BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Attached Service List

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

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: February 4, 2022

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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 Jonathan Shefftz Opinions without the Non-Disclosable Exhibits, a copy of which is hereby served upon you was filed on February 4, 2022 with the following:

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

and that true copies of the Notice of Filing, Certificate of Service for Midwest Generation, LLC's Motion *In Limine* to Exclude Jonathan Shefftz Opinions with the Non-Disclosable Exhibits were emailed on February 4, 2022 to the parties listed on the foregoing Service List. The Motion and Non-Disclosable Exhibits have been mailed to the IPCB, Don Brown.

/s/ Jennifer T. Nijman

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

In the Matter of:	)	
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	)	**PCB 2013-015**
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	)	
v.	)	
	)	
MIDWEST GENERATION, LLC,	)	
	)	
Respondent.	)	

MIDWEST GENERATION, LLC'S
MOTION *IN LIMINE* TO EXCLUDE JONATHAN SHEFFTZ OPINIONS

Pursuant to 35 Ill. Adm. Code 101.500, 101.502 and 101.504, Respondent, Midwest Generation, LLC ("MWG"), submits this Motion *In Limine* requesting the Hearing Officer enter an order excluding the Expert Opinions of Jonathan Shefftz because: (1) his economic benefit opinion is not based upon reliable evidence or evidence reasonably relied upon by economic experts; rather, it is predicated on speculative information provided by Petitioners' attorneys and information rejected by Petitioners' groundwater expert and therefore lacks foundation and is otherwise irrelevant; (2) his deterrence opinion wrongly attempts to opine on how the Board should interpret its own regulations and conflicts with Board precedent. Because his economic benefits analysis and deterrence opinions must be excluded, his opinion on MWG's ability to pay for his suggested penalty must also be excluded.

In support of its Motion, MWG states as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Midwest Generation, LLC

By: /s/ Jennifer T. Nijman
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EXHIBIT 1

NON-DISCLOSABLE INFORMATION

AND FILED WITH THE BOARD PURSUANT TO PART 130 OF THE BOARD RULES

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EXHIBIT 2

NON-DISCLOSABLE INFORMATION

AND FILED WITH THE BOARD PURSUANT TO PART 130 OF THE BOARD RULES

Electronic Filing: Received, Clerk's Office 2/04/2022

EXHIBIT 3

NON-DISCLOSABLE INFORMATION

AND FILED WITH THE BOARD PURSUANT TO PART 130 OF THE BOARD RULES

EXHIBIT 4

Electronic Filing: Received, Clerk's Office 2/04/2022

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,)
COMPLAINANTS,)
-VS-)NO. PCB 2013-015
MIDWEST GENERATION, LLC,)(ENFORCEMENT - WATER)
RESPONDENT.)

DISCOVERY DEPOSITION OF

JONATHAN S. SHEFFTZ

CHICAGO, ILLINOIS

OCTOBER 28, 2021

ATKINSON-BAKER, A VERITEXT COMPANY
(800) 288-3376
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REPORTED BY: CHERYL LYNN MOFFETT, CSR NO. 084-002218
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these reports, it's not the US EPA BEN model, correct?

A. Correct.

Q. And this is my understanding, correct me if I'm wrong, it's your own BEN model that's based upon a 1998 US EPA model?

A. Incorrect in two different ways.

Q. Okay. Go ahead.

A. Not my BEN model. It's my economic benefit analysis. And, no, it's not based upon the 1998 version of the BEN model.

Q. It's similar, though, to the US EPA 1998 BEN model, right?

MR. WANNIER: Objection: Mischaracterizes, vague, asked and answered.

THE WITNESS: I mean in one sense it's similar to all versions of the BEN model even predating my involvement with it starting in 1992 going all the way back to the original BEN in 1984.

MS. GALE: Why don't we take a break. Five minutes?

THE WITNESS: Sure.

MS. GALE: Greg?

MR. WANNIER: Jonathan, what do you want? It's up to you.

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A. It doesn't appear like I did.
Q. And --
A. Actually let me go look at my second report and see if I mentioned anything like that.
No, I don't see any reference to a subsequent report by him in my July 2021 report.
Q. Okay. We can certainly go to the pages reviewed, but I believe you state in your report that you reviewed and relied upon Table 6 of Dr. Kunkel's report? Is that correct?
A. I can look at my report to see where I specifically mention that.
So, on Page 22.
Q. Yes.
A. I say specifically -- so, we're on the first bullet point, second sentence. Specifically I used the low-end estimates from Table 6 of the expert report.
Q. Okay. Thank you. Did you rely on anything else in this remedy report for your opinion in your January 2021 report?
A. Yes. I used the date of his report as my cost estimate date. Otherwise, my recollection is that was it.
Q. Okay. And, you know, you do not have an

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

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

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

A. 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.

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

A. No.

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

A. No.

Q. Do you recognize the name of Weaver Consultants?

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

the characterizing of his answers as meandering. I think it's somewhat rude to the witness.

BY MS. GALE:

Q. Go ahead.

A. I'm really puzzled as to what you're getting at here. You asked me for an all encompassing question regarding what aspects of the case I discussed with petitioners' counsel, and then you said you want to kind of be more focused, but it appears to be the same question again. I'm -- I'm really confused as to what you're trying to get at here.

Q. You discussed Dr. Kunkel's report, Exhibit 6 that we just discussed. Is that correct?

A. Yes.

MR. WANNIER: Objection, vague.

BY MS. GALE:

Q. Okay. And you discussed the corrective actions recommended by Dr. Kunkel. Correct?

MR. WANNIER: Objection, vague.

THE WITNESS: Broadly speaking, yes.

BY MS. GALE:

Q. Okay. And petitioners' counsel directed you to Table 6. Right?

MR. WANNIER: Objection to the extent it

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sites."

So, that corresponds to Column I and O respectively in Table 3 on Page 25. By contrast, the bullet point that you originally were asking me about, the cost estimate dates, that's just always July 2015 based upon the date of the Kunkel report. It's much, much easier. So, that actually was not relied upon the information from petitioners' counsel, it's just the date of Dr. Kunkel's report. Sorry about that.

Q. Thank you. No, thank you for the clarification.

So, on to that second bullet, the expenditure dates on Page 22. So, I think you just -- you just answered that.

So, you state in the second sentence, "The schedule is based on information that petitioners' counsel provided me in response to my request." Do you see that there?

A. Yes.

Q. And right before that, sorry, is the phrase, "Based on a ten-year cleanup schedule at each of the four sites." Right?

A. Yes.

Q. And that's the schedule you're talking about

in the second sentence?

A. Both, yes, both the number of years of the schedule and when the start date should be for each schedule.

Q. Okay. What is your basis for using ten years?

MR. WANNIER: Objection: Asked and answered, mischaracterizes.

MS. GALE: I don't know how I've asked this before.

MR. WANNIER: You can answer the question.

THE WITNESS: The answer is the second sentence that we've just been reading. "This schedule is based on information that petitioner's counsel provided to me in response to my request."

So, I said, "Okay. We have these total costs. What's the expenditure pattern and timing look like?" And I was told ten years, and here are the start dates for both the on-time scenario and the delayed-compliance scenario.

BY MS. GALE:

Q. So, you have no independent opinion on the start date. Right?

A. That's correct --

Q. And you're --

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A. I'm still talking, please.

Although I didn't repeat it in this bullet point, it's the same as in the prior bullet points where I write both as I am an economist, not an engineer, I have no independent expert opinion on the cost estimates prepared in that report. So, same thing here regarding the ten-year schedule, both number of years and the timing of it.

Q. And I think you answered this, but I just want to make sure because that answer was long. I want to make sure. You said timing of ten years. I think my question was you have no opinion on the start date. That's also true?

A. Correct.

Q. Okay. And you do not plan to have an opinion on the start date. Correct?

A. I -- I have a hard time envisioning any scenario under which I develop an opinion on the start date.

Q. Very good. And you don't plan to have an opinion on the ten years either. Correct?

A. You never --

MR. WANNIER: Objection, asked and answered.

THE WITNESS: You never know what might happen

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time.

THE WITNESS: I'm really confused as to what's being asked here. I mean this -- we keep trying to pick this apart, but --

BY MS. GALE:

Q. I just want to understand. So, you had said --

A. I'm still talking. I'm trying to answer your questions here.

I thought I had a complete explanation of this in the three sentences that comprise this bullet point. Whether -- and I understand how that can be disputed on the technical engineering merits of it, which I think we all understand is beyond the scope of my expertise and hence my opinion, but what I'm explaining here is that even if these costs have been undertaken, if petitioners say that they would have been undertaken regardless of whether or not the measures in the Kunkel report were undertaken, then, no, it doesn't enter into my analysis. Were I to add it to Table 3, these costs would be added under both the on-time and the compliance scenario with the same dates. And if what is in a mechanical kind of point of view if, turning to my Table 3, if the -- all the figures in I through N are exactly the same as what's

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in O through T, then it doesn't affect the analysis at all. So, what's the point of doing that?

Q. All right. And just so I follow, that's what you mean by a wash in that bullet?

A. Yes. Apologies if I was unclear. I just meant that it ended up being exactly the same. I mean there are all sorts of things we can throw in there that are the same. But just like, say, in contract damages cases where you have a cost of cover calculation, there are all sorts of things that you don't have to worry about if they are the same, which means both the on-time and delayed compliance scenario you don't have to analyze them.

Q. Okay. And for this ash liner cost, other than petitioners' counsel, did you talk with anyone else on whether these measures would have needed to be taken or not?

A. No.

Q. Okay. Third bullet on Page 14, which is about Table 4 from the Koch report for Midwest Gen incurred groundwater monitoring costs. Do you see that?

A. Yes.

Q. And it says here again, "Which petitioners once again informed me would have needed to be undertaken

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even had respondent already achieved that compliance." Do you see that there?

A. Yes.

Q. And I take it your answers for the other bullets are the same here. Correct?

MR. WANNIER: Objection, compound.

THE WITNESS: If you mean by that any sort of outside verification of these positions, then same answer. I did not. I'm not trying to be that guy. So.

BY MS. GALE:

Q. Okay. Continuing on to page -- well, kind of skipped over. So, bottom of 14, the paragraph starts with, "Regarding the compliance-related date," and continues on to 15. Do you see that?

A. Yes.

Q. And here you are taking issue with Ms. Koch for her dates of non-compliance. Is that right?

MR. WANNIER: Objection to the extent it mischaracterizes.

THE WITNESS: Yes, I'm addressing the disparity between -- disparity between our respective dates.

BY MS. GALE:

Q. And you have a quote here from the February 6,

ongoing.
BY MS. GALE:
Q. I think you -- well, let's look. I think you said as violations continue my numbers will change. Isn't that correct?
MR. WANNIER: Where? Sorry. Where is that phrase?
BY MS. GALE:
Q. I'm looking for it. Page 15 of your opinion.
A. Which opinion? Which report?
Q. Page 15 of Exhibit 2, your second.
A. Okay.
MR. WANNIER: And where -- sorry. Where on that page does it say as these violations continue?
BY MS. GALE:
Q. Okay. I'll read it. "Because I understand from petitioners' counsel that respondent continues to be in violation of the act." Do you see that there?
A. Yes.
Q. Okay. So, these dates and this Board opinion, you've not included these dates into your economic benefit opinion, have you?
MR. WANNIER: Objection, asked and answered. I think the testimony speaks for itself. You can answer.

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petitioners' counsel for the dates. Correct?

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

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

BY MS. GALE:

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

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

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

BY MS. GALE:

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