BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S DECISION TO ADMIT MARK QUARLES'S OPINIONS AND REPORTS**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

Faith E. Bugel

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: August 16, 2023

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S DECISION TO ADMIT MARK QUARLES'S OPINIONS AND REPORTS

Complainants Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") hereby respond to Midwest Generation, LLC's ("MWG") interlocutory appeal of the Hearing Officer's ruling admitting Mark Quarles's opinions and reports ("MWG Appeal"). The Illinois Pollution Control Board ("Board") should uphold the Hearing Officer's May 15, 2023 on the record ruling admitting Mark Quarles's opinions and reports over MWG's objection because Mr. Quarles's opinions are consistent with the Hearing Officer's September 14, 2020 order on MWG's Motion in Limine on the same issue and also consistent with the Board's December 15, 2022 upholding the Hearing Officer's order. In support of their arguments that the Board should uphold the Hearing Officer's rulings, Complainants incorporate by reference "Complainants' Response to Midwest Generation, LLC's Motion for Interlocutory Appeal from Hearing Officer's Rulings Allowing Quarles's Opinions and Redacting Quarles's Notes" and "Complainants' Response to

Respondent Midwest Generation, LLC's Motion *in Limine* to Exclude Quarles Opinions," attached hereto.

A. The Standard is Prejudice and MWG Has Not Demonstrated Prejudice.

In his September 14, 2020 order, the Hearing Officer allowed both parties to identify additional witnesses and the Board upheld this ruling. Dec. 15, 2022 Order of Bd. at 13-15. The Hearing Officer correctly opined on the standard for substituting experts: "neither party will be surprised or prejudiced because it will have knowledge of any new expert reports and depose any new witnesses prior to the hearing." Sept. 14, 2020 Hr'g Officer Order at 3; *see People v. Pruim*, No. 2004-207, 2008 WL 4415083 at *3 (Ill. Pol. Control Bd., Sept. 24, 2008) (holding that if parties will not be surprised or prejudiced, parties may substitute experts). MWG narrowly focuses on just a few words in the Hearing Officer's Sept. 14, 2020 Order and the Board's Dec. 15, 2022 Order on substitution of experts, thereby taking that phrasing out of context and suggesting that it places constraints on remedy-phase expert testimony that are not contained in either of those Orders. The September 14, 2020 order reads more completely as follows:

> The parties may call additional witnesses to provide more information to the Board for the second hearing in this matter. To hold otherwise, I would fail my duty "to ensure development of a clear, complete, and concise record. . . ." Section 101.610 of the Board's procedural rules. The discovery schedule regarding expert witnesses, including reports and depositions, have yet to be determined. If additional witnesses are identified, neither party will be surprised or prejudiced because it will have knowledge of any new expert reports and depose any new witnesses prior to the hearing. Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification.

Sept. 14, 2020 Hr'g Officer Order at 3 (emphasis added).

The focus of the Hearing Officer's Order was prejudice, and the Hearing Officer properly held that neither party would be prejudiced by the substitution of expert witnesses. The focus of the Board's Dec. 15, 2022 Order was that Mr. Quarles met the three-part framework

determinative of whether to admit an expert's testimony. Dec. 15, 2022 Order of Bd. at 13-14 (citing *Bielskis v. Louisville Ladder, Inc.*, 663 F.3d 887, 893-94 (7th Cir. 2011).

MWG's overlooks the requirement that they must show surprise and prejudice and summarily claims prejudice while completely omitting any explanation of why or how they were prejudiced. MWG Appeal at paras. 7, 22. MWG is not prejudiced or surprised in the present case, because MWG was on notice of exactly what Complainants' 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. *See People v. Pruim*, No. 2004-207, 2008 WL 4415083 at *3 (Ill. Pol. Control Bd. 2008) (PCB hearing officer denied motion to bar newly-disclosed witness and instead delayed hearing to give movant opportunity to depose witness); *Hartman v. Pittsburgh Corning Co.*, 261 Ill. App. 3d 706, 720, 634 N.E.2d 1133, 1142 (Ill. App. Ct. 5th Dist., 1994) (holding that party was not prejudiced when 48-day continuance "allowed defendant to depose the witnesses before trial and examine the additional evidence sufficiently to adjust its defense accordingly"). Mr. Quarles's hearing testimony was completely consistent with his reports and deposition.

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. MWG Appeal at paras. 10, 15. The barring of a party's designated witness has not been "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. . . ." *Appelgren v. Walsh*, 136 Ill. App. 3d 700, 704, 483 N.E.2d 686, 689 (Ill. App. Ct. 2d Dist., 1985) (emphasis added) (citing *Rosales*

v. Marquez, 55 Ill. App. 2d 203, 204 N.E.2d 829 (Ill. App. Ct. 1st Dist., 1965); *Miksatka v. Ill. N. Ry. Co.*, 49 Ill. App. 2d 258, 199 N.E.2d 74 (Ill. App. Ct. 1st Dist. 1964)). The Board must weigh the effect of barring a witness on the party offering the witness. *Sullivan v. Eichmann*, 213 Ill. 2d 82, 92–93, 820 N.E.2d 449, 454 (Ill. Sup. Ct., 2004).

Barring, or even just giving Mr. Quarles's testimony little weight, would harm Complainants far more than any prejudice that Respondent could conjure up. Complainants would be left with no expert who discussed the mechanics of the remedy at the hearing. That would be far more prejudicial than the unidentified impact on MWG.

B. Mr. Quarles Built on the Testimony Given in the Record.

MWG also argues that Mr. Quarles's reliance on the Board's Liability Phase Opinion, as discussed below, is insufficient reliance on the prior expert testimony in the record. MWG Appeal at paras. 10-15. In so arguing, MWG misreads the Board's Dec. 15, 2022 Order as creating an expectation that there needs to be an explicit and direct connection between Mr. Quarles's expert work and Dr. Kunkel's expert work when no such expectation appears in either the Board's Dec. 15, 2022 Order or the Hearing Officer's Sept. 14, 2020 Order. This misreading of the Board's Order runs afoul of the Illinois rules and case law.

The Hearing Officer ruled that "Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." Sept. 14, 2020 Hr'g Officer Order at 3. The Board upheld the Hearing Officer's Sept. 14, 2020 Order allowing substitution of witnesses. Dec. 15, 2022 Order of Bd. at 13-15. Mr. Quarles's reports and deposition testimony adhere to the Hearing Officer's and Board's directive to build on the "testimony that stands." Sept. 14, 2020 Hr'g Officer Order at 3. Both parties (not just Complainants) were required to build on the testimony in the record, all testimony, not just Dr. Kunkel's. That is exactly what Mr. Quarles did. Mr. Quarles's testimony

and reports show that he built on the testimony, exhibits, and evidence from the liability phase. Mr. Quarles, appropriately, relies heavily on the Board's findings and conclusions in its June 20, 2019 liability-phase order. Hr'g Ex. 1101 at 1-13; Hr'g Ex. 1102 at 2-3 (together containing 100+ citations to the June 20, 2019 Board Order). When asked about his process for selecting what to review from the thousands of pages in the record from the liability phase of this case, Mr. Quarles stated "[T]he Board's opinion was the best factual summary of that prior history of the expert opinions." May 16, 2023 Hr'g Tr. at 83:8-10. The Board itself acknowledges that "The Board has already made use of Mr. Kunkle's [sic] opinions in its interim order." Dec. 15, 2022 Order of Bd. at 13-15.

Mr. Quarles uses the liability phase Board Order as the foundation of and basis for his remedy phase reports. The June 20, 2019 Board Order obviously includes evidence, such as Dr. Kunkel's testimony, that provided the grounds for the Board's decision that MWG is liable for violations of Sections 12(a), 12(d) and 21(a) of the Illinois Environmental Protection Act. By relying on the Board's Order, Mr. Quarles is building on the testimony already given—and especially building on the testimony that the Board found most pertinent and cited in its report. As a result, Mr. Quarles's reports, opinions and deposition testimony are all consistent with and build on Dr. Kunkel's hearing testimony, the evidence that is in the record, and most importantly the Board's findings and conclusions in its June 20, 2019 Order.

For these reasons, Mr. Quarles's testimony and reports are completely consistent with the Hearing Officer's Sept. 14, 2020 Order and the Board's Dec. 15, 2022 Order and should not be barred.

C. The Board Has Already Determined that Quarles's Opinions Aid the Board.

In arguing that Mr. Quarles's opinions and reports should not be admitted, MWG just rehashes issues that the Board has already decided. MWG argues that Mark Quarles opinions do

not aid the Board. MWG Appeal at paras. 5-7. Here MWG makes an argument that disregards and is inconsistent with the Board's previous decision on this issue. The Board found in its decision on MWG's appeals of MWG's motions in limine that "Mr. Quarles's testimony will assist the Board in understanding the groundwater issues in this case." Dec. 15, 2022 Order of Bd. at 14.

MWG rehashes yet another argument that the Board has already decided in arguing that "Mr. Quarles does not identify a corrective action or remedy for any MWG stations." MWG Appeal at para. 16. The Board has already ruled on MWG's argument that Mr. Quarles does not offer a remedy and stated that "the Board finds that Mr. Quarles does offer a proposed remedy process in recommending a source identification and site investigation of the four facilities." Dec. 15, 2022 Order of Bd. at 14-15.

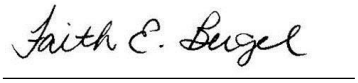
Finally, MWG throws up a lot of unfounded accusations that Mr. Quarles's opinions create confusion and do not provide sufficient parameters. The fact is that the parties, the State of Illinois, and MWG are in this position because MWG violated the law by failing to conduct due diligence on its properties and investigate the sources of groundwater contamination. The Board found MWG liable for not adequately investigating and assessing onsite contamination. *See, e.g.*, Interim Order at 79 (finding that MWG "is not undertaking any further actions to stop or even identify the specific source."); *Id.* ("No further investigation of historic areas is taking place"). It is now impossible for the Board, in determining a remedy, to consider several of the Section 33(c) factors without more information about the source, nature, and extent of the contamination. This is not a failure of Complainants, and not a failure of Mr. Quarles. This is a failure of MWG's and the Board must put the onus on MWG to remedy it.

D. Conclusion

For all of these reasons, the Board should deny MWG's appeal requesting that the Board reverse the Hearing Officer rulings admitting Quarles's reports opinions.

Dated: August 16, 2023

Respectfully submitted,



Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Gregory E. Wannier
Megan Wachspress
2101 Webster St., Ste. 1300
Oakland, CA 94612
Greg.Wannier@sierraclub.org
megan.wachspress@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
802-662-7800 (phone)
ARuss@environmentalintegrity.org

Attorney for Prairie Rivers Network

Albert Ettinger
Law Firm of Albert Ettinger
7100 N. Greenview
Chicago, IL 60606
(773) 818-4825
Ettinger.albert@gmail.com

Attorney for ELPC

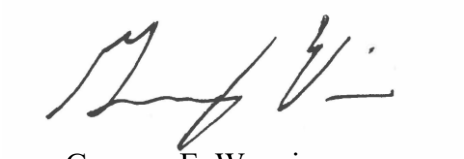
Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750
Chicago, IL 60606
312-726-2938
KHarley@kentlaw.iit.edu

Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned, Gregory E. Wannier, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL OF THE HEARING OFFICER'S DECISION TO ADMIT MARK QUARLES'S OPINIONS AND REPORTS** before 5 p.m. Central Time on August 16, 2023, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 50 pages.

Respectfully submitted,



Gregory E. Wannier
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5646
greg.wannier@sierraclub.org

PCB 2013-015 SERVICE LIST:

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

Megan Wachspress
2101 Webster St., Ste. 1300
Oakland, CA 94612
Megan.wachspress@sierraclub.org

Abel Russ
Environmental Integrity Project
1000 Vermont Ave. NW, Suite 1100
Washington, DC 20005
(202) 263-4453
aruss@environmentalintegrity.org

Albert Ettinger
Law Firm of Albert Ettinger
7100 N. Greenview
Chicago, IL 60606

Jennifer T. Nijman
Susan M. Franzetti
Kristen Laughridge Gale
Kelly Emerson
Nijman Franzetti LLP
10 South LaSalle St., Suite 3400
Chicago, IL 60603
(312) 251-5250
jn@nijmanfranzetti.com
sf@nijmanfranzetti.com
kg@nijmanfranzetti.com
ke@nijmanfranzetti.com

Don Brown – Clerk of the Board
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, IL 60601k
(312) 814-3620
don.brown@illinois.gov

(773) 818-4825
ettinger.albert@gmail.com

Keith I. Harley
Greater Chicago Legal Clinic, Inc.
211 West Wacker Drive, Suite 750
Chicago, IL 60606
(312) 726-2938
kharley@kentlaw.edu

James M. Morphew
Sorling Northrup
1 N. Old State Capitol Plaza, Suite 200
P.O. Box 5131
Springfield, IL 62705
(217) 544-1144
jmmorphew@sorlinglaw.com

Dated: August 16, 2023

Brad Halloran, Hearing Office
Illinois Pollution Control Board
100 W. Randolph St., Suite 11-500
Chicago, IL 60601k
(312) 814-3620
brad.halloran@illinois.gov

Melissa S. Brown
Hepler Broom LLC
4340 Acer Grove Drive
Springfield, IL 62711
(217) 523-4900
melissa.brown@heplerbroom.com

Attachment 1

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Respectfully submitted,

Faith E. Bugel

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: March 4, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINIONS

Pursuant to 35 Ill. Adm. Code 101.500, Complainants offer the following response to Midwest Generation, LLC's Motion *in Limine* to Exclude Quarles Opinions ("MWG's Quarles Motion").

I. MWG Misrepresents the Hearing Officer's Sept. 14, 2020 Order.

a. The Hearing Officer Order Does Not Limit Mr. Quarles' Opinions and Testimony to Only Elaboration and Amplification.

MWG misrepresents the Hearing Officer's Sept. 14, 2020 Order on substitution of experts and suggests that it places constraints on remedy-phase expert testimony that are nowhere to be found in the Order. Specifically, Respondent claims that the "Hearing Officer . . . order[ed] that the existing expert reports stand, and new experts were only permitted to 'elaborate and amplify'" the opinions of Complainants' liability-phase expert, Dr. James Kunkel. MWG's Quarles Mot. at 6 (citing *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order (Sept. 14, 2020) ("Sept. 14, 2020 Order")). However, the Hearing Officer's Sept.

14, 2020 Order clearly does not constrain remedy phase experts in this way. The Sept. 14, 2020 Order provides, in relevant part:

> The parties may call additional witnesses to provide more information to the Board for the second hearing in this matter. To hold otherwise, I would fail my duty 'to ensure development of a clear, complete, and concise record . . .'. Section 101.610 of the Board's procedural rules. The discovery schedule regarding expert witnesses, including reports and depositions, have yet to be determined. If additional witnesses are identified, neither party will be surprised or prejudiced because it will have knowledge of any new expert reports and depose any new witnesses prior to the hearing. Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification.

Sept. 14, 2020 Order, at 3 (emphasis added). MWG ignores much of the language of the Hearing Officer's Sept. 14, 2020 Order.

MWG disregards the Hearing Officer Halloran's use of the term "including." Sept. 14, 2020 Order, at 3. The Hearing Officer's Order allows Mr. Quarles' testimony to "present more information, including elaboration and amplification." *Id.* According to Black's Law Dictionary, "include" means "to contain as a part of something. The participle *including* typically indicates a partial list. . . . But some drafters use phrases such as *including without limitation* and *including but not limited to*—which mean the same thing." Black's Law Dictionary (11th ed. 2019). In other words, the use of the term "including" does not limit Mr. Quarles testimony to just "elaboration and amplification." "Elaboration and amplification" are permitted to be part of Mr. Quarles' testimony, while the term "including" indicates that the totality of Mr. Quarles' testimony may go beyond just elaboration and amplification of prior expert testimony.

MWG also ignores the very broad language of the Hearing Officer's Order, which allows the parties and their substitute expert witnesses to "present more information." Sept. 14, 2020 Order, at 3. The Order allowing expert witnesses to "present more information" does not limit or qualify "more information" with any requirement that such additional information stay within the

scope of the liability-phase testimony or reports. In sum, the Order does not limit the parties' new expert witness testimony to either the scope of the prior expert testimony or reports or to just elaboration and amplification of prior expert testimony or reports. Since new expert testimony is not limited in the way MWG argues, Mr. Quarles' reports and opinions are consistent with Hearing Officer's Sept. 14, 2020 Order.

b. Hearing Testimony Stands—and Mr. Quarles Has Been Consistent with Dr. Kunkel's Hearing Testimony

Consistent with Hearing Officer Halloran's Sept. 14, 2020 Order on substitution of expert witnesses, Mr. Quarles' reports (*Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Expert Opinion of Mark A. Quarles, P.G. (Jan. 25, 2021) ("Quarles Initial Report", Ex. 2 to MWG's Quarles Mot.); *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Expert Opinion, Rebuttal Report of Mark A. Quarles, P.G. (July, 2021) ("Quarles Rebuttal Report", Ex. 3 to MWG's Quarles Mot.)) build on the "testimony that stands." *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order, at 3 (Sept. 14, 2020). Hearing Officer Halloran ordered "that the parties must proceed to build on that information and present more information, including elaboration and amplification." *Id.* Mr. Quarles' reports show that he builds on, elaborates on, and amplifies the most relevant testimony, exhibits, and evidence from the liability phase. Mr. Quarles, appropriately, relies heavily on the Board's findings and Interim Order. Quarles Initial Rep. at 1-13; Quarles Rebuttal Rep. at 2-3. By way of example, Mr. Quarles' two reports contain more than 100 citations to the Interim Board Order. It is evident that Mr. Quarles uses the Interim Board Order as the foundation of and basis for his remedy phase reports. The Interim Board Order obviously includes evidence, such as Kunkel's testimony, that provided the grounds for the Board's decision. As a result, consistent with the Hearing Officer's Sept. 14, 2020 Order, Mr. Quarles's opinions and reports present more information and build on, elaborate

on, and amplify the testimony from the liability phase proceedings.

MWG incorrectly suggests that Mr. Quarles was required to elaborate on Dr. Kunkel's opinions with respect to remedy. This is false, for at least three reasons. First, Dr. Kunkel's report on remedy is not "testimony." Hearing Officer Halloran ordered that "[a]ny testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification." Sept. 14, 2020 Order, at 3 (emphasis added). While Dr. Kunkel's report on remedy is reliable, relevant evidence in regards to remedy in this proceeding, the report is not "testimony." *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, James R. Kunkel, Ph.D., P.E. Expert Report on Remedy for Ground-water Contamination (July 1, 2015) ("Kunkel Remedy Report", Ex. 5 to MWG's Quarles Mot.). A witness's statements only rise to the level "testimony" if they are provided under oath. Black's Law Dictionary defines "testimony" as "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." Black's Law Dictionary (11th ed. 2019). Dr. Kunkel's Remedy Report was not provided under oath or penalty of perjury, is not signed, and is not notarized. *Id.* Dr. Kunkel's Remedy Report, therefore, is not testimony. While Dr. Kunkel's Remedy Report may be relevant, reliable evidence that is admissible during remedy phase, it is outside the scope of the Hearing Officer's order.

Second, Dr. Kunkel's Remedy Report is not part of the liability phase record. *See, e.g.*, Comp's Ex. 401 James Kunkel Expert Report, Groundwater Contamination-July 1, 2015; Comp's Ex. 407, Kunkel Expert Rebuttal Report-December 8, 2015; 408, Kunkel Expert Rebuttal Report-March 16, 2016; Resp.'s Ex 412, James Kunkel Supplemental Rebuttal Report-December 8, 2015 (comprising all of Kunkel's reports that are exhibits in the record). No hearings have yet been held on remedy, and the existing record is related to liability. While Dr.

Kunkel's Remedy Report is reliable, relevant evidence in regards to remedy in this proceeding, it is not part of the record in the liability phase proceeding and is outside the scope of the Hearing Officer's order.

Third, Dr. Kunkel's deposition testimony, while it is "testimony" in the everyday use of the term, is not part of the formal liability-phase record, and therefore does not qualify as the kind of testimony that the Hearing Officer was referring to. Dr. Kunkel provided no hearing testimony on remedy because the Hearing Officer ordered a separate hearing on remedy. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order, at 1 (Feb. 9, 2017) (ordering that argument on scope of remedy be deferred "until when and if a hearing on remedy is held"). The Board also ordered a separate hearing on remedy. "[T]he Board directs the hearing officer to hold additional hearings to determine the appropriate relief and any remedy, considering Sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c) and 42 (h) (2016))." *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Interim Board Order, at 93 (June 20, 2019). The testimony that is part of the record is Dr. Kunkel's liability hearing testimony. As a result, it would be difficult to see how liability-phase deposition testimony, particularly with respect to remedy, could or should stand pursuant to the Hearing Officer's Sept. 14, 2020 Order. Testimony as referenced in the Hearing Officer's Order should be limited to hearing testimony. Sept. 14, 2020 Order, at 3.

Further, there is no requirement from the Hearing Officer's Order that Mr. Quarles' testimony adhere lock-step to Dr. Kunkel's prior testimony, although Mr. Quarles did appropriately refer to, rely upon, and build upon liability phase testimony, evidence, findings and conclusions in the Board's Interim Order. Nevertheless, Mr. Quarles' opinions and testimony are in no way inconsistent with Dr. Kunkel's positions, and simply present "more information"

as directed by Hearing Officer Halloran. Mr. Quarles' reports recommend a remedial process for determining what should be done for each area where coal ash is causing contamination at the sites. MR. Quarles's reports make clear where and why more information is needed as part of that remedial process (to identify where there is ash, the depth of ash, contact with groundwater, and whether ash is causing contamination). Quarles's reports do not reject Kunkel's recommended remedy of removal. Quarles's reports simply recommend a remedial process (and explain clearly why this process is necessary and why more information is necessary).

c. MWG Has Not Been "Surprised or Prejudiced".

Complainant's expert's testimony will not prejudice MWG, so there is no legal basis for it to be barred. The Hearing Officer already found that MWG will not be prejudiced by Complainant's substitution of experts. Hearing Officer's Order Sept. 14, 2020, at 3. Complainants' substitution of experts—or for that matter, any party's substitution of experts—will not "surprise[] or prejudice[]" any party because the parties "will have knowledge of any new expert reports and depose any new witnesses prior to the hearing." *Id.*; *see also People v. Pruim*, PCB 04-207, 2008 WL 4415083, at *3 (Sept. 24, 2008) (PCB hearing officer denied motion to bar newly-disclosed witness and instead delayed hearing to give movant opportunity to depose witness); *Hartman v. Pittsburgh Corning Corp.*, 261 Ill. App. 3d 706, 720, 634 N.E.2d 1133, 1142 (1994) (holding that party was not prejudiced when 48-day continuance "allowed defendant to depose the witnesses before trial and examine the additional evidence sufficiently to adjust its defense accordingly"). The barring of a party's designated witness has not been "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. . . ." *Appelgren v. Walsh*, 483 N.E.2d 686, 689 (Ill. App.

Ct. 2d Dist. 1985) (citing *Rosales v. Marquez*, 55 Ill. App. 2d 203, 204 N.E.2d 829 (Ill. App. Ct. 2d Dist. 1965); *Miksatka v. Illinois Northern Ry. Co.*, 49 Ill. App. 2d 258, 199 N.E.2d 74 (Ill. App. Ct. 2d Dist. 1964). Surprise generally occurs when a party discloses a witness after the close of discovery or in the few days or weeks preceding a scheduled hearing or trial. *Smith v. Murphy*, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist. 2013).

Demonstrating prejudice requires far more than Respondent's mere claim of interference with their litigation strategy. MWG's Quarles Mot., at 2. A party is only prejudiced when they will not be able to depose an expert or retain their own rebuttal expert. *Smith v. Murphy*, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist.2013) ("[T]he disclosure of a new expert would be prejudicial to defendants' case because it would be unlikely that the defendants would be able to depose the new expert and retain their own expert to rebut the plaintiff's new expert so close to trial.").[1] Being completely unable to prepare a litigation strategy rises to the level of prejudice which is very different from Respondent's claim of possibly having to alter their litigation strategy. *Firstar Bank v. Peirce,* 306 Ill. App. 3d 525, 532, 239 Ill. Dec. 558, 714 N.E.2d 116 (Ill. App. Ct. 1st Dist. 1999) (holding that undisclosed expert witnesses are a surprise and prejudicial when opposing party had no time to prepare or construct trial strategy). Because Respondent has knowledge of Complainants' new expert reports, were able to depose new witnesses prior to the hearing, and have had more than a year to prepare for litigation, Respondent is not prejudiced or surprised by Mr. Quarles' testimony. As a result, his testimony

[1] "[D]efendants were first informed of this previously undisclosed plaintiff's expert witness when plaintiff attached the expert's affidavit to plaintiff's response to defendants' motion for summary judgment well after discovery had closed and the case was set for trial. Therefore, we agree that defendants were clearly surprised when plaintiff disclosed this new expert for the first time in this manner, months after discovery was closed by court order, and just four days before the previously agreed-upon trial date which dictated when a timely summary judgment motion could be filed." *Smith v. Murphy*, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist.2013).

should not be barred.

Respondent only cites one case in support of their position that Mr. Quarles' reports violate the Hearing Officer's Sept. 14, 2020 Order—*Indiana Insurance Company v. Valmont Electric*. MWG's Quarles Mot., at 2, 4) (*citing Ind. Ins. Co. v. Valmont Elec., Inc.*, 2011 U.S. Dist. LEXIS 23256, *4 (S.D. Ind. 2001)). This case that is not from the Board or even Illinois. A single case from the Southern District of Indiana is not precedent and cannot outweigh the binding Illinois and Board precedent which hold that where a party is not prejudiced, an expert's testimony will not be barred. In any event, that one case is also easily distinguishable. Here, unlike the case cited by MWG, the Hearing Officer did not "order[] that the opinions of the new experts to be the same" or "bar[] any introduction of new and different theories." MWG's Quarles Mot. at 2, 4.

Finally, barring Mr. Quarles's testimony would harm Complainants far more than the fictitious inconvenience that Respondent claims from allowing Mr. Quarles' testimony to go forward. The Hearing Officer must weigh the effect of barring a witness on the party offering the witness. *Sullivan v. Eichmann*, 213 Ill. 2d 82, 92–93, 820 N.E.2d 449, 454 (2004) ("We further note that a trial court is obligated to consider both the prejudice to the defendant and the detriment caused to the moving party by denial of substitution.") Complainants would be left with no expert who can discuss the mechanics of a remedy at all.

In sum, Respondent has knowledge of Mark Quarles' expert reports and deposed Mr. Quarles. Based on both the standard in Illinois law for substituting experts and the Hearing Officer's Sept. 14, 2020 Order, Respondent is not prejudiced or surprised and there are no grounds for excluding or limiting Mr. Quarles' opinions or testimony.

II. Mark Quarles' Opinions and Testimony Aid the Board.

MWG argues that Mark Quarles opinions are vague and do not aid the Board. MWG's Quarles Mot., at 5-6. Mark Quarles' recommended remedial process with the first step constituting source identification and an investigation aids the Board because, without source identification and an investigation, the Board cannot consider the factors required by the Illinois Environmental Protection Act Section 33(c) ("Section 33(c)"). 415 ILCS 5/33(c). Specifically, Mr. Quarles' recommendation as to a remedial process that includes source identification and further investigation of the contamination is an essential first step for any remedy. The Board is required to consider Section 33(c). Section 33(c) provides

c) In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges or deposits involved including, but not limited to: (i) the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
(ii) the social and economic value of the pollution source;
(iii) the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved;
(iv) the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source; and
(v) any subsequent compliance.

415 ILCS 5/33(c).

The Board spent more than 9 months and 93 pages clearly and meticulously identifying coal areas for which MWG is liable. Among other things, the Board found MWG liable for not adequately investigating and assessing onsite contamination. *See, e.g.*, Interim Order at 79 (finding that MWG "is not undertaking any further actions to stop or even identify the specific source." (emphasis added); *Id.* ("No further investigation of historic areas is taking place"). It is now impossible for the Board, in determining a remedy, to consider several of the Section 33(c)

factors without more information about the source, nature, and extent of the contamination. More specifically, the Board cannot determine whether reducing or eliminating the discharges from certain areas of coal ash, and remedying the numerous open dumping violations, is economically reasonable if the Board does not know how much it would cost to reduce or eliminate those discharges or areas of coal ash. None of the parties can know how much it will cost to reduce or eliminate a discharge or deposit if we do not know the volume of ash, the depth of ash in that area, whether ash is in contact with groundwater, and/or the extent of contamination that area is contributing. As a result, further investigation is needed and Mr. Quarles provides sufficient detail as to what a further investigation looks like.

Identifying more specifically how much and what each source of contamination is contributing is a critical first step. "Source identification is a critical component of a site investigation." Quarles Initial Rep. at 17. After the sources are adequately identified, additional information needs to be collected "to determine, for example:

- How much coal ash exists in unlined disposal and storage areas,
- What types of coal ash exist (e.g., fly ash, bottom ash, slag, and cinders),
- How much saturated and unsaturated coal ash exists,
- The thickness of any saturated coal ash,
- The vertical and horizontal migration of contaminants into the aquifer,
- The chemical and geochemical conditions in the saturated ash and the aquifer,
- The direction of groundwater flow from the disposal and fill areas, and
- Migration pathways of contaminants from the source(s).

Id. at 17. Mr. Quarles went on to point out that the investigation at each station needs to define "the nature and extent of contamination" for each active and historical coal ash areas. *Id.* at 24.

And Mr. Quarles identified the components of a nature and extent investigation:

- Sampling, analyses, and field screening activities,
- Characterization of sources and potential sources of contamination,
- A determination of the degree of saturation of coal ash and connectivity to groundwater,
- A three-dimensional analysis (horizontally and vertically) and the nature, direction, and rate of movement of contaminants,
- Characterization of present and post-remediation exposure routes that may potentially threaten human or environmental receptors, and
- Characterization of significant physical features of the remediation site and vicinity that may affect contaminant fate and transport and present a risk to human health, safety, and the environment.

Id. at 24-25.

Finally, Mr. Quarles also identified regulatory analogies for his recommendations. "Source identification and defining the nature and extent of contamination are fundamental first steps for selecting a remedy under IEPA and Federal programs such as the Resource Conservation and Recovery Act (RCRA, 42 U.S.C. Sections 6901 – 6992k), the Comprehensive Environmental Response, Compensation and Liability Act (CERLCA, 42 U.S.C. Sections 9601 - 9675), and other state- equivalent programs." *Id.* at 21; *see also id.* at 18 ("Defining the nature and extent of contamination is a basic foundation of any environmental investigation defined by State and Federal regulations." (citing 40 CFR Part 257.98 (g)(1), 35 Illinois Administrative Code §§ 740.415, 740.420)).

After a nature and extent investigation, Mr. Quarles recommended a process for selecting a remedy:

Based upon my experience – regardless of the state or Federal regulatory

> framework that requires such a plan – a remedial action or corrective action plan should include an alternatives analysis that considers multiple potential remedial technologies for each contaminated media (e.g., soil, groundwater). Each of those alternatives are then evaluated individually and collectively – based upon site-specific conditions determined during the nature and extent investigation – to then select a recommended remedial approach. An evaluation of these basic components of possible remedial alternatives is fundamental to evaluating and selecting a remedy:
>
> - Ability of the remedy to protect human health and the environment,
> - Ability of the remedy to control, reduce, or eliminate future releases of contaminants,
> - Long and short-term effectiveness of the remedy and the degree of certainty that it will achieve the required objectives,
> - Feasibility of implementation; and
> - Whether remediation objectives will be achieved within a reasonable period of time.

Id. at 22. This all aids the Board because it is impossible to consider the economic reasonability and technical feasibility of any remedy without first knowing the nature and extent of the contamination. Mark Quarles opinions are specific, detailed, and aid the Board.

III. Mr. Quarles' Discussion of the Weaver Witnesses Qualifications

MWG argues that Mr. Quarles' evaluations of the Weaver witnesses' professional qualifications must be barred. MWG's Quarles Mot., at 6-9. MWG is incorrect, however, because if the testimony can aid the Board, the Board has the discretion to allow it. In the present case, Mr. Quarles' testimony on the Weaver witnesses' qualifications can be helpful to the Board, so the Hearing Officer should allow it.

MWG argues that "There is no doubt that whether an expert is qualified is for the Board to determine." MWG's Quarles Mot., at 7. Even if that issue is for the Board to determine, the Board is not by law required to exclude Mr. Quarles' opinions on the qualifications of the

Weaver witnesses. To the contrary, the Board is given wide discretion on determining whether to permit expert testimony such as Mr. Quarles'. *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *2 (stating that "the Board is given wide discretion in determining whether to permit expert testimony;" (citing *Wiegman*, 308 Ill. App. 3d at 799; *Consolidated Freightways*, 1978 WL 9011, at *5)). Allowing testimony on an issue for the Board to decide does not usurp the Board's function because the Board is not "required to accept an expert's opinion." *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 799 (2d Dist. 1999) ("Because the jury is not required to accept an expert's opinion, allowing him to testify as to the ultimate issue in a case . . . does not usurp the jury's function.") cited in *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *2. In the present case, allowing Mr. Quarles' testimony on the Weaver witnesses' qualifications does not usurp the Board's functions and the Board can decide for themselves whether to accept Mr. Quarles' opinions.

There is no doubt that Mr. Quarles has established himself as an expert on coal ash remediation. His CV indicates that his "Coal combustion waste experience has included investigations for over 100 coal combustion waste disposal sites across the United States, with a particular emphasis on these states: Alabama, Florida, Georgia, Illinois, Iowa, Kentucky, New York, North Carolina, South Carolina, and Tennessee." Quarles Initial Rep., App. A, at 1. His CCR compliance experience includes "expert opinion technical reports, expert testimonies, and comments at public hearings regarding Environmental Impact Statements, CCR Rule compliance, proposed investigations to define the nature and extent of contamination, proposed closure plans, and proposed corrective action measures." *Id.* His CV includes a representative (not comprehensive) list of (1) ten different projects related to CCR; (2) seven pieces of CCR litigation; and (3) several peer-reviewed publications related to CCR. *Id.* at 2-5.

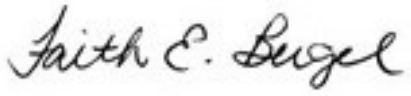
Because Mr. Quarles established himself as a qualified expert on CCR remediation, the question is then whether his testimony is helpful to the Board. "A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions." *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006) cited in *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *3. Mr. Quarles testimony is helpful to the Board because it is informative on the experts' qualifications. However, MWG argues that Mr. Quarles is not "permitted to opine on the credibility of another witness." MWG's Quarles Mot., at 8. Even if Mr. Quarles is not an "expert" on whether the Weaver witnesses qualify as experts, his testimony can still be helpful to the Board. Where a witness may not qualify as an expert to opine on an issue, their testimony can still have "probative value." *Village of Addison, v. Tedio Printing Co.*, 1985 WL 21429, at *5 (Board found witness's noise survey and testimony had probative value even though witness was not a qualified environmental expert). Under such circumstances, the Board can weigh the expert's testimony accordingly. *Graham v. IEPA*, PCB 95-89, 1995 WL 518726, at *4 (Aug. 24, 1995) (Board weighed expert testimony accordingly over Agency's assertion that expert was not qualified). For these reasons, Mr. Quarles' testimony on the Weaver witnesses should be permitted and the Board can weigh Mr. Quarles' testimony accordingly.

IV. Conclusion

For the reasons stated in detail above, Complainants respectfully request that the Hearing Officer deny MWG's Motion *In Limine* to Exclude Quarles Opinions in its entirety.

Dated: March 4, 2022

Respectfully submitted,



Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Gregory E. Wannier
2101 Webster St., Ste. 1300
Oakland, CA 94612
(415) 977-5646
Greg.Wannier@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
802-662-7800 (phone)
ARuss@environmentalintegrity.org

Attorney for Prairie Rivers Network

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 E Wacker Dr, Ste 1600
Chicago, IL 606057
cjones@elpc.org
kcourtney@elpc.org
(312) 673-6500

Attorney for ELPC, Sierra Club and Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.

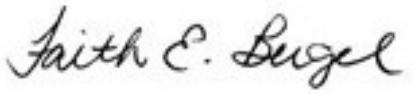
211 W. Wacker, Suite 750
Chicago, IL 60606
312-726-2938
KHarley@kentlaw.iit.edu

Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO RESPONDENT MIDWEST GENERATION, LLC'S MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINIONS** before 5 p.m. Central Time on March 4, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 18 pages.

Respectfully submitted,



Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

PCB 2013-015 SERVICE LIST:

Jennifer T. Nijman
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
jn@nijmanfranzetti.com
kg@nijmanfranzetti.com

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

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org

Gregory E. Wannier
Sierra Club Environmental Law Program
2101 Webster St., Ste. 1300
Oakland, CA
94612
greg.wannier@sierraclub.org

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 E Wacker Dr, Ste 1600
Chicago, IL 606057
cjones@elpc.org
kcourtney@elpc.org

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

Attachment 2

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

PLEASE TAKE NOTICE that I have filed today with the Illinois Pollution Control Board the attached **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER'S RULINGS ALLOWING QUARLES'S OPINIONS AND REDACTING QUARLES'S NOTES**, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

Faith E. Bugel

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Attorney for Sierra Club

Dated: August 10, 2022

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S APPEAL FROM HEARING OFFICER'S RULINGS ALLOWING QUARLES'S OPINIONS AND REDACTING QUARLES'S NOTES

Complainants Sierra Club, Environmental Law & Policy Center, Prairie Rivers Network, and Citizens Against Ruining the Environment ("Complainants") hereby respond to Midwest Generation, LLC's ("MWG") Appeal from the Hearing Officer Ruling's Allowing Quarles's Opinions and Redacting Quarles's Notes ("MWG Appeal"). The Illinois Pollution Control Board ("Board") should uphold the Hearing Officer's July 13, 2022 Order denying MWG's motion to exclude the expert opinions of Mark Quarles (35 Ill. Adm. Code 101.518) because Mr. Quarles's opinions are consistent with the Hearing Officer's September 14, 2020 order "provide more information." In addition, Mr. Quarles's opinions assist the Board because he recommends a process for remedy. The Board should also uphold (1) the Hearing Officer's denial of MWG's motion to exclude certain observations Mr. Quarles made in his expert reports about MWG's experts' credentials (1) the Hearing Officer's granting Complainants' motion to exclude a derogatory statement in Mr. Quarles's notes for the reasons stated below. Finally, in support of

their arguments that the Board should uphold the Hearing Officer's rulings, Complainants incorporate by reference "Complainants' Response to Respondent Midwest Generation, LLC's Motion *in Limine* to Exclude Quarles's Opinions," "Complainants' Motion *in Limin*e to Exclude Certain Documents," and "Complainants' Memorandum In Support Of Motion For Leave To Designate Substitute Expert Witnesses."

A. The Hearing Officer's Orders Allowing Substitution of Expert Witnesses and Denying MWG's MIL Are Not in Error and Are Consistent

MWG argues that Hearing Officer Halloran's July 27, 2022 decision on MWG's Motion *in Limine* regarding Mark Quarles's testimony violates the Hearing Officer's own order of Sept. 14, 2020 allowing substitution of expert witnesses. MWG Appeal at 7-9. MWG suggests that the Hearing Officer somehow misinterpreted or misunderstood his own order. To the contrary, the Hearing Officer is best equipped to interpret his own order.

First, turning to the Hearing Officer's September 14, 2020 Order, the Hearing Officer properly allowed the substitution of Complainant's Expert. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order, at 3 (Sept. 14, 2020) ("Sept. 14, 2020 Order"). The Hearing Officer allowed both parties to identify additional witnesses and concluded that "neither party will be surprised or prejudiced because it will have knowledge of any new expert reports and depose any new witnesses prior to the hearing." Sept. 14, 2020 Order, at 3. As discussed below, the Hearing Officer got the standard for substituting experts right: If the parties will not be surprised or prejudiced, parties may substitute experts. *See People v. Pruim*, PCB 04-207, 2008 WL 4415083, at *3 (Sept. 24, 2008). Just like Complainants, MWG identified multiple new witnesses—four in total, those witnesses provided "more information," just like Complainants' expert, and that information was new, different and outside the scope of testimony that liability phase experts had provided in the record of this proceeding.

MWG misrepresents the Hearing Officer's Sept. 14, 2020 Order on substitution of experts and suggests that it places constraints on remedy-phase expert testimony that are nowhere to be found in that Order.

> The parties may call additional witnesses to provide more information to the Board for the second hearing in this matter. To hold otherwise, I would fail my duty "to ensure development of a clear, complete, and concise record. . . ." Section 101.610 of the Board's procedural rules. The discovery schedule regarding expert witnesses, including reports and depositions, have yet to be determined. If additional witnesses are identified, neither party will be surprised or prejudiced because it will have knowledge of any new expert reports and depose any new witnesses prior to the hearing. Any testimony already given stands and the parties must proceed to build on that information and present more information, including elaboration and amplification.

Sept. 14, 2020 Order, at 3.

MWG ignores the broad language of the Hearing Officer's Sept. 14, 2020 Order, which allows the parties and their substitute expert witnesses and directs the parties to "present more information." Sept. 14, 2020 Order, at 3. The Order allowing expert witnesses to "present more information" does not limit or qualify "more information" with any requirement that such additional information stay within the scope of the liability-phase testimony or reports. In sum, the Order does not limit the parties' new expert witness testimony to either the scope of the prior expert testimony or reports or to just elaboration and amplification of prior expert testimony or reports. Because new expert testimony is not limited in the way MWG argues, Mr. Quarles's reports and opinions are consistent with Hearing Officer's Sept. 14, 2020 Order.

MWG argues that Complainants somehow "misled the Hearing Officer by focusing their argument on the term 'testimony' in the Hearing Officer's Sept. 14, 2020 Order." MWG Appeal at 7. This is a ridiculous assertion. Complainants cannot imagine a scenario where a party could mislead a hearing officer, board, or court by focusing on a term that the adjudicator used in **their own order**. The Hearing Officer stated that "any testimony already given stands." Sept. 14,

2020 Order, at 3. Complainants focused on the word "testimony," among other things because the Hearing Officer used the word "testimony." Complainants' Response to Respondent Midwest Generation, LLC's *Motion in Limine* to Exclude Quarles's Opinions, at 4-7 (March 4, 2022) ("Comp's Response"). What could possibly be misleading about that?

In addition, the Complainants focused on the directive in the Hearing Officer's Sept. 14, 2020 Order that, among other directives, "the parties must proceed to . . . present more information" and Mr. Quarles's reports and deposition testimony build on the "testimony that stands." Sept. 14, 2020 Order, at 3. As pointed out in Complainants' Response to Respondent's *Motion in Limine*, presenting more information does not require the parties to adhere lock step to the previous expert witness's opinions. Comp's Response, at 3-6. Mr. Quarles's reports show that he builds on the testimony, exhibits, and evidence from the liability phase. Mr. Quarles, appropriately, relies heavily on the Board's findings and Interim Order. Quarles Initial Report at 1-13; Quarles Rebuttal Report at 2-3 (containing 100+ citations to the Interim Board Order). Mr. Quarles uses the Interim Board Order as the foundation of and basis for his remedy phase reports. The Interim Board Order obviously includes evidence, such as Kunkel's testimony, that provided the grounds for the Board's decision. As a result, Mr. Quarles's reports, opinions and deposition testimony are all consistent with Dr. Kunkel's hearing testimony and the evidence that is in the record.

Dr. Kunkel's remedy report is not "testimony that stands." Dr. Kunkel's report on remedy is reliable, relevant evidence on remedy in this proceeding; the report, however, is not "testimony." *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, James R. Kunkel, Ph.D., P.E. Expert Report on Remedy for Ground-water Contamination (July 1, 2015) ("Kunkel Remedy

Report", Ex. 5 to MWG's Quarles Mot.).[1] A witness's statements only rise to the level of "testimony" if they are provided under oath. Black's Law Dictionary (11th ed. 2019). Dr. Kunkel's Remedy Report was not provided under oath or penalty of perjury, is not signed, and is not notarized and, therefore, is not testimony. *Id.* Dr. Kunkel's Remedy Report is also not part of the liability-phase record. *See, e.g.*, Comp's Ex. 401 James Kunkel Expert Report, Groundwater Contamination-July 1, 2015; Comp's Ex. 407, Kunkel Expert Rebuttal Report-December 8, 2015; 408, Kunkel Expert Rebuttal Report-March 16, 2016; Resp.'s Ex 412, James Kunkel Supplemental Rebuttal Report- December 8, 2015 (comprising all of Kunkel's reports that are exhibits in the record). Dr. Kunkel's deposition testimony, while it is "testimony", is not part of the formal liability-phase record. Dr. Kunkel provided no hearing testimony on remedy because the Hearing Officer and the Board ordered a separate hearing on remedy. *Sierra Club v. Midwest Generation, LLC*, PCB 13-15, Hearing Officer's Order, at 1 (Feb. 9, 2017); Interim Board Order, at 93 (June 20, 2019). The testimony that is part of the record is Dr. Kunkel's liability hearing testimony. Liability-phase deposition testimony, with respect to remedy, certainly can be relied on for proper purposes (*e.g.*, impeachment of a witness) but, because his deposition testimony was not admitted into evidence at the liability-phase hearing, there is no reason for Dr. Kunkel's deposition phase testimony to bind or limit Mr. Quarles's remedy phase testimony. Sept. 14, 2020 Order, at 3.

In short, Hearing Officer Halloran allowed the substitution of expert witnesses and found that the parties were not prejudiced by the substitution of expert witnesses because there was plentiful time and were opportunities to exchange expert reports and take depositions. Sept. 14,

[1] In addition, it is reasonable for Shefftz to rely on Dr. Kunkel's Remedy Report because Mark Quarles has recommended an iterative approach based around a nature and extent study. Although that approach will ultimately yield the most targeted remedy, by definition it cannot immediately produce a cost estimate. So, Mr. Shefftz reasonably relied on the estimate from Dr. Kunkel's report, which describes a full ash removal approach.

2020 Order, at 3. Further, in allowing elaboration, amplification, building on prior testimony, and **presenting more information**, the Hearing Officer did not require the new experts to adhere to prior experts' testimony. For these reasons, Mr. Quarles's testimony and reports are completely consistent with the Hearing Officer's Sept. 14, 2020 Order and should not be barred.

B. MWG Will Not Be Surprised or Ambushed Because Mr. Quarles is Limited to His Opinions Expressed in His Expert Report and Deposition Testimony.

MWG claims that they will be surprised because they do not know what Complainants are going to seek as remedies. MWG Appeal at 10. MWG is not prejudiced or surprised in the present case, because MWG is on notice of exactly what Complainants expert witnesses will say: MWG has received Complainants' expert reports from Mr. Shefftz and Mr. Quarles, deposed both experts, many months before the scheduled hearing, and have had the opportunity to prepare responsive reports and expert opinions. *See People v. Pruim*, PCB 04-207, 2008 WL 4415083, at *3 (Sept. 24, 2008) (PCB hearing officer denied motion to bar newly-disclosed witness and instead delayed hearing to give movant opportunity to depose witness); *Hartman v. Pittsburgh Corning Corp.*, 261 Ill. App. 3d 706, 720, 634 N.E.2d 1133, 1142 (1994) (holding that party was not prejudiced when 48-day continuance "allowed defendant to depose the witnesses before trial and examine the additional evidence sufficiently to adjust its defense accordingly"). Mr. Quarles's hearing testimony will be consistent with his reports and deposition and likewise with Mr. Shefftz. Based on Mr. Quarles's recommendation for a nature and extent investigation, where an adequate investigation has already occurred and the facts from that investigation support removal, Complainants will recommend removal. For instance, Mr. Quarles discusses the Former Slag/Fly Ash Storage Area at Waukegan, indicating that cap-in-place is not a long-term remedy that will improve groundwater conditions. Quarles Rebuttal

Report at 31.[2] Further, where removal is required as a matter of law, Complainants will also recommend removal.

MWG relies on *Nelson v. Upadhyaya*, but substitution of experts is not even what was at issue in the cited opinion. The substitution of experts is only mentioned in dicta that was recounting the procedural history of the case:

> Shortly before trial an illness made Dr. Eichenwald unavailable to testify. The court permitted plaintiff to identify a substitute expert on pediatric infectious diseases. Plaintiffs named Dr. Roger Barkin as the substitute and arranged for a deposition on the eve of trial. Following the deposition defendants moved to bar Dr. Barkin from testifying in plaintiffs' case in chief because he had reviewed far more material than had Dr. Eichenwald and Dr. Barkin held opinions Dr. Eichenwald had not expressed. The court granted the motion to bar Dr. Barkin's testimony.

Nelson v. Upadhyaya, 361 Ill. App. 3d 415, 417-418, N.E.2d 784, 786–87 (Ill. App. Ct. 2005). At issue in *Nelson v. Upadhyaya* was whether the testimony of defense experts adequately supported the verdict and whether materials that post-dated the doctors' treatment of the plaintiff could be used to establish the standard of care at the time of injury. *See id.* at 422. Further, even the substitution of experts discussed in the procedural history of the case is distinguishable because the element of surprise. In *Nelson v. Upadhyaya*, the defendants did not have an opportunity to depose plaintiff's substitute expert until the eve of trial. *Id.* at 418. At that late date, there would have been no opportunity for defendants to prepare a responsive case to plaintiff's new expert's new opinions and the material he relied on for his opinions.

[2] "As discussed in Section 2.3.5, MWG plans to close the FS/FAS Area by constructing a cap over the wastes that are at least 22 feet below ground and are sometimes saturated. Also, as discussed in Section 2.3.5, that closure method will not prevent continued leaching of CCR constituents to groundwater and in fact, the concentrations might even increase. If the FS/FAS Area is considered to be an active pond according to the CCR Rule and the Illinois CCR regulations, closure-in-place would not be a closure option because CCRs would remain saturated. The only remaining closure option would therefore be closure-by-removal – where MWG would be required to excavate all CCRs and transport them to a lined landfill. MWG's plan to construct a cap is not a long-term remedy that would be expected to improve groundwater conditions." Quarles Rebuttal Report at 31.

MWG seeks to have Mr. Quarles completely barred from testifying yet barring of a party's witness is an extreme measure used in only the most egregious cases of surprise and prejudice. The barring of a party's designated witness has not been "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. . . ." *Appelgren v. Walsh*, 136 Ill. App. 3d 700, 704, 483 N.E.2d 686, 689 (Ill. App. Ct. 2d Dist. 1985) (emphasis added) (citing *Rosales v. Marquez*, 55 Ill. App. 2d 203, 204 N.E.2d 829 (Ill. App. Ct. 2d Dist. 1965); *Miksatka v. Illinois Northern Ry. Co.*, 49 Ill. App. 2d 258, 199 N.E.2d 74 (Ill. App. Ct. 2d Dist. 1964)). Just like in *Nelson v. Upadhyaya* relied upon by MWG, surprise generally occurs when a party discloses a witness after the close of discovery or in the few days or weeks preceding a scheduled hearing or trial. *See Smith v. Murphy*, 2013 IL App (1st) 121839, ¶ 26, 994 N.E.2d 617, 622 (Ill. App. Ct. 1st Dist. 2013). A party is only prejudiced when they will not be able to depose an expert or retain their own rebuttal expert. *Id.* at ¶ 27 ("[T]he disclosure of a new expert would be prejudicial to defendants' case because it would be unlikely that the defendants would be able to depose the new expert and retain their own expert to rebut the plaintiff's new expert so close to trial."). Respondents claim that they are prejudiced because they "tailored" their hearing strategy and cross-examination of Dr. Kunkel in the first hearing in consideration of a second hearing on remedy. MWG Appeal at 3. Complainants question what it means that Respondents tailored their hearing strategy considering that no remedy topics were covered in the liability hearing. Being completely unable to prepare a litigation strategy rises to the level of prejudice which is very different from Respondent's claim of prejudice. *See Firstar Bank v. Peirce,* 306 Ill. App. 3d 525, 532-533, 714 N.E.2d 116, 120 (Ill. App. Ct. 1st Dist. 1999) (explaining that undisclosed expert witnesses are a surprise and

prejudicial when opposing party had no time to prepare or construct trial strategy). In the present case, Complainants disclosed their substituted expert witness and provided his reports years before hearing, and he was deposed more than a year before hearing. MWG was thus given ample time to talk to our expert and prepare a responsive case. MWG is neither surprised nor prejudiced by Mr. Quarles's testimony or opinions.

Barring Mr. Quarles's testimony would harm Complainants far more than any prejudice that Respondent conjures up from allowing Mr. Quarles's testimony to go forward. The Hearing Officer must weigh the effect of barring a witness on the party offering the witness. *Sullivan v. Eichmann*, 213 Ill. 2d 82, 92–93, 820 N.E.2d 449, 454 (2004) ("We further note that a trial court is obligated to consider both the prejudice to the defendant and the detriment caused to the moving party by denial of substitution.") Complainants would be left with no expert who can discuss the mechanics of a remedy at all. That is far more prejudicial than MWG's claimed impact on its "tailored" ligation strategy. In short, there is no surprise because Respondent is on notice as to what each expert will testify to: Mr. Quarles will offer opinions consistent with his reports and deposition, and Mr. Shefftz will offer opinions consistent with his reports and deposition.

C. Quarles's Opinions Aid the Board

MWG argues that Mark Quarles's opinions do not aid the Board. MWG Appeal at 11-13. Mark Quarles's recommended a remedial process with the first step constituting source identification and an investigation, followed by a determination of what to do for each area where coal ash is causing contamination at the sites. Quarles Initial Report, at 17-25 (Jan. 25, 2021). Mr. Quarles's reports make clear where and why more information is needed as part of that remedial process (to identify where there is ash, the depth of ash, contact with groundwater,

and whether ash is causing contamination). *Id.* at 2-17. Quarles's reports do not reject Kunkel's recommended remedy of removal. Quarles's reports simply recommend a remedial process (and explain clearly why this process is necessary and why more information is necessary).

The Board spent more than 9 months and 93 pages clearly and meticulously identifying coal areas for which MWG is liable. Among other things, the Board found MWG liable for not adequately investigating and assessing onsite contamination. *See, e.g.*, Interim Order at 79 (finding that MWG "is not undertaking any further actions to stop or even identify the specific source." (emphasis added); *Id.* ("No further investigation of historic areas is taking place"). It is now impossible for the Board, in determining a remedy, to consider several of the Section 33(c) factors without more information about the source, nature, and extent of the contamination. More specifically, the Board cannot determine whether reducing or eliminating the discharges from certain areas of coal ash, and remedying the numerous open dumping violations, is economically reasonable if the Board does not know how much it would cost to reduce or eliminate those discharges or areas of coal ash. None of the parties can know how much it will cost to reduce or eliminate a discharge or deposit if we do not know the volume of ash, the depth of ash in that area, whether ash is in contact with groundwater, and/or the extent of contamination that area is contributing. As a result, further investigation is needed and Mr. Quarles provides sufficient detail as to what a further investigation looks like.

Identifying more specifically how much and what each source of contamination is contributing is a critical first step. "Source identification is a critical component of a site investigation." Quarles Initial Report at 17. After the sources are adequately identified, additional information needs to be collected to determine how much and what types of ash are present, how much ash is saturated, the migration of contaminants and migration pathways,

conditions of the ash and the aquifer, and the direction of groundwater flow. *Id.* Mr. Quarles went on to point out that the investigation at each station needs to define "the nature and extent of contamination" for each active and historical coal ash areas and Mr. Quarles identified the components of a nature and extent investigation. *Id.* at 24. Mr. Quarles also identified regulatory support for the concept of a nature and extent identification. "Defining the nature and extent of contamination is a basic foundation of any environmental investigation defined by State and Federal regulations." *Id.* at 18; *see also id.* at 21. (citing 40 CFR Part 257.98 (g)(1), 35 Illinois Administrative Code §§ 740.415, 740.420). After a nature and extent investigation, Mr. Quarles recommended a process for selecting a remedy—an alternatives analysis. *Id.* at 22. This all aids the Board because it is impossible to consider the economic reasonability and technical feasibility of any remedy without first knowing the nature and extent of the contamination.

MWG also argues that Mr. Quarles's opinions on the qualification of the Weaver witnesses do not aid the Board. The Board is given wide discretion on determining whether to permit expert testimony such as Mr. Quarles's. *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *2 (stating that "the Board is given wide discretion in determining whether to permit expert testimony;" (citing *Wiegman*, 308 Ill. App. 3d 789, 799 (2d Dist. 1999); *Consolidated Freightways*, 1978 WL 9011, at *5)). Allowing testimony on an issue for the Board to decide does not usurp the Board's function because the Board is not "required to accept an expert's opinion." *Wiegman v. Hitch-Inn Post of Libertyville, Inc.*, 308 Ill. App. 3d 789, 799 (2d Dist. 1999) ("Because the jury is not required to accept an expert's opinion, allowing him to testify as to the ultimate issue in a case . . . does not usurp the jury's function." (cited in *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *2)). In the present case, allowing Mr. Quarles's testimony on the Weaver witnesses' qualifications does not usurp the

Board's functions, and the Board can decide for themselves whether to accept Mr. Quarles's opinions.

Mr. Quarles more than establishes himself as a qualified expert on CCR remediation and his testimony on the Weaver witnesses will help the Board. Quarles Initial Report, App. A, at 1-5. "A person will be allowed to testify as an expert if his experience and qualifications afford him knowledge that is not common to laypersons, and where his testimony will aid the trier of fact in reaching its conclusions." *Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *3 (citing *Thompson v. Gordon*, 221 Ill. 2d 414, 428 (2006)). Mr. Quarles's testimony is helpful to the Board because it is informative on the experts' qualifications. Even where a witness may not qualify as an expert to opine on an issue, their testimony can still have "probative value." *Village of Addison, v. Tedio Printing Co.*, PCB 84-160, 1985 WL 21429, at *5. Under such circumstances, the Board can weigh the expert's testimony accordingly. *Graham v. IEPA*, PCB 95-89, 1995 WL 518726, at *4 (Aug. 24, 1995) (Board weighed expert testimony accordingly over Agency's assertion that expert was not qualified). Mr. Quarles's testimony on the Weaver witnesses should be permitted, and the Board can weigh Mr. Quarles's testimony accordingly.

D. The Hearing Officer's Rulings—Allowing Quarles to Opine on Weaver's Credentials and Excluding Quarles's Remark—Are Consistent and Proper

MWG argues that Mr. Quarles's opinions on the Weaver expert witnesses' credentials should be excluded or, alternatively, the derogatory remark in Mr. Quarles's notes should not be redacted. MWG Appeal at 13-15. To the contrary, the Hearing Officer's rulings on Mr. Quarles's opinions on the Weaver witnesses and on the remark in Mr. Quarles's notes should be upheld. MWG cites *La Playita Cicero, Inc. v. Town of Cicero* to support its argument that Mr. Quarles's opinions on the Weaver witnesses should be excluded. MWG Appeal at 14 (citing 2017 U.S.

Dist. LEXIS 44868, *26-27 (N.D. Ill. Mar. 28, 2017)). MWG claims the *La Playita Cicero* stands for the proposition that the court excluded "expert's general opinions on witness's character and credibility because they were not supported by the facts and would not help the trier of fact." MWG Appeal at 14. However, the Court's actual statement on excluding the witness's testimony is as follows:

> [T]he Court agrees with Plaintiffs that these overbroad statements about Meza's general credibility and character are not supported by the evaluations Jaffe conducted. "[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert." Gen. Elec., 522 U.S. at 146. Because these generalized criticisms of Meza's credibility and character constitute such *ipse dixit* assertions, the Court finds that they are inadmissible under FRE 702.

La Playita Cicero, Inc. v. Town of Cicero, 2017 U.S. Dist. LEXIS 44868, *26-27, 11-CV-1702, 2017 WL 1151066, at *9 (N.D. Ill. Mar. 28, 2017). MWG claims that Mr. Quarles's critiques of the Weaver witnesses are baseless and analogous to *La Playita Cicero* but Mr. Quarles's claims were not *ipse dixit* assertions. *Ipse dixit* assertions are a person's own assertion without any authority or proof. *Ipse dixit*, Wex Legal Dictionary, Legal Information Institute, Cornell Law School (June 2020). In other words, saying an assertion is *ipse dixit* is similar to saying that it is baseless. MWG's own memorandum in support of their appeal indicates, however, that not only do Mr. Quarles's assertions have a basis, they have more than one. Mr. Quarles's observations regarding the Weaver witnesses were (1) based on reviewing the Weaver witnesses' resumes and (2) based on reviewing reports from a case. MWG Appeal at 14. In fact, MWG contradicted its own statements about Mr. Quarles's review of the Weaver witnesses' CCR experience, saying in one sentence that those critiques were based "solely" on reviewing "a resume" and acknowledging in another sentence that, in fact, Mr. Quarles reviewed more than just a resume but also reviewed reports from a case. *Id.* In short, unlike in *La Playita Cicero*, Mr. Quarles's

assertions were not *ipse dixit* but had a basis. In addition, Mr. Quarles had more than one basis to support his claims about the MWG witnesses.

In the hopes of obscuring Mr. Quarles's legitimate criticisms of the Weaver witnesses, MWG labels the critiques of the experts' qualifications as "personal . . . attacks." MWG Appeal at 13. Once again, MWG goes too far. Mr. Quarles stated, for example, that Mr. Dorgan's "resume did not include any CCR related experience or representative projects, nor did it include any project(s) where he served as an expert witness for any CCR related matter. (WCG at 77-79)." Quarles Rebuttal Report at 4. This was the evidence for Mr. Quarles's statement that "Mr. Dorgan has minimal CCR related expertise." *Id.* As far as Mr. Maxwell, Mr. Quarles stated that "In summary, Maxwell has very limited CCR related experience: four projects in 24 years of environmental consulting." *Id.* at 6. Mr. Quarles goes on to say "Mr. Maxwell's role as a testifying expert in this case is especially concerning given that one of his demonstrative example projects was rejected by IDEM and another consulting firm." *Id.* Mr. Quarles explained further that the reason for concern is that the Mr. Maxwell designed a groundwater monitoring system for a project but "the groundwater monitoring system and his determination for upgradient and downgradient well designations were rejected and disapproved by the regulatory agency." *Id.* Mr. Quarles's observations are not abusive like a personal attack, and he provides the evidence to support them. These **are not** personal attacks.

MWG also invents facts out of whole cloth when smearing Mr. Quarles's valid assessment of the Weaver witnesses. *See* MWG Appeal at 14. MWG claims, without any evidence and without any citations, that Mr. Quarles's review of the Weaver witnesses' resumes was "cursory." *Id.* MWG has absolutely no basis for this claim. In fact, Mr. Quarles provided two paragraphs explaining his criticisms of Mr. Dorgan and two pages explaining his criticisms of Mr. Maxwell,

with his criticisms of Mr. Maxwell supported by Mr. Quarles's additional research. *See* Quarles Rebuttal Report at 4-6. This does not constitute a "cursory" review. In short, by mischaracterizing Mr. Quarles's legitimate criticisms of the Weaver witnesses, it is merely an attempt to distract from the compelling foundation for those criticisms.

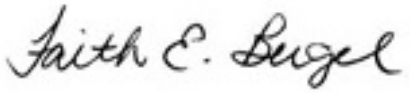
MWG also wants derogatory language allowed into the proceeding. The derogatory language is potentially prejudicial and for that reason, the Hearing Officer correctly concluded, in the July 13, 2022 Order, that language should be kept out of the proceeding. *See* ***Sierra Club v. Midwest Generation, LLC***, PCB 13-15, Hearing Officer's Order, at 16 (July, 13, 2022) ("July 2022 Hearing Officer Order"). MWG assumes that it was Mr. Quarles who labeled the Weaver witnesses with derogatory language when Mr. Quarles notes from his conference calls do not indicate whether he is capturing his own observations or transcribing something someone else said. MWG's assumption as to the speaker has no basis and without knowing who used the derogatory language, the statement has no probative value and cannot go to motive, bias, nature, or credibility as MWG claims. MWG also offers no explanation as to why or how this statement might go towards Mr. Quarles's motives or credibility. Nor does MWG explain why the statement is not prejudicial. Even if the statement might have some probative value, if its prejudicial effect outweighs its probative value, it should be kept out. For these reasons, the Hearing Officer was correct that "Any relevancy arguments fail where the potentially prejudicial effect is outweighed by its probative value. *See generally People v. Serritella*, No. 1-20-0072, 86 (May 20, 2022)." July 2022 Hearing Officer Order at 16.

E. Conclusion

For all of these reasons, the Board should deny MWG's Appeal requesting that the Board reverse the Hearing Officer rulings allowing Quarles's opinions and redacting Quarles's notes.

Dated: August 10, 2022

Respectfully submitted,



Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
(312) 282-9119
FBugel@gmail.com

Peter M. Morgan
Sierra Club Environmental Law Program
1536 Wynkoop St., Ste. 200
Denver, CO 80202
(303) 454-3367
peter.morgan@sierraclub.org

Attorneys for Sierra Club

Abel Russ
Attorney
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
802-662-7800 (phone)
ARuss@environmentalintegrity.org

Attorney for Prairie Rivers Network

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 E Wacker Dr, Ste 1600
Chicago, IL 606057
cjones@elpc.org
kcourtney@elpc.org
(312) 673-6500

Attorney for ELPC, Sierra Club and
Prairie Rivers Network

Keith Harley
Chicago Legal Clinic, Inc.
211 W. Wacker, Suite 750

Chicago, IL 60606
312-726-2938
KHarley@kentlaw.iit.edu

Attorney for CARE

CERTIFICATE OF SERVICE

The undersigned, Faith E. Bugel, an attorney, certifies that I have served electronically upon the Clerk and by email upon the individuals named on the attached Service List a true and correct copy of **COMPLAINANTS' RESPONSE TO MIDWEST GENERATION, LLC'S MOTION FOR INTERLOCUTORY APPEAL FROM HEARING OFFICER'S RULINGS ALLOWING QUARLES'S OPINIONS AND REDACTING QUARLES'S NOTES** before 5 p.m. Central Time on August 10, 2022, to the email addresses of the parties on the attached Service List. The entire filing package, including exhibits, is 19 pages.

Respectfully submitted,

Faith E. Bugel
1004 Mohawk
Wilmette, IL 60091
fbugel@gmail.com

PCB 2013-015 SERVICE LIST:

Jennifer T. Nijman
Kristen L. Gale
NIJMAN FRANZETTI LLP
10 South LaSalle Street, Suite 3600
Chicago, IL 60603
jn@nijmanfranzetti.com
kg@nijmanfranzetti.com

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

Abel Russ
Environmental Integrity Project
1000 Vermont Avenue NW
Washington, DC 20005
aruss@environmentalintegrity.org

Peter M. Morgan
Sierra Club Environmental Law Program
1536 Wynkoop St., Ste. 200
Denver, CO 80202
(303) 454-3367
peter.morgan@sierraclub.org

Cantrell Jones
Kiana Courtney
Environmental Law & Policy Center
35 E Wacker Dr, Ste 1600
Chicago, IL 606057
cjones@elpc.org
kcourtney@elpc.org

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