

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board, Midwest Generation, LLC’s Motion in Limine to Exclude the Kunkel Remedy Report, a copy of which is hereby served upon you.

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: May 1, 2023

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Kristen L. Gale
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10 South LaSalle Street, Suite 3400 (please note new suite no.)
Chicago, IL 60603
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SERVICE LIST

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that a true copy of the foregoing Notice of Filing, Certificate of Service for Midwest Generation, LLC's Motion in Limine to Exclude the Kunkel Remedy Report, a copy of which is hereby served upon you and filed on May 1, 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 May 1, 2023 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC (“MWG”), submits its Motion *In Limine* requesting the Hearing Officer enter an order barring the admission of the Expert Report on Remedy for Groundwater Contamination by James R. Kunkel, July 15, 2015 (“Kunkel Remedy Report”). In support of its Objection and Motion, MWG states as follows:

1. Complainants should be precluded from admitting the Kunkel Remedy Report during this second phase of the above-captioned matter because it cannot be authenticated and is not reliable evidence. Complainants chose to change their expert (from Kunkel to Quarles) and to change their proposed remedy (from removal to investigation). Complainants are also choosing not to call Mr. Kunkel as a witness, meaning that he is not available to authenticate his report and is not subject to cross examination on his conclusions. Very simply, there is no foundation and the standards for admission cannot be met.
2. Complainants originally designated James R. Kunkel as their expert for liability and remedy. Following his decision to bifurcate the case, the Hearing Officer conducted a hearing on

liability in 2017 and 2018. The Kunkel Remedy Report was not entered as an exhibit.¹ The Illinois Pollution Control Board (“Board”) specifically noted that the Kunkel’s Remedy Report was not admitted into the record for the first hearing. Board Dec. 15, 2022 Order, p. 17.

3. On September 14, 2020, over MWG’s objection, the Hearing Officer granted Complainants’ request to designate new testifying experts, including replacing Mr. Kunkel. Complainants identified a new remedy expert, Mark Quarles, and a new economic expert, Jonathon Shefftz.

4. Complainants’ new remedy expert, Mr. Quarles, completely ignores the Kunkel Remedy Report. Mr. Quarles admitted under oath during his deposition that he barely recognized Mr. Kunkel’s name, did not review or consider Mr. Kunkel’s prior reports, and was not even aware that Mr. Kunkel had written three reports for this matter that included opinions on remedy. Ex. A – Excerpt of Quarles Deposition, p. 53:19-54:8. Mr. Quarles then admitted that he did not even attempt to elaborate or amplify Mr. Kunkel’s opinions. *Id.*, p. 54:21-55:5.

Q: So you have not attempted to elaborate or amplify Mr. Kunkle’s (sic) opinions?

{Mr. Wannier objection: vague}

A: I haven’t.

Id. Mr. Quarles never relied on nor offered an opinion on the Kunkel Remedy Report.

5. Mr. Shefftz stated that he only relied upon one table concerning remedy costs from the Kunkel Remedy Report and the date of the report for his opinion, and nothing else. Ex. B – Excerpt of Shefftz Deposition, 60:7-23. Mr. Shefftz took the table at face value, did not explore its validity, and offered no opinion on the Kunkel Remedy Report. Ex. B, p. 61:12-15 (“I have no plans to become an engineer and develop an understanding that would allow me to develop an alternative opinion or verify the information in Dr. Kunkel’s report”).

¹ Kunkel’s Contamination Report was entered as Exhibit 401.

6. On January 18, 2022, Complainants submitted their Preliminary Exhibit List and Witness List to MWG. Complainants' Preliminary Exhibit List did not include the Kunkel Remedy Report, and they did not identify Mr. Kunkel as a witness. Ex. C – Comp. Preliminary Exhibit List and Witness List.

7. On March 22, 2023, Complainants submitted a Proposed Exhibit list to MWG, which included “Expert Report on Groundwater Contamination” by James R. Kunkel. MWG assumed the report was Mr. Kunkel’s groundwater report that was already in the record as Exhibit 401. Following a request for clarification by MWG, on April 10, 2023 Complainants amended their Proposed Exhibit List, and for the first time listed the Kunkel Remedy Report as an exhibit. Ex. D - Amended Complainants’ Exhibit List, #42. Complainants’ identified their economic expert, Jonathan Shefftz as the witness through which they plan to seek admission of the document.

8. On April 21, 2023, in their Pre-Hearing Memorandum, Complainants suggest that the Board may somehow use the Kunkel Remedy Report to implement Kunkel’s suggested remedy. *See* Comp.’s Pre-Hearing Memo, p. 8 (“...in the event that the Board requires MWG to implement Dr. Kunkel’s suggested remedy.”) Complainants did not identify Mr. Kunkel as a witness and in fact reaffirm in their Pre Hearing Memorandum that “Complainants are not offering Dr. Kunkel as an expert witness because we believe a nature and extent study is necessary to determine the scope of cleanup that is needed at the four sites.” *Id.* Complainants’ statement is disingenuous, at best, given that Complainants argued to the Hearing Officer that their purported reason to replace Mr. Kunkel was not based on his remedy, but on wholly unrelated reasons. Complainants true reasons were explained in an affidavit labeled as Non-Disclosable Information (“NDI”) filed on May 29, 2020 and disclosed to MWG on July 7, 2020 pursuant to a Hearing Officer order. The NDI affidavit demonstrates that Complainants’ withdrawal of Mr. Kunkel as an expert had nothing

to do with their belief in the potential next steps at the MWG Stations, but concerned issues they had with the expert himself.

9. The Kunkel Remedy Report cannot be admitted as evidence in this matter because none of Complainants' witnesses are able to lay the proper foundation to authenticate the document. This motion is timely made in response to Complainants' late notification of their intent to enter the Kunkel Remedy Report and, more significantly, their Pre-Hearing Memorandum comments about how they hope to use it.

10. The First District Court of Appeals of Illinois succinctly set forth the basic rules of evidence in *Anderson v. Human Rights Comm'n*:

In civil cases in Illinois, the basic rules of evidence require a proponent of documentary evidence to lay a foundation for the introduction of that document into evidence. Evidence must be presented to demonstrate that the document is what its proponent claims it to be. Without proper authentication and identification of the document, the proponent of the evidence has not provided a proper foundation and the document cannot be admitted into evidence. The purpose of requiring a foundation is to prevent "inadmissible evidence from being suggested to the [trier of fact] by any means. *Id.*, 314 Ill. App. 3d 35, 42, 246 Ill. Dec. 843, 849, 731 N.E.2d 371, 377 (2000) (citations omitted)

11. *Anderson v. Human Rights Comm'n* is instructive because the issue here is analogous to a similar issue presented to the hearing officer in that administrative proceeding. In *Anderson v. Human Rights Comm'n*, the petitioner attempted to introduce a document through one of her witnesses, even though that witness had not prepared the document. *Id.*, 314 Ill. App. 3d at 42-43. The Hearing Officer sustained the respondent's objection to admission of the document telling the petitioner: "You have to do certain foundational requirements as to authenticity and overcome hearsay objections, et cetera. You need a witness on the stand - ... who is competent to testify to that document." *Id.* at 43. The First District upheld the Hearing Officer's decision finding that the hearing officer properly required the petitioner to satisfy foundational requirements. *Id.* See also *Greaney v. Indus. Comm'n (Michel Masonry Co.)*, 358 Ill. App. 3d 1002, 1011, 295 Ill. Dec. 180,

190, 832 N.E.2d 331, 341 (2005) (Court found Commission abused its discretion by admitting documents without adequate foundation, even though they may have been admissible under a hearsay exception); Ill. R. Evid. 901(a) (Requirement of Authentication or Identification).

12. Here, there is no witness who can authenticate the Kunkel Remedy Report and present the proper foundation. None of Complainants' hearing witnesses wrote the report. Mr. Quarles admits he did not look at or rely on the report, and Mr. Shefftz only looked at a single table that he cannot verify. Without the proper foundation, the report is inadmissible.

13. Complainants cannot claim that the Kunkel Remedy Report is admissible because Mr. Shefftz relied on a single page. While an expert may testify about the findings and conclusions in a non-testifying expert's report that they used in forming their opinions, the non-testifying expert's report is not admissible.² The Illinois Supreme Court specifically noted this distinction in *People v. Williams*, 238 Ill. 2d 125, 345 Ill. Dec. 425 (2010) *aff'd Williams v. Illinois*, 567 U.S. 50, 132 S. Ct. 2221 (2012). In *People v. Williams*, the Illinois Supreme Court upheld the admission of an expert's testimony that included discussion of the results in a report written by someone else because the testimony about the report was not admitted for the truth of the matter asserted. *Id.* at 145. The Illinois Supreme Court specifically stated that the testimony was introduced live on the witness stand and "the report was not admitted into evidence at all." *Id.* (emphasis added).

14. A recent Illinois court opinion further clarified that while an expert's testimony may include inadmissible data and information that they relied upon to support their opinion, a non-

² Even though the report may not be admissible because of foundational reasons, the non-testifying expert's report, and all other data and information an expert relies upon, must still be reliable to allow admission of the expert testimony. "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. Here, Complainants cannot establish that the Kunkel Remedy Report is reliable, as MWG detailed in its Motion *in Limine*. MWG does not waive and continues to object to Mr. Shefftz's opinions because none of the assumptions or information he relies on to formulate his opinion are based on reliable direct or circumstantial evidence, or even his own independent knowledge and expertise. See MWG's Motion *in Limine* to Exclude Jonathan Shefftz's Opinions (Feb. 4, 2022) and its Appeal from Hearing Officer's Ruling Denying its Motion *in Limine* to Exclude Jonathan Shefftz's Opinions (July 27, 2022).

testifying expert's report may only be admitted with proper foundation. In *Hunt-Lima Drainage & Levee Dist. v. Roskamp*, the Third District upheld the trial court admission of a non-testifying expert's report because the testifying expert established the foundation for the information in the report. *Id.* 2022 IL App (3d) 210294 (3rd Dist., 2022). The testifying expert described the methodology used to generate the non-testifying expert's report and verified the scientific data upon which it was based to ensure it provided an adequate representation of the costs claimed by the defendant. *Id.*, ¶49.

15. Here, Mr. Shefftz readily admitted that he is not an engineer and does not have an independent expert opinion on the Kunkel Remedy Report, including the cost estimates or engineering issues. Ex. B, pp. 61:6-15, 110:19-22. He cannot describe the methodology Mr. Kunkel used to generate his report and cannot verify the data in the Kunkel Remedy Report to ensure it is adequate. Without any foundation from Mr. Shefftz, the report is inadmissible.

16. MWG would be materially prejudiced by the admission of the Kunkel Remedy Report. Less than a month before the hearing, Complainants are attempting to revive an opinion and remedy that Complainants' specifically chose to reject when they sought to replace Mr. Kunkel, and a remedy that Mr. Quarles does not rely on nor adopt. This is the exact "trial by surprise" MWG objected to and described in its Motions *in Limine* to both Mr. Shefftz's opinion and Mr. Quarles' opinion. See MWG's July 27, 2022 Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions, p. 10 and MWG's July 27, 2022 Appeal from Hearing Officer's Ruling Denying its Motion *in Limine* to Exclude Jonathan Shefftz's Opinions, p. 15.

17. Complainants are attempting to backdoor the admission of Mr. Kunkel's removal remedy without having to present an expert to support that opinion, nor subject it to any cross-examination. Complainants were careful not to describe the remedy Mr. Kunkel recommends in their Pre-Hearing Memorandum. However, merely three pages earlier they suggest to the Board that it could

order MWG to remove “the coal ash from the historic fill areas.” Comp. Pre-Hearing Memo., p. 5. It should come as no surprise that the Kunkel Remedy Report recommends removal of any coal ash in purported historic areas at the MWG stations. Because Mr. Kunkel is not testifying at the hearing and is outside the subpoena power of the Board, MWG is precluded from cross examining any witness on the basis for the opinions in the Kunkel Remedy Report. When Mr. Kunkel testified at the first hearing, because the first hearing was solely about liability, MWG was precluded from cross-examining him on his remedy opinion.³ Complainants’ testifying witnesses cannot be cross-examined on the report because Mr. Quarles never read it, and Mr. Shefftz specifically states that he is not an engineer and cannot testify on the remedy or the validity of its purported costs. Ex. A & B.

WHEREFORE, for the reasons stated above, MWG requests that the Hearing Officer grant this Motion *In Limine* and enter an order excluding the Expert Report on Remedy for Groundwater Contamination by James R. Kunkel.

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
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312-251-5255

³ The Board incorrectly suggested that MWG had an opportunity to cross-examine Mr. Kunkel on his Remedy Report. Board Dec. 15, 2022 Order, p. 17. While Mr. Kunkel was subjected to a lengthy cross-examination during the first phase of this hearing, the cross examination was limited to Mr. Kunkel’s opinions on liability. The Kunkel Remedy Report was not in the record, as the Board specifically noted, and Mr. Kunkel was not cross-examined on his Remedy Report or remedy opinions.

EXHIBIT A

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ILLINOIS POLLUTION CONTROL BOARD

SIERRA CLUB, ENVIRONMENTAL LAW)
AND POLICY CENTER, PRAIRIE RIVERS)
NETWORK, AND CITIZENS AGAINST)
RUINING THE ENVIRONMENT,)
)
Complainants,)
) PCB 2013-015
vs.) Enforcement-Water
)
MIDWEST GENERATION, LLC,)
)
Respondent.)

Zoom video conference, evidence deposition,
of MARK QUARLES, pursuant to notice, commencing
at 10:00 a.m., Tuesday, October 12, 2021, before
Connie L. James, CSR.

Reported by: Connie L. James
CSR No. 084.002510

1 A. Yes.

2 Q. And Mark Quarles, P.G. --

3 A. Can you blow that up?

4 Q. Yeah. And the Mark Quarles, P.G., listed as
5 an author, that's you, right?

6 A. It is, yeah.

7 Q. Did you ever question or formally renounce
8 any of the conclusions in this report?

9 MR. WANNIER: Objection. Vague.

10 THE WITNESS:

11 A. I have no idea. I don't recall ever
12 renouncing anything, but I don't recall that report
13 that was written fifteen years ago, the particulars of
14 it.

15 MS. NIJMAN:

16 Q. Are you aware that Dr. Anne Maest renounced
17 the conclusions in the report?

18 A. I'm not.

19 Q. Do you recognize the name James Kunkle?

20 A. I do recognize that name.

21 Q. From what?

22 A. I think he had some involvement in the prior
23 phase of this case.

24 Q. Did you review any of the reports Mr. Kunkle

1 prepared for this case?

2 A. No, not in detail.

3 Q. What do you mean by not in detail?

4 A. I can't even -- I didn't even review his
5 entire report.

6 Q. Okay. Are you aware he wrote three reports
7 in this case?

8 A. I'm not.

9 Q. Do you know if Mr. Kunkle's reports are in
10 your files?

11 A. It's quite possible that it is in an
12 electronic file.

13 Q. You don't know?

14 A. I don't.

15 Q. Did you review Mr. Kunkle's deposition
16 transcript for this case?

17 A. I did not.

18 Q. Did you review his hearing transcript for
19 this case?

20 A. I did not.

21 Q. So you have not attempted to elaborate or
22 amplify Mr. Kunkle's opinions?

23 MR. WANNIER: Objection. Vague.

24

1 MS. NIJMAN:

2 Q. You can answer.

3 MR. WANNIER: You can answer.

4 THE WITNESS:

5 A. I haven't.

6 MS. NIJMAN:

7 Q. Okay. Now, your report, Exhibit 1, cites on
8 several occasions to the Federal CCR Regulations,
9 correct?

10 A. It does.

11 Q. And you're familiar with those regulations,
12 right?

13 A. I am.

14 Q. And you've also cited in your rebuttal report
15 to the Illinois CCR Rules, correct?

16 A. I did.

17 Q. And are you familiar with the Illinois CCR
18 Rules?

19 A. Yeah.

20 Q. And you would agree that both the federal and
21 Illinois CCR Rules or Regulations apply to defined CCR
22 impoundments?

23 MR. WANNIER: Objection. Legal conclusion.
24

EXHIBIT B

1 A. It doesn't appear like I did.

2 Q. And --

3 A. Actually let me go look at my second report
4 and see if I mentioned anything like that.

5 No, I don't see any reference to a subsequent
6 report by him in my July 2021 report.

7 Q. Okay. We can certainly go to the pages
8 reviewed, but I believe you state in your report that you
9 reviewed and relied upon Table 6 of Dr. Kunkel's report?
10 Is that correct?

11 A. I can look at my report to see where I
12 specifically mention that.

13 So, on Page 22.

14 Q. Yes.

15 A. I say specifically -- so, we're on the first
16 bullet point, second sentence. Specifically I used the
17 low-end estimates from Table 6 of the expert report.

18 Q. Okay. Thank you. Did you rely on anything
19 else in this remedy report for your opinion in your
20 January 2021 report?

21 A. Yes. I used the date of his report as my cost
22 estimate date. Otherwise, my recollection is that was
23 it.

24 Q. Okay. And, you know, you do not have an

1 opinion independent about Dr. Kunkel's remedy as outlined
2 in this 2015 report. Correct?

3 A. As I stated here, and I quote, this is the
4 second sentence. I'm sorry, the third sentence
5 immediately following the second sentence that I
6 previously quoted. Quote, "As I am an economist, not an
7 engineer, I have no independent expert opinion on the
8 cost estimates that were prepared in that report," end of
9 quote.

10 Q. Okay. And you don't have to -- excuse me.
11 Strike that. You don't have a plan to do so, correct?

12 A. I have no plans to become an engineer and
13 develop an understanding that would allow me to develop
14 an alternative opinion or verify the information in
15 Dr. Kunkel's report.

16 Q. Very good. Do you recognize the name of John
17 Seymour.

18 A. No.

19 Q. Okay. Do you recognize the name of Mark
20 Quarrels?

21 A. No.

22 Q. Do you recognize the name of Weaver
23 Consultants?

24 A. We're 0 for 3 so far. It does not strike a

1 petitioners' counsel for the dates. Correct?

2 MR. WANNIER: Objection: Vague, asked and
3 answered.

4 THE WITNESS: I'm sorry. You're talking about
5 the schedule? Well, being that -- you're talking about
6 the schedule being over ten years and the start date for
7 both the -- the schedules for both the on-time and
8 delayed scenario?

9 BY MS. GALE:

10 Q. Look at Page 15 of your report, Exhibit 2,
11 which we already discussed. "Because I understand from
12 petitioners' counsel that respondent continues to be in
13 violation of the Act." You're relying upon petitioners'
14 counsel for that. Correct?

15 MR. WANNIER: Objection: Vague, asked and
16 answered.

17 THE WITNESS: Well, right, that's what it
18 says. I understand petitioners' counsel, so that means
19 I'm relying upon petitioners' counsel. I'm not forming
20 any independent expert opinion on the legal issues here
21 or the engineering aspects, monitoring issues or
22 whatever.

23 BY MS. GALE:

24 Q. Okay. Great. Continuing on with Page 15.

EXHIBIT C

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

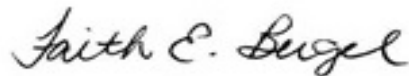
In the Matter of:)	
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NOTICE OF SERVICE

To: Don Brown, Clerk of the Board
Illinois Pollution Control Board
100 West Randolph St
Suite 11-500
Chicago, IL 60601

PLEASE TAKE NOTICE that I have on January 18, 2022, served a true and correct copy of **COMPLAINANTS' WITNESS LIST AND PROPOSED ORDER OF WITNESSES AND PRELIMINARY EXHIBIT LIST** via electronic mail to the parties listed on the attached service list.

Respectfully submitted,



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Attorney for CARE

Dated: January 18, 2022

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v.)	
)	
MIDWEST GENERATION, LLC,)	
)	
Respondents)	

COMPLAINANTS' WITNESS LIST AND PROPOSED ORDER OF WITNESSES

Pursuant to the December 10, 2021 Hearing Officer Order, Complainants submit their witness list and proposed order of witnesses. Complainants propose calling these witnesses in the order in which they appear below.

1. Sharene Shealey
2. Richard Gnat
3. David Callen
4. Mark Quarles
5. Jonathan Shefftz

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COMPLAINANTS' PRELIMINARY EXHIBIT LIST

Pursuant to the December 10, 2021 Hearing Officer Order, Complainants submit their Preliminary Exhibit List. Complainants reserve the right to supplement their exhibits with exhibits used by Respondent or with exhibits used in cross-examination or sur-rebuttal.

- Comp. 65720-65920
- Comp. 65921-66010
- Comp. 66011: Document Produced in its Native Format (approx. 1000 pages)
- Comp. 66013-66027
- Comp. 66028-66067
- Comp. 66068-66069
- Comp. 67198-67339
- Comp. 67340-67380
- Comp. 67391-67473
- Comp. 66012

- MWG_13-15 108483-108578
- MWG_13-15 108579-108646
- MWG_13-15 108647-108718

Electronic Filing: Received, Clerk's Office 05/01/2023

MWG_13-15	109155-109262
MWG_13-15	109263-109349
MWG_13-15	109350-109354
MWG_13-15	109355-109474
MWG_13-15	109475-109632
MWG_13-15	110276-110367
MWG_13-15	110368-110452
MWG_13-15	110453-110539
MWG_13-15	110540-110621
MWG_13-15	111265-111324
MWG_13-15	111325-111408
MWG_13-15	111409-111484
MWG_13-15	111485-111570
MWG_13-15	19470-19473
MWG_13-15	24264-24386
MWG_13-15	59460-59541
MWG_13-15	59603-59693
MWG_13-15	62322-62386
MWG_13-15	62387-62468
MWG_13-15	62469-62534
MWG_13-15	62535-62642
MWG_13-15	63415-63512
MWG_13-15	64321-64555, 64906-65103, 71106-71303, 71850-72084
MWG_13-15	65227-65447, 65456-65671, 71417-71632, 72085-72305

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MWG_13-15 67097-67196, 72375-72474
MWG_13-15 67197-67289
MWG_13-15 67899-67998, 72568-72667
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Electronic Filing: Received, Clerk's Office 05/01/2023

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MWG_13-15 71106 - 71303
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Resp. Ex. 808

Resp. Ex. 901

Comp. Ex. 20D

Comp. Ex. 17D

Comp. Ex. 19D

Comp. Ex. 18D

Comp. Ex. 12C

Comp. Ex. 13C

Comp. Ex. 14C

Comp. Ex. 15C

Comp. Ex. 31

R 2020-19, Prefiled Testimony of Sharene Shealey on Behalf of Midwest Generation (August 27, 2020).

PCB 13-15, Interim Opinion and Order of the Board (June 20, 2019)

PCB 13-15, Order of the Board Granting in Part and Denying in Part MWG's Motion to Reconsider (Feb. 6, 2020)

Report: Expert Opinion of Mark A. Quarles, P.G., January 2021

Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G., July 2021

Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, by Jonathan S. Shefftz (January 25, 2021), with deletions pursuant to Hearing Officer Order as agreed by counsel for all parties.

Supplemental and Rebuttal Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, by Jonathan S. Shefftz (July 16, 2021), with deletions pursuant to Hearing Officer Order as agreed by counsel for all parties.

Second Supplemental and Rebuttal Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs, by Jonathan S. Shefftz (October 26, 2021)

2019 NRG Form 10-K (limited to the sections containing MWG financial information)

Lessons Learned: Using Decision Analysis to Estimate Toxic Tort Liabilities, NR&E Winter 2006

35 Ill. Admin. Code Part 845: STANDARDS FOR THE DISPOSAL OF COAL COMBUSTION RESIDUALS IN SURFACE IMPOUNDMENTS

40 CFR Subpart D - Standards for the Disposal of Coal Combustion Residuals in Landfills and Surface Impoundments

History of Construction, Powerton Former Ash Basin, Geosyntec Consultants, April 2018

Respectfully submitted,

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Dated: January 18, 2022

Attorney for CARE

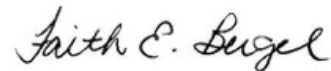
CERTIFICATE OF SERVICE

The undersigned, Faith Bugel, an attorney, certifies that a true copy of the foregoing **NOTICE OF SERVICE** was filed electronically on January 18, 2022 with the following:

Don Brown, Clerk of the Board
Illinois Pollution Control Board
100 West Randolph St
Suite 11-500
Chicago, IL 60601

And that true copies of the **COMPLAINANTS' WITNESS LIST AND PROPOSED ORDER OF WITNESSES AND PRELIMINARY EXHIBIT LIST** were served via electronic mail to the parties on the foregoing service list before 5:00 PM on January 18, 2022 to the email addresses of the parties' counsel. The entire package is 16 pages.

Respectfully submitted,



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Wilmette, IL 60091
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FBugel@gmail.com

EXHIBIT D

Electronic Filing: Received, Clerk's Office 05/01/2023

	Document (Bates) Number	Title	Date	Witness
1.	Comp. 63980-63988	History of Construction, Former Ash Basin, Powerton Generating Station	April 2018	Shealey
2.	Comp. 65720-65920	Hazardous and Solid Waste Management System; Disposal of Coal Combustion Residuals from Electric Utilities; Final Rule	April 17, 2015	Quarles
3.	Comp. 65921-66010	Evaluation and Modeling of Cap Alternatives at Three Unlined Coal Ash Impoundments	September 2001	Quarles
4.	Comp. 66011: https://kheprw.org/wp-content/uploads/2018/04/Harding-Street-Coal-Ash-Closure-Plan-Compressed.pdf	Sampling and Analysis Plan, Harding Street Station Coal Combustion, Indianapolis, Indiana, Attachment C	July 28, 2016	Quarles
5.	Comp. 66012	Letter from Mark Holbrook to Randy Jones	February 10, 2020	Quarles
6.	Comp. 66013-66027	2018 CCR Annual Groundwater Monitoring and Corrective Action Report: Indianapolis Power & Light Company, Harding Street Generating Station	January 31, 2019	Quarles
7.	Comp. 66028-66067	Report on Corrective Measures Assessment, Harding Street Generating Station, Indianapolis, Indiana	September 2019	Quarles
8.	Comp. 66068-66069	Coal Combustion Residue Management in Illinois	September 2010	Quarles
9.	Comp. 67340-67380	Use of Monitored Natural Attenuation at Superfund, RCRA CA, and UST Sites	August 1, 2015	Quarles
10.	Comp. 67391-67473	Use of Monitored Natural Attenuation for Inorganic Contaminants in Groundwater at Superfund Sites	August 2015	Quarles
11.	Comp. Ex. 12C	Hydrogeologic Assessment Report, Joliet Generating Station No. 29, Joliet, Illinois	February 2011	Quarles
12.	Comp. Ex. 13C	Hydrogeologic Assessment Report, Powerton Generating Station, Pekin, Illinois	February 2011	Quarles

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Electronic Filing: Received, Clerk's Office 05/01/2023

13.	Comp. Ex. 14C	Hydrogeologic Assessment Report, Waukegan Generating Station, Waukegan, Illinois	February 2011	Quarles	
14.	Comp. Ex. 15C	Hydrogeologic Assessment Report, Will County Generating Station, Romeoville, Illinois	February 2011	Quarles	
15.	Comp. Ex. 17D	Commonwealth Edison Company Phase II Environmental Site Assessment of Powerton Generating Station	December 1998	Quarles	
16.	Comp. Ex. 18D	Commonwealth Edison Company Phase II Environmental Site Assessment of Will County Generating Station	December 1998	Quarles	
17.	Comp. Ex. 19D	Commonwealth Edison Company Phase II Environmental Site Assessment of Waukegan Generating Station	November 1998	Quarles	
18.	Comp. Ex. 20D	Commonwealth Edison Company Phase II Environmental Site Assessment of Joliet #29 Generating Station	December 1998	Quarles	
19.	MWG_13-15 59460-59541	History of Construction, Ash Surge Basin and Bypass Basin, Powerton Generating Station	October 2016	Shealey	Deleted: Quarles
20.	MWG_13-15 59603-59693	History of Construction, East and West Ash Basins, Waukegan Generating Station	October 2016	Shealey	Deleted: Quarles
21.	MWG_13-15 64321-64555	CCR Compliance Annual Groundwater Monitoring and Corrective Action Report – 2018 Former Ash Basin, Powerton Generating Station	January 31, 2019	Gnat	Deleted: Quarles
22.	MWG_13-15 70018-70091	CCR Compliance Annual Groundwater Monitoring and Corrective Action Report – 2019, Will County	1/31/2019 [sic]	Gnat	Deleted: Quarles
23.	MWG_13-15 70092	Placement Above the Uppermost Aquifer Location Restrictions, Former Ash Basin, Powerton Station	April 2020	Shealey	Deleted: Quarles
24.	MWG_13-15 70121	Placement Above the Uppermost Aquifer Location Restrictions, Ash Surge Basin and Bypass Basin, Powerton Station	October 2018	Shealey	Deleted: Quarles
25.	MWG_13-15 70122-70123	Placement Above the Uppermost Aquifer Location Restrictions, East and West Ash Basins, Waukegan Station	October 2018	Shealey	Deleted: Quarles
26.	MWG_13-15 73054	Placement Above the Uppermost Aquifer Location Restrictions, South	October 2018	Shealey	Deleted: Quarles

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		Ash Ponds 2S and 3S, Will County Station		
27.	MWG_13-15 76486-76562	Quarterly Groundwater Monitoring Report, Will County Generating Station, Letter to Ms. Andrea Rhodes from Kristina Cameron, Station Director	July 13, 2020	Gnat
28.	MWG_13-15 76563-76742	Quarterly Groundwater Monitoring Report, Powerton Generating Station, Letter to Ms. Andrea Rhodes from Dale Green, Station Manager	July 13, 2020	Gnat
29.	MWG_13-15 79775-79903	Annual and Quarterly Groundwater Monitoring Report, Joliet #29 Generating Station - Fourth Quarter 2020	January 21, 2021	Gnat
30.	MWG_13-15 79904-80049	Annual and Quarterly Groundwater Monitoring Report, Powerton Generating Station - Fourth Quarter 2020	January 15, 2021	Gnat
31.	MWG_13-15 80050-80156	Annual and Quarterly Groundwater Monitoring Report, Will County Generating Station - Fourth Quarter 2020	January 21, 2021	Gnat
32.	MWG_13-15 80157-80354	Annual and Quarterly Groundwater Monitoring Report, Waukegan Generating Station - Fourth Quarter 2020	January 21, 2021	Gnat
33.	Available at https://app.box.com/s/xkhaptk6u19lh4fxj5o18r3g4n5eajmd	Expert Opinion of Mark A. Quarles, P.G., Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment v. Midwest Generation, LLC	January 2021	Quarles
34.	Available at https://app.box.com/s/nzv880lvibqr3sbvuvadv808z31pf6ax	Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G., Sierra Club, Environmental Law and Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment v. Midwest Generation, LLC	July 2021	Quarles
35.	Resp. Ex. 808	Standard Test Method for Shake Extraction of Solid Waste with Water	1985 (re-approved)	Quarles
36.	MWG_13-15 76150-	Non-Disclosable Midwest Generation,	December 31,	Shefftz

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	76176	LLC and Subsidiaries, Consolidated Financial Statements, 2017 and 2018	2018 and 2017	
37.	MWG_13-15 76177-76201	Non-Disclosable Midwest Generation, LLC and Subsidiaries, Consolidated Financial Statements, 2018 and 2019	December 31, 2019 and 2018	Shefftz
38.	MWG_13-15 108251-108252	Non-Disclosable Midwest Generation, LLC and Subsidiaries, Consolidated Balance Sheets, 2018 and 2019	December 31, 2020 and December 31, 2019	Shefftz
39.	Available at https://app.box.com/s/juiyepuox14vb6zd9vv4n57jdecdb5xn	Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs	January 25, 2021	Shefftz
40.	Available at https://app.box.com/s/09muuenwu331jlxfk b2bxtj3zqvqpaez	Supplemental and Rebuttal: Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs	July 16, 2021	Shefftz
41.	Available at https://app.box.com/s/72df4ajc7j826015zv z0lzehyoicel8j	Second Supplemental and Rebuttal: Expert Opinion on Economic Benefit of Noncompliance and Economic Impact of Penalty Payment and Compliance Costs	October 26, 2021	Shefftz
42.	Available at https://app.box.com/s/dtwk8za9ou9w68pn338jbobdpdvm7xmx	Expert Report on Remedy for Groundwater Contamination by James R. Kunkel, Ph.D., P.E.	July 1, 2015	Shefftz
43.	MWG_13-15 71841-71844	Closure Plan, Former Ash Basin, Powerton Station	April 2018	Shealey
44.	MWG_13-15 71847-71849	Closure Plan, Former Ash Basin, Powerton Station	May 2019	Shealey
45.	MWG_13-15 73136-73139	Letter to IEPA Re: IEPA Program: COALIN – Invoices Addressed to Midwest Generation, LLC for CCR Surface Impoundments	January 29, 2020	Shealey
46.	MWG_13-15 73176-73178	Letter to IEPA Re: Invoices to Midwest Generation, LLC for CCR Surface Impoundments	April 29, 2020	Shealey
47.	MWG_13-15 77743-77874	Letter to IEPA Re: Violation Notice: Midwest Generation, LLC, Waukegan Generating Station	September 16, 2020	Shealey

48.	MWG_13-15 77920-	Will County Generating Station, Demonstration For a Site-Specific Alternative Deadline to Initiate Closure	November 30, 2020	Shealey
49.	MWG_13-15 78366-	Waukegan Generating Station, Demonstration For a Site-Specific Alternative Deadline to Initiate Closure	November 30, 2020	Shealey
50.	MWG_13-15 78820-	Poweron Generating Station, Demonstration For a Site-Specific Alternative Deadline to Initiate Closure	November 30, 2020	Shealey
51.	MWG_13-15 116758-117216	Application for Retrofit Construction Permit, Poweron - Bypass Basin	July 15, 2022	Shealey
52.	MWG_13-15 119367-120525	AS 2021-001, Midwest Generation LLC's Petition for Adjusted Standard and Finding of Inapplicability for the Joliet 29 Station	May 11, 2021	Shealey
53.	MWG_13-15 120526-120614	AS 2021-001, Recommendation of the Illinois Environmental Protection Agency, Joliet 29 Station	September 22, 2021	Shealey
54.	MWG_13-15 120615-122671	AS 2021-003, Midwest Generation LLC's Petition for an Adjusted Standard and Finding of Inapplicability for the Waukegan Station	February 4, 2022	Shealey
55.	MWG_13-15 123236-124087	AS 2021-003, Midwest Generation LLC's Petition for an Adjusted Standard and Finding of Inapplicability for the Waukegan Station	May 11, 2021	Shealey
56.	MWG_13-15 124088-124116	AS 2021-003, Midwest Generation, LLC's Amended Petition for an Adjusted Standard and a Finding of Inapplicability for Waukegan Station	September 17, 2021	Shealey
57.	MWG_13-15 124132-124139	AS 2021-002, Midwest Generation, LLC's Amended Petition for an Adjusted Standard and a Finding of Inapplicability for Poweron Station	November 11, 2021	Shealey
58.	No Bates Number:	available at https://app.box.com/s/c43h21t76u6bb7jd14rmcvofo5ra2gx https://pcb.illinois.gov/documents/dsweb/Get/Document-104076	May 11, 2021	Shealey
59.	No Bates Number:	AS 2021-003, Illinois Environmental Protection Agency's Recommendation	October 31, 2022	Shealey

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	available at https://pcb.illinois.gov/documents/dsweb/Get/Document-106879	for Waukegan Station		
60.	No Bates Number; Remedy Dep. Ex. 11; available at https://app.box.com/s/tdujbrffpyxt0jcbix6ftyxw6p6godf9v	R 2020-19, Pre-filed Testimony of Sharene Shealey on Behalf of Midwest Generation, LLC	August 27, 2020	Shealey
61.	MWG_13-15 24960-25127	Letter with attachments from Gnat to Briette Re Coal Ash and Slag Removal - Joliet #29	December 6, 2005	Gnat
62.	MWG_13-15 63811-63873	CCA Quarterly Groundwater Monitoring Report, Joliet #29 Generating Station - Third Quarter 2019	October 7, 2019	Gnat
63.	MWG_13-15 64906-65221	CCR Compliance Annual Groundwater Monitoring and Corrective Action Report - 2018, Ash By-Pass and Ash Surge Basin, Powerton Station	January 31, 2019	Gnat
64.	MWG_13-15 65456-65856	CCR Compliance Annual Groundwater Monitoring and Corrective Action Report - 2019, Ash Surge and Ash By-Pass Basin, Powerton Station	January 31, 2020	Gnat
65.	MWG_13-15 66096-66203	CCA Quarterly Groundwater Monitoring Report, Powerton Generating Station - Third Quarter 2019	October 7, 2019	Gnat
66.	MWG_13-15 67097-67289	CCR Compliance Annual Groundwater and Corrective Action Report - 2018, Waukegan Station	January 31, 2019	Gnat
67.	MWG_13-15 68260-68923	CCA Quarterly Groundwater Monitoring Report, Waukegan Generating Station - Third Quarter 2019	October 7, 2019	Gnat
68.	MWG_13-15 69436-69609	CCR Compliance Annual Groundwater Monitoring and Corrective Action Report - 2018, Will County	January 31, 2019	Gnat
69.	MWG_13-15 69946-70017	CCA Quarterly Groundwater Monitoring Report, Will County Generating Station - Third Quarter 2019	October 7, 2019	Gnat
70.	MWG_13-15 70527-70601	Alternate Source Demonstration, CCR Groundwater Monitoring, Powerton	March 9, 2020	Gnat

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		Generating Station - Former Ash Basin	
71.	MWG_13-15 72568-	CCR Compliance Annual Groundwater Monitoring and Corrective Action Report - 2019, Waukegan Station	January 31, 2020 Gnat
72.	MWG_13-15 79493-	Sampling Grid Exhibit and Boring Logs, Waukegan	November 23, 2020 Gnat
73.	MWG_13-15 79534-	Eurofins Analytical Report, Waukegan	December 11, 2020 Gnat
74.	MWG_13-15 79586-	Eurofins Analytical Report, Waukegan	December 7, 2020 Gnat
75.	MWG_13-15 79637-	Eurofins Analytical Report, Waukegan	December 7, 2020 Gnat
76.	MWG_13-15 79688-	Eurofins Analytical Report, Waukegan	December 8, 2020 Gnat
77.	MWG_13-15 79721-	Eurofins Analytical Report, Waukegan	December 8, 2020 Gnat
	79771	Soil Testing	
78.	MWG_13-15 108447-108482	Alternate Source Demonstration, CCR Groundwater Monitoring, Joliet #29	October 11, 2021 Gnat
79.	MWG_13-15 108719-109154	Application for Operating Permit, Joliet #29 Generating Station	October 29, 2021 Gnat
80.	MWG_13-15 109638-110275	Application for Initial Operating Permit, Poweron Generating Station - Ash Bypass, Ash Surge, and Former Ash Basin	October 29, 2021 Gnat
81.	MWG_13-15 110625-111264	Application for Initial Operating Permit, Waukegan Generating Station	October 29, 2021 Gnat
82.	MWG_13-15 113953-114056	Federal CCR Compliance Annual Groundwater Monitoring and Corrective Action Report - 2021, Joliet #29	January 31, 2022 Gnat
83.	MWG_13-15 115224-115272	Data Summary Posting, Joliet #29	No single date Gnat
84.	MWG_13-15 115601-115662	Data Summary Posting, Waukegan	No single date Gnat
85.	MWG_13-15 115942-116018	CCR Groundwater Monitoring Report, Poweron Generating Station Monitoring Results - Ash By-Pass Basin & Ash Surge Basin - Second Quarter 2022	July 26, 2022 Gnat
86.	MWG_13-15 116082-116117	CCR Detection Report, Waukegan	July 27, 2022 Gnat

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87.	MWG_13-15 116118-116145	CCR Detection Groundwater Monitoring Report, Joliet #29 Generating Station	July 26, 2022	Gnat
88.	MWG_13-15 116146-116240	Initial Assessment Monitoring Data Evaluation, CCR Groundwater Monitoring, Will Co. Station	July 27, 2022	Gnat
89.	MWG_13-15 116241-116331	Alternate Source Demonstration, CCR Groundwater Monitoring, Will County Generating Station	March 28, 2022	Gnat
90.	MWG_13-15 116332 -116757	Application for Initial Construction Permit, Joliet #29 Generating Station - Pond #2	January 28, 2022	Gnat
91.	MWG_13-15 117229 -118125	<u>Application for Initial Construction Permit, Waukegan Generating Station – East and West Ash Ponds</u>	January 28, 2022	Gnat
92.	MWG_13-15 118134-118235	CCA Annual and Quarterly Groundwater Monitoring Report, Joliet #29 Generating Station	January 20, 2022	Gnat
93.	MWG_13-15 118236-118378	CCA Annual and Quarterly Groundwater Monitoring Report, Powerton Generating Station	January 14, 2022	Gnat
94.	MWG_13-15 118379-118488	CCA Annual and Quarterly Groundwater Monitoring Report, Will County Generating Station	January 20, 2022	Gnat
95.	MWG_13-15 118489-118627	CCA/Permit Annual and Quarterly Groundwater Monitoring Report, Waukegan Generating Station	January 20, 2022	Gnat
96.	MWG_13-15 124547 -125119	Application for Construction Permit, Powerton Generating Station - Former Ash Basin	October 26, 2022	Gnat
97.	MWG_13-15 125120 -125604	Application for Initial Operating Permit, Powerton Generating Station - Metal Cleaning Basin	March 31, 2022	Gnat
98.	MWG_13-15 125605 -126095	Application for Initial Operating Permit, Will County Generating Station - Pond 1N & Pond 1S	March 31, 2022	Gnat

Deleted: AS 2021-001, Midwest Generation, LLC's Petition for Adjusted Standard and Finding of Inapplicability for the Joliet 29 Station