d at 27. 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 in forming their opinions.” Rock v. Pickleman, 214 Ill. App. 3d 368, 374 (1st Dist. 1991), *citing Fed. R. Evid. 703*. Further, the courts have held that cross-examination at trial is the remedy for such an issue. Additionally, “[t]he Illinois Supreme Court has explained the basis for a witness’s

opinion generally goes only to the weight of the evidence, not its sufficiency. Noakes, *citing Snelson v. Kamm*, 204 Ill. 2d 1, 26-27 (2003).

Midwest cross-examined Mr. Shefftz at length during the second set of hearings. The Board finds no basis in the testimony at hearing to disqualify Mr. Shefftz as an expert witness in this matter. The Board again finds that his opinions relied upon reasonable assumptions arising from factual evidence in this case. The Board is a technical body and in that respect is able to evaluate expert testimony including, “arguments regarding the scientific or mathematical basis for the expert testimony.” PCB 13-15, slip op. at 16 (Dec. 15, 2022). The Board will do so in its final order in this case regarding Mr. Shefftz’s testimony and expert opinions, but finds no compelling reason to strike Mr. Shefftz’s testimony or opinions at this point. Therefore, the Board denies Midwest’s appeal of the hearing officer’s order allowing Shefftz’s testimony.

Exhibit 1408

Exhibit 1408 is a recommendation of IEPA filed in a separate matter, i.e., Midwest’s adjusted standard petition, AS 21-3. In the matter of: Petition of Midwest Generation, LLC for an Adjusted Standard from 845.740(a) and Finding of Inapplicability of Part 845 for the Waukegan Station, AS 21-03. Midwest had filed an adjusted standard petition before the Board regarding two locations at the Waukegan Station, the East Pond and the “Grassy Field.” Midwest subsequently filed an amended petition that limited its request to just the Grassy Field. For the Grassy Field, Midwest asks that the Board find Part 845 inapplicable. In its initial petition before the Board in AS 21-3, Midwest sets forth the existing dispute between it and IEPA concerning the Grassy Field’s regulatory status. *Id.* at 1.

On October 31, 2022, IEPA filed its recommendation for this adjusted standard. IEPA recommended that the Board deny the adjusted standard for the East Pond and the finding of inapplicability for the Grassy Field. At hearing, during the Environmental Groups’ examination of Ms. Sharene Shealey, the Environmental Groups moved to admit IEPA’s recommendation in AS 21-3 as Exhibit 1408. May 19 TR. at 12. Over Midwest’s objection, the hearing officer admitted Exhibit 1408 into evidence. *Id.* at 12-13.

Midwest argues that Exhibit 1408 is neither reliable nor relevant. Midwest Appeal 1408 at 1. As to reliability, Midwest argues that since the document does not include an affidavit from IEPA, nor does the document identify witnesses that would testify as to the information included within, it is an “unverified” document. *Id.* at 5. “The Illinois EPA Recommendation also has many inaccuracies that MWG will address in its response to be filed on July 29, 2023, and MWG will challenge Illinois EPA’s positions at the Part 845 adjusted standard hearing.” *Id.*

The Environmental Groups argue that the Board has previously admitted, over hearsay objections, IEPA-authored documents. Env. Groups Resp. 1408 at 11. Citing three cases in which letters, landfill inspection reports, a responsiveness summary, and an IDNR study were admitted by the Board, the Environmental groups say, “[t]he Board thus has a longstanding practice of admitting documents produced by IEPA and other state agencies expressing the agencies’ legal and factual conclusions regarding a site, facility or practice at issue.” *Id.* at 11, *citing*, Castellari v. Prior, PCB 86-79 (May 28, 1987) at 12; Sierra Club v. Ameren Energy

Medina Valley Cogen, LLC, PCB 14-134 (Nov. 6, 2014) at 4; Thomas E. Greenland v. City of Lake Forest, PCB 84-155 at 1.

“Here there is a clear ‘nexus’ between findings relating to what MWG has or has not done with respect to coal ash at the Waukegan site and what regulatory requirements it will be subject to... and the issue in this case: namely, what remedies are appropriate to address water contamination from the coal ash at the Waukegan site.” *Env. Groups Resp.* 1408 at 12.

Further, Midwest argues that Exhibit 1408 is not relevant to this proceeding. Midwest Appeal 1408 at 2. The adjusted standard petition and recommendation are related to Part 845 of the Board Rules. “The issues in this matter have nothing to do with Part 845, a regulation enacted pursuant to Section 22.59 of the Act. [citations omitted] Instead, the issues there relate to Part 620 of the Board Rules and Sections 12 and 21 of the Act.” *Id.* at 3. Midwest also argues that excluding Exhibit 1408 will not prejudice the Environmental Groups as, “Complainants are not prejudiced if Exhibit 1408 is excluded because their question, and Ms. Shealey’s response, remains on the record.” *Id.*

Board Discussion and Findings. Prior to reaching a determination on the reliability and relevance of Exhibit 1408, the Board must determine whether the exhibit is hearsay, and if so, whether it qualifies for a hearsay exception.

Castellari v. Prior sets forth the requirements for the Board to accept public records as an exception to hearsay. “However, even though the exhibits could qualify under an exception to the rule against hearsay, their admissibility is not automatic. That is, the documents’ authenticity must be shown before being admitted.” Castellari, et al. v. John Prior, PCB 86-79, slip op. at 14 (May 28, 1987). “The admissibility of public records depends on custody and authenticity.” *Id.*

IEPA’s recommendation in the adjusted standard proceeding, AS 21-3, was filed with the Board’s Clerk on October 31, 2022. It is a recommendation prepared by an IEPA attorney, Sara Terranova, signed by her, and includes a certificate of service also signed by her. The Board’s rules for adjusted standards do not require inclusion of an affidavit when the Agency submits its recommendation. The lack of an affidavit in Exhibit 1408 does not make the document unreliable. Similarly, the Board’s rules do not require the Agency to identify witnesses in its adjusted standard recommendations. The lack of identified witnesses in the recommendation does not make the document unreliable. The Board therefore finds Exhibit 1408 reliable.

In Sierra v. Ameren, at issue was an IEPA responsiveness survey that was part of the permitting process for the construction of a boiler. Sierra Club v. Ameren Energy Medina Valley Cogen, LLC, PCB 14-134 (Nov. 6, 2014) at 4. “Respondents maintain that the responsiveness summary is not offered for the truth of the matter asserted, but to provide the Board with procedural context and to provide the Board with IEPA’s response to comments provided to IEPA by Sierra. If it were hearsay, it would meet the exception found for public records and reports. This exception applies to reports setting forth ‘matters observed pursuant to a duty imposed by law as to which matters there was a duty to report.’” *Id.* The Board held that it was unconvinced the document was hearsay, but if it was, it would meet the public records hearsay exception. *Id.* at 5.

In Greenland v. City of Lake Forest, Greenland sought to enter into evidence a study issued by the Illinois Institute of Natural Resources on the subject of leaf burning. “Although the respondent is entitled to the procedural safeguards of testimony under oath, cross-examination, and confrontation of witnesses, the Board holds that there is enough reliability to the document to cure any absence of these safeguards as to this document since the agency has been statutorily mandated to perform such a study.” Greenland v. City of Lake Forest, PCB 84-155, slip op. at 2 (June 13, 1985).

IEPA is required to submit a recommendation to the Board once an adjusted standard petition has been filed. *See*, 35 Ill. Adm. Code 104.416. The Board finds the recommendation reliable and relevant to this proceeding and further finds that it is a public record and is therefore exempt from hearsay. The Board denies Midwest’s appeal of the hearing officer’s order and thereby allows Exhibit 1408 to be admitted.

CONCLUSION

The Board denies the Environmental Groups’ motion for interlocutory appeal of the hearing officer’s orders regarding economic impact testimony and grants the Environmental Group’s motion for appeal of the hearing officer’s limited admission of Exhibits 1331 and 1332. The Board denies Midwest’s appeal of the hearing officer’s order to admit Mark Quarles’ opinions and reports, however, determines that little weight will be given to his opinions and reports. The Board denies Midwest’s motion to appeal the hearing officer’s denial of Midwest’s objection to Jonathan Shefftz’s opinions; and Midwest’s objection and appeal from the hearing officer’s ruling to admit Exhibit 1408.

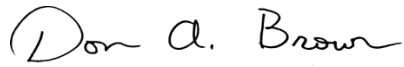
ORDER

1. The Board denies the Environmental Groups motion for interlocutory appeal of the hearing officer’s orders regarding economic impact testimony.
2. The Board grants the Environmental Groups’ motion for interlocutory appeal of the hearing officer’s order on Midwest Generation’s objection to Exhibits 1331 and 1332.
3. The Board denies Midwest’s appeal of the hearing officer’s decision to admit Mark Quarles’ opinions and reports.
4. The Board denies Midwest’s appeal of the hearing officer’s ruling denying its objection to Jonathan Shefftz’s opinions.
5. The Board denies Midwest’s objection to and appeal from the hearing officer’s ruling to admit Complainant’s Exhibit 1408 as evidence.
6. The parties’ simultaneous post-hearing briefs are due January 4, 2024.

7. Any motion to reconsider findings within this order will be taken up in the Board's final order in this case.

IT IS SO ORDERED.

I, Don A. Brown, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on October 5, 2023, by a vote of 4-0.

A handwritten signature in cursive script that reads "Don A. Brown".

Don A. Brown, Clerk
Illinois Pollution Control Board