BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

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

NOTICE OF FILING

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

Attached Service List

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

MIDWEST GENERATION, LLC

By: /s/ Jennifer T. Nijman

Dated: March 18, 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 and Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion in Limine to Exclude Quarles Opinion, a copy of which is hereby served upon you was filed on March 18, 2022 with the following:

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

and that true copies of the Notice of Filing, Certificate of Service and Midwest Generation, LLC's Motion for Leave to File, *Instanter*, Its Reply in Support of Its Motion in Limine to Exclude Quarles Opinion were emailed on March 18, 2022 to the parties listed on the foregoing Service List.

/s/ Jennifer T. Nijman

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MIDWEST GENERATION, LLC'S MOTION FOR LEAVE TO FILE, *INSTANTER*, ITS REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINION

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

1. In their Response to MWG's Motion *in limine* to exclude Quarles Opinion ("Response"), Complainants incorrectly state that the Hearing Officer's September 14, 2020 order ("Order") allowed them to submit a new expert opinion without regard to the prior opinions submitted by their original expert, Mr. Kunkel. Complainants attempt a tortured reading of the Order that must

be addressed. In addition, while Complainants argue that MWG is not prejudiced by this new, inconsistent expert, Complainants ignore the material prejudice caused by Complainants' diametrically opposed positions for two of its experts. For Mr. Quarles, Complainants argue that the Kunkel remedy opinion must be ignored, yet for Mr. Shefftz, Complainants rely on Mr. Kunkel's remedy to develop cost opinions. It is entirely unclear which remedy Complainants will advance at hearing, resulting in "trial by ambush" and unfair surprise.

2. On February 4, 2022, MWG filed its Motion *in Limine* to exclude the opinions of Mark Quarles because his opinions are: (i) in violation of the Hearing Officer's Order stating that "any testimony already given stands and the parties must proceed to build on that information," including to elaborate and amplify; (ii) his opinions do not assist the Board because they do not recommend a remedy; and (iii) his derogatory statements about MWG's experts do not assist the Board because his opinions on their qualifications have no basis..

3. On March 4, 2022, Complainants filed their Response to MWG's Motion *In Limine* to Exclude Quarles Opinions.

4. In their Response, Complainants attempt to argue that the Hearing Officer's statement that "*any testimony already given stands*" in the Order should be read to mean only "hearing testimony" (emphasis added), and thus their new expert Mr. Quarles should be able to ignore the prior opinions of Mr. Kunkel. But the Order does not say "hearing testimony" – it says, "ANY testimony" and there is nothing to suggest that the Order intended such a limitation on the term "testimony." Rather, the legal definition of "testimony" includes testimony at a trial *or deposition*. In this case, Mr. Kunkel's deposition testimony, which included detailed questions about his remedy and included his remedy reports, are a part of his "testimony" and cannot be ignored.

5. This is consistent with the remaining language of the Order, in which the Hearing Officer states that, "the parties must proceed to build on that information" (referring back to "any testimony") and present more information, including elaboration and amplification. Again, Mr. Quarles did not build on anything – he admits in his deposition that he did not rely on Mr. Kunkel's opinions in any way. Accordingly, Mr. Quarles's contradictory opinion and proposed first step (not even a remedy) to investigate the MWG Stations is in violation of the Hearing Officer's order and must be excluded.

6. Strangely, Complainants have apparently not rejected Mr. Kunkel's Remedy report when it is convenient. Complainants' economic expert Mr. Shefftz relies on Mr. Kunkel's proposed remedy – and not Mr. Quarles's report – for his opinion on economic benefit. This is exactly the type of confusion that MWG predicted when it objected to Complainants' motion to substitute their expert in 2020. *See* MWG's Response to Complainants' Motion to Designate Substitute Expert Witnesses, April 15, 2020, p. 14.

7. Mr. Kunkel and Mr. Quarles have conflicting opinions – yet because Mr. Kunkel is no longer a witness in the case, and because Mr. Quarles did not review or rely on the Kunkel opinions, there is no one to testify as to these conflicts. Mr. Quarles does not even mention Mr. Kunkel in his opinions or reports.

8. MWG does not know which remedy Complainants are suggesting – is it the complete removal recommended by Mr. Kunkel (and adopted by Mr. Shefftz)? Or the investigation recommended by Mr. Quarles? Also, if Complainants are only suggesting an investigation at this time, are Complainants envisioning that the parties return for more hearings on the investigation, and then another hearing following the results of the investigation? MWG is

materially prejudiced by not knowing which remedy Complainants are recommending to the Board and being subject to multiple hearings not contemplated by the Board.

9. Finally, Complainants wrongfully claim that there is authority to support their contention that Mr. Quarles's baseless aspersions about MWG's experts' qualifications are helpful to the Board. Each of Complainants' cited "authority" is inapplicable, and has nothing to do with an expert evaluating an opposing expert's qualifications. More importantly, Complainants improperly cite, multiple times, to a party's argument in the response brief of an unrelated matter. Complainants' Response uses the following cite: "*Johns Manville Corp. v. Illinois Dep't of Transp.*, 2016 WL 758049, at *2." Without even explaining that the citation does not refer to a court, Board or Hearing Officer order, Complainants inappropriately suggest that this citation to a response brief, in a wholly unrelated case, is a basis of support. The reference and citation are improper and highly questionable.

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

11. MWG respectfully submits that the filing of the attached Reply will prevent material prejudice and injustice by addressing Complainants' new and contrived reading of the Hearing Officer's Order, detailing the internal inconsistencies between Mr. Quarles (who ignores Kunkel's opinions and testimony) and Mr. Shefftz (who adopts Mr. Kunkel's remedy estimates), explaining that the two conflicting remedy opinions (Mr. Kunkel vs. Mr. Quarles) will cause MWG unfair surprise at the hearing on remedy (and potentially multiple hearings), and pointing out Complainants' false citation.

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

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

Respectfully submitted,

MIDWEST GENERATION, LLC

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

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MIDWEST GENERATION, LLC'S REPLY IN SUPPORT OF ITS MOTION *IN LIMINE* TO EXCLUDE QUARLES OPINIONS

Mr. Quarles's "remedy" opinion must be excluded because it violates the Hearing Officer's order to provide "more information" and stating that "any testimony already given stands" and directing the parties to "build upon that information." Mr. Quarles readily admitted that his opinion has nothing to do with Mr. Kunkel's Remedy opinion, reports, or deposition testimony, that he never reviewed or relied on any of Mr. Kunkel's reports or testimony, and that he does not build on or even mention Mr. Kunkel's remedy of complete removal. Moreover, MWG is highly prejudiced because Complainants take the exact opposite position for their economic expert, Mr. Shefftz. Complainants actually provided Mr. Shefftz with Mr. Kunkel's remedy opinions for the express purpose of having Mr. Shefftz rely on the Kunkel proposed remedy as the basis for his economic benefit opinions. Complainants cannot have it both ways.

Complainants' Response makes clear that they do not consider Mr. Kunkel's Remedy report to be "in the record," apparently attempting to justify that Mr. Quarles ignored every aspect

of Mr. Kunkel's remedy opinions. Complainants conveniently avoid the fact that the Mr. Kunkel's supplemental expert reports, that further detail his remedy, ARE in the record – and both were still ignored by Mr. Quarles. *See* Hearing Exs. 407, pp. 11-12 and 412, pp. 11-12.

In addition, the Hearing Officer should exclude Mr. Quarles's baseless aspersions about the Weaver consultants' qualifications. Mr. Quarles' derogatory statements about other experts have no place in this proceeding. They are based solely on a cursory review of a resume, without ever having worked with or met the Weaver consultants, without speaking to other consultants about them, and without having even reviewed Weaver's deposition testimony. The statements are unprofessional and provide nothing to aid the Board.

MWG notes that Complainants' Response fails to include page numbers, in violation of Board rules, and making citations to the Response difficult. If MWG mistakenly refers to an incorrect page of the Response, MWG asks that the Board require Complainants to refile their Response with page numbers included so there is no confusion going forward.[1]

A. Complainants' Presentation of Two Contradictory Opinions Expressly Violates the Hearing Officer's Order

The Hearing Officer's Sept. 14, 2020 Order ("Order") was not limitless and certainly did not allow Complainants to present an entirely new opinion that completely ignores Complainants' original expert. Complainants' assertions in their Response disregard the words of the Order and selectively quote statements out of context. The Hearing Officer's Order first states that the parties may call "additional witnesses to provide *more* information to the Board." The Order then states that, "*Any testimony* already given stands and *the parties must proceed to build on that information*

[1] Complainants' failure to follow the procedural rule – "All pages in the document sequentially numbered" is an additional unnecessary burden to MWG, the Hearing Officer, and the Board. 35 Ill. Adm. Code 101.302(g) (emphasis added). Two of Complainants four Responses failed to include page numbers – this Response, and Complainants' combined Response to MWG's Motions to Exclude Consideration of Remedy at the Historic Ash Areas. The Hearing Officer could reject both documents on that basis alone.

and present more information, including elaboration and amplification." Order of 9/14/20 (emphasis added).

Complainants falsely assert that the words "*Any testimony*" in the Order means only testimony from the first hearing in this proceeding. That is not the language of the Order, is not consistent with the remaining words, and is not consistent with the arguments and issues before the Hearing Officer leading to his Order. The Hearing Officer specifically did not use the words "hearing testimony," and instead used "*Any* testimony." To suggest that the word "any" is somehow limited to testimony in the hearing is simply false and misleading. Even the Black's Law Dictionary, repeatedly relied upon by Complainants for their Response, specifically includes in the definition of "testimony", evidence given "at trial or in an affidavit *or deposition*." Comp. Resp. p. 4 (emphasis added). In this case, Mr. Kunkel's deposition testimony expressly included detailed discussions of his proposed remedy, and all three of Mr. Kunkel's reports that were the subject of the deposition questions, including his remedy report, were part of the deposition testimony. There is no question that Mr. Quarles violated the Hearing Officer's order by ignoring Mr. Kunkel's "testimony" that already stands.

Additionally, the Hearing Officer's Order states that the parties must proceed to "build on that information," referencing back to the words "any testimony." Sept. 14, 2020 Hearing Officer Order. Mr. Quarles does nothing of the sort. Mr. Quarles completely ignored Mr. Kunkel's previous opinions, never read his testimony (at hearing or from the deposition), and made no attempt to build on, elaborate or amplify Mr. Kunkel's opinions. See Quarles Dep. p. 54:21-55:5, attached as Ex. 1. By flat-out refusing to even reference Mr. Kunkel's remedy opinions and testimony, Mr. Quarles did not remotely "build on the information." Again, this is a clear and direct violation of the Hearing Officer's Order.

Complainants cannot feign surprise over this clear reading of the Order. The Hearing Officer's Order is consistent with MWG's position and relevant caselaw stating that substitution of an expert is not an opportunity to introduce new and difference theories. See MWG Response to Complainants' Motion to Designate Substitute Expert Witnesses, 4/15/20, p. 14, *citing, Nelson v. Upadhyaya,* 361 Ill. App. 3d 415, 417-18, 836 N.E.2d 784, 786-87 (1st Dist. 2005); *Ind. Ins. Co. v. Valmont Elec., Inc.*, 2001 U.S. Dist. LEXIS 23256, at *4 (S.D. Ind. Dec. 27, 2001); *United States for the Use & Benefit of Agate Steel, Inc. v. Jaynes Corp*., 2015 U.S. Dist. LEXIS 45379 (D. Nev. Apr. 6, 2015). MWG's objections to Complainants' motion to replace Mr. Kunkel were based upon the exact situation we are now faced with here.

What is even more astounding, is that Complainants want to ignore Mr. Kunkel's remedy opinions here, but then purposefully provided the Kunkel Remedy report to their economic benefit expert, Mr. Shefftz. Mr. Shefftz relies solely on the Kunkel remedy opinions and costs for his estimate of economic benefit. Ex. 2, Shefftz Table 3, Ex. 3, Shefftz Dep. p. 59:6 – 60:23. Complainants seem to have no explanation for these directly opposing positions. Are Complainants seeking a removal action as opined by Mr. Kunkel, relied upon by Mr. Shefftz, but rejected by Mr. Quarles? Or is Mr. Quarles entitled to ignore the previous expert testimony, rendering irrelevant all of MWG's prior work to prepare for this case, and instead take three steps backward and present a new, vague recommendation for an undefined investigation? Do we accept Mr. Quarles' opinions? Or those of Mr. Shefftz (who relies on Kunkel)?

B. MWG is Highly Prejudiced By the Two Contradictory Opinions

Complainants' presentation of two contradictory opinions highly prejudices MWG. Mr. Kunkel's remedy was complete removal of CCR at the MWG Stations. Pursuant to the discovery schedule, MWG had an opportunity to interrogate that remedy during Mr. Kunkel's deposition. Now, Complainants' new expert, Mr. Quarles, is not presenting a remedy. Instead he recommends

an investigation at each of the Stations. Comp. Quarles Resp., p. 9. Mr. Quarles admitted during his deposition that he has no idea of the scope or size or locations of his proposed investigations. Ex. 1, pp. 83:6-8, 105:22-106:1, 106:17-19. Nor did he review Mr. Kunkel's report that specifically stated that the existing investigations at the Will County and Waukegan Stations were already sufficient to develop a remedy. *Id.* p. 54:4-8. Mr. Kunkel stated that both Stations have sufficient soil borings and groundwater monitoring wells to adequately characterize the thickness of coal ash-impacted soils and the groundwater impacts. Ex. 4, Kunkel Remedy Rpt. Pp. 7-8. He concluded that no additional soil borings or groundwater monitoring was required for his recommended remedy. *Id.* Mr. Quarles is thus completely unaware of the fact that Mr. Kunkel reviewed the boring and groundwater data at the Stations, made an assessment of the groundwater monitoring, ash areas and quantity, and for at least two Stations concluded no further investigations were required. Mr. Quarles also admitted he did not review Mr. Kunkel's hearing testimony, in which he specifically testified to many issues that are relevant to the remedy hearing. For example, Kunkel agreed at the hearing that MWG's stations have no impact on offsite drinking water, and that the concentrations at wells downgradient of the Former Ash Basin at the Powerton Station were below the Class I standards. 10/27/17 Hearing Tr. pp. 181:4-182:7, 210:16-22. Because he did not even review the hearing testimony (Ex. 4), Mr. Quarles presents a new opinion that requires MWG to begin again. Though Complainants would argue that MWG can cross examine Mr. Quarles at the hearing, MWG was unable to do so during his deposition because Mr. Quarles had no basis to testify as to the prior opinions by Mr. Kunkel, having not reviewed or relied on them. Ex. 4. The same will occur at hearing -- Mr. Quarles will have no basis to analyze Mr. Kunkel's prior opinions having never reviewed them.

At this point in the case, when the second phase of discovery is long closed, MWG now has no indication which remedy the Complainants will present at the next hearing. Both? Possibly neither? Illinois does not permit "trial by ambush" and Complainants' suggestion that there is no prejudice is wrong. Because Complainants are not suggesting a remedy now, but still relying upon a remedy previously presented when it is convenient to them, MWG will be surprised and prejudiced by whatever remedy Complainants present at the hearing, and whether Mr. Quarles disagrees with the conclusions Mr. Kunkel has already made.

MWG is also prejudiced because it appears that Complainants see the remedy hearing as not the end, but the beginning of at least two more phases of hearings. Complainants state that Mr. Quarles recommends "a process for selecting a remedy." Comp. Quarles Resp., p. 11. If the Board were to order an investigation, as suggested by Mr. Quarles, Complainants likely would ask the Board to assess the scope of that currently unknown investigation (which likely will be disputed by the parties), and then, once the investigation is complete, order the Parties to return for ***another*** hearing based on the results of the investigation to potentially determine a remedy at each Station. That is absurd and not in compliance with the Board's Order. The Board ordered the Parties to proceed to a hearing on remedy. *Sierra Club v. Midwest Generation LLC*, PCB13-15, Feb. 6, 2020 Order. MWG prepared and submitted expert opinions that include a proposed remedy based on over ten years of sampling data from the Stations. Complainants' failure to similarly present a remedy to the Board violates the Board Interim Order and it is prejudicial to MWG to subject MWG to multiple hearings on a remedy.

Complainants' claim -- that there is little authority barring the exact tactic taken by Complainants here -- has no merit because no other party has been so bold as to entirely change their expert and the expert opinion in the middle of litigation. The authorities Complainants rely

upon are of no support because none allow a party to replace an expert with a new expert who is inconsistent with and conflicts with the original expert. For instance, in *People v. Pruim*, PCB04-207 (Sept. 24, 2008), the Complainant never submitted an expert opinion so there was no conflict between two experts, and the new expert worked with the original expert indicating that the opinions were substantially similar. *Id.* at 4. In *Firstar Bank v. Pierce*, 306 Ill. App. 3d 525, 535. (1st Dist. 1999), the plaintiffs' testifying expert did not change, instead he stated an undisclosed opinion at the trial. In *Smith v. Murphy*, 2013 IL App (1st) 121839, ¶20, 994 N.E.2d 617, 621 (1st Dist. 2013), the court barred the new expert because plaintiff's disclosure of the replacement was untimely.

The remaining cases Complainants cite are irrelevant because they rely upon inapplicable Illinois Supreme Court rules, including Rule 220 and even older rules.[2] The applicable rule requiring disclosure of expert opinions is Rule 213. Rule 213 is stricter than the older rule 220 and does not allow a party to name a previously undisclosed expert. "Rule 213 establishes more exacting standards regarding disclosure than did Supreme Court Rule 220…which formerly governed expert witnesses. Trial courts should be more reluctant under Rule 213 than they were under former Rule 220(1) to permit the parties to deviate from the strict disclosure requirements, or (2) not to impose severe sanctions when such deviations occur. Indeed, we believe one of the reasons for new Rule 213 was the need to require stricter adherence to disclosure requirements." *Seef v. Ingalls Mem'l Hosp*., 311 Ill. App. 3d 7, 21-22, 724 N.E.2d 115, 126 (1st Dist. 1999), quoting *Dept. of Trans. v. Crull*, 294 Ill. App. 3d 531, 538-39 (1st Dist. 1998).

[2] Those cases are: *Appelgren v. Walsh*, 483 N.E.2d 686 (2nd Dist. 1985); *Rosales v. Marquez*, 55 Ill. App. 2d 203 (2nd Dist. 1965); *Miksatka v. Illinois Northern Ry. Co.*, 49 Ill. App. 2d 258 (2nd Dist. 1964); *Hartman v. Pittsburgh Corning Corp.*, 261 Ill. App. 3d 706 (5th Dist. 1994); Complainants should know that these cases are outdated and irrelevant because MWG specifically identified their irrelevance in its *Response to Complainants' Motion to Designate Substitute Expert Witnesses*, dated April 15, 2020, p. 7, n. 4.

Here, there is a clear conflict between Mr. Quarles's opinion and Mr. Kunkel's previous opinion. Not only do they recommend different remedies, but Mr. Kunkel specifically stated that the existing data for at least two of the Stations was already sufficient to develop a remedy (Ex. 4, pp. 7-8). Mr. Kunkel also reviewed boring data and determined that he was able to develop a remedy. As such, Mr. Kunkel opined that additional investigation, as posited by Mr. Quarles, is not required. Further, Mr. Kunkel rejected a remedy that Mr. Quarles believes could be viable. *Compare* Ex. 2 to MWG's Quarles Motion, p. 25 to Ex. 6 to MWG's Quarles Motion (Mr. Kunkel rejects pump and treat as a remedy and Mr. Quarles speculates that it is a potential remedy). Additionally, all of the questions Complainants pose on page 10 of their Response were answered by Mr. Kunkel, certainly for the Waukegan and Will County Stations, based on his review of the data. Because Complainants have submitted two conflicting expert opinions and rely on both of them, MWG will be highly prejudiced if Mr. Quarles's opinion is allowed. Accordingly, the Hearing Officer should exclude the opinion.[3]

C. Mr. Quarles' Baseless Personal Attacks on the Weaver Experts Must Be Excluded

Complainants' claim, that Mr. Quarles' "opinions" on the expertise of the Weaver consultants will somehow assist the Board, is baseless. Complainants identify no authority that allows an expert to opine on the qualifications of an opposing expert, and certainly not when the alleged "opinion" is based on nothing but a resume and an internet search. Instead, their authority exclusively concerns whether an expert is qualified to testify on the *subject of the case*. In *Wiegman v. Hitch-Inn Post*, 308 Ill. App. 3d 789, 799 (2nd Dist. 1999), the court allowed the expert to testify

[3] Complainants also falsely state that the Board found MWG "liable" for not investigating its Stations. Comp. Resp. p. 9. The Board made no such finding. On page 79 of its opinion, the Board made observations as part of its evaluation of whether there was a release of contaminants. *Interim Order*, p. 79. The Board did not cite to any regulation or statute requiring investigations (nor does Complainants' complaint claim it) and did not make a finding of liability for a purported lack of investigation based on any alleged violation of the Act. 415 ILCS 5/*et seq.*

on the type of flooring that the plaintiff fell on. Similarly, in *People v. Consolidated Freightways Corp. of Delaware et al*., PCB76-107 (Oct. 4, 1978), *slip op.* p. 7, the Board accepted the testimony of an expert on the physical and chemical effects of certain material. In *Thompson v. Gordon*, 221 Ill. 2d 414, 418, 429 (2006), the court upheld the admission of an expert witness even though he was not licensed in Illinois, but the criticism of the expert's qualifications came from the parties, *not* another expert. In *Village of Addison v. Tedio Printing Co.*, PCB 84-160 (July 19, 1985) *slip op.* at 6, the Board found the non-expert's probative value was in the data he collected for the noise survey.[4] Finally, in *Graham v. Illinois EPA*, PCB95-89 (Aug. 24, 1995), *slip op.* p. 6, the Illinois EPA did not object to the complainant's expert's qualifications, only that Illinois EPA was not given an opportunity to voir dire the expert prior to his testimony and asked the Board to weigh his testimony accordingly.

In what can only be seen as misleading the Hearing Officer, Complainants cite to a party's advocacy brief in a different case as support, and not to a Board or Hearing Officer decision, without even noting the distinction. Complainants cite three times to the case of *Johns Manville Corp. v. Illinois Dept. of Transp*, without providing a Board Docket Number or the date, only a Westlaw citation. The citation, itself, is incomplete and improper. The only case in front of the Board with that name is *Johns Manville v. Ill. Dept. of Transp.*, PCB14-3. The Westlaw citation provided by Complainants indicates a date of 2016. While the Hearing Officer issued an order on April 26, 2016 for PCB14-3, regarding the parties' motions in limine of expert opinions, that April 26th order does not include the quote Complainants cite, nor does it reference the cases

[4] Complainants failed to provide the Board docket number and date for *Village of Addison v. Tedio Printing Co*. MWG assumes that Complainants are citing to the July 19, 1985 order in PCB84-160. But, as discussed further below, because Complainants rely upon a party's response as authority in support of their Response, it is equally possible that Complainants are similarly relying upon something other than a Board or Hearing Officer order for this case. It is impossible to tell.

Complainants' now cite – *Wiegman* or *Consolidated Freightways*. *Johns Manville v. Illinois Dept. of Trans*, PCB14-3, Hearing Officer Order, April 26, 2016, p. 3 (B. Halloran). The Hearing Officer's Order is attached as Ex. 5. Instead, Complainants' three citations are from the ***response brief*** filed by the complainant in that matter (Johns Manville). *See Johns Manville v. Illinois Dept. of Trans.*, PCB14-3, Complainant's Response to Respondent's Motion *in Limine* to Bar Certain Opinion Testimony, Feb. 16, 2016, p. 4. The *Johns Manville* matter has nothing to do with this matter – it has different parties, different issues, and concerns private cost recovery due to another party's violations of the Act. *Id.*, Dec. 15, 2016 Board Order, p. 21. It is basic legal and ethical practice that a motion or response brief, presented in unrelated matter, with wholly unrelated parties and issues, is not authority that anyone may rely upon. Complainants did not identify that the citation was from a response brief, and Complainant's suggestion that the Johns Manville response is somehow authority for the Hearing Officer to follow is misleading at best.

In any case, the Johns Manville response does not support Complainants. In that case, the issue concerned whether testimony from Johns Manville's expert was a legal conclusion. *Id.* The Hearing Officer denied the motion, holding that Johns Manville's expert's opinion did not amount to a legal conclusion and could assist the Board. Ex. 5, p. 3.

Here, Complainants provide no support that Mr. Quarles has the knowledge or basis to opine on the qualifications and experience of other experts. His opinions, based exclusively on a review of a resume and an internet search, are not beyond an ordinary citizen, and thus are of no use to the Board. He does not know the Weaver experts, has never met them, has never worked with them, and does not report having spoken to anyone about them. Accordingly, Mr. Quarles's baseless aspersions on the Weaver Experts' qualifications are unreliable and must be excluded from the record.

D. CONCLUSION

MWG respectfully requests that the Hearing Officer exclude Mr. Quarles's report because it is in violation of the Hearing Officer's Order and because Complainants have submitted conflicting remedy opinions resulting in prejudice to MWG. If the Hearing Officer accepts Complainants' argument that Mr. Quarles may ignore Mr. Kunkel's remedy opinions and prior testimony, then the Hearing Officer has no choice but to exclude Mr. Shefftz's opinion which is based upon Mr. Kunkel's remedy. Additionally, MWG requests that the Hearing Officer exclude Mr. Quarles's baseless opinions on the Weaver Consultants. It is of no aid to the Board and prejudicial to MWG and Weaver to allow baseless and derogatory "opinion" testimony to remain in the record.

Respectfully submitted,

MIDWEST GENERATION, LLC

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

Jennifer T. Nijman
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EXHIBIT 1

ILLINOIS POLLUTION CONTROL BOARD

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

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

Reported by: Connie L. James
CSR No. 084.002510

A. Yes.
Q. And Mark Quarles, P.G. --
A. Can you blow that up?
Q. Yeah. And the Mark Quarles, P.G., listed as an author, that's you, right?
A. It is, yeah.
Q. Did you ever question or formally renounce any of the conclusions in this report?
MR. WANNIER: Objection. Vague.
THE WITNESS:
A. I have no idea. I don't recall ever renouncing anything, but I don't recall that report that was written fifteen years ago, the particulars of it.
MS. NIJMAN:
Q. Are you aware that Dr. Anne Maest renounced the conclusions in the report?
A. I'm not.
Q. Do you recognize the name James Kunkle?
A. I do recognize that name.
Q. From what?
A. I think he had some involvement in the prior phase of this case.
Q. Did you review any of the reports Mr. Kunkle

prepared for this case?
A. No, not in detail.
Q. What do you mean by not in detail?
A. I can't even -- I didn't even review his entire report.
Q. Okay. Are you aware he wrote three reports in this case?
A. I'm not.
Q. Do you know if Mr. Kunkle's reports are in your files?
A. It's quite possible that it is in an electronic file.
Q. You don't know?
A. I don't.
Q. Did you review Mr. Kunkle's deposition transcript for this case?
A. I did not.
Q. Did you review his hearing transcript for this case?
A. I did not.
Q. So you have not attempted to elaborate or amplify Mr. Kunkle's opinions?
MR. WANNIER: Objection. Vague.

MS. NIJMAN:
Q. You can answer.
MR. WANNIER: You can answer.
THE WITNESS:
A. I haven't.
MS. NIJMAN:
Q. Okay. Now, your report, Exhibit 1, cites on several occasions to the Federal CCR Regulations, correct?
A. It does.
Q. And you're familiar with those regulations, right?
A. I am.
Q. And you've also cited in your rebuttal report to the Illinois CCR Rules, correct?
A. I did.
Q. And are you familiar with the Illinois CCR Rules?
A. Yeah.
Q. And you would agree that both the federal and Illinois CCR Rules or Regulations apply to defined CCR impoundments?
MR. WANNIER: Objection. Legal conclusion.

A. Define scope.
Q. Well, are you thinking like a grid pattern across the stations?
MR. WANNIER: Objection. Vague. Foundation.
THE WITNESS:
A. I'm not thinking grid versus non-grid versus discreet versus integrated sampling. I'm not defining what that sampling program should be.
MS. NIJMAN:
Q. Okay. Would you agree that there may be areas of CCR ash that do not constitute a source?
A. No. If there's ash that's disposed of in historical fill areas, in all likelihood they are a source of groundwater contamination or certainly the probable or possible source of contamination.
Q. Well, you limited your answer to historical fill areas, that's not part of my question. I'm looking a little more broadly. Could there be areas of CCR ash not in a historic fill area that are not a source?
MR. WANNIER: Objection. Incomplete hypothetical.
THE WITNESS:
A. If you designed and operated a surface

Q. And you reviewed the board's findings as to Joliet station, correct?
A. I did.
Q. And the board found groundwater impacts from CCRs in one location at that station, at MW9, correct?
A. I don't remember particularly if there were other wells that exceeded standards, but MW9 was certainly one of those.
Q. And MW9 is certainly within the GMZ, right? If you need to look at your maps and your report, feel free.
A. I don't believe I show the GMZ in the maps and my reports.
Q. MW9 is right near Pond 3, right?
A. Yeah --
MR. WANNIER: Objection. Vague as to the meaning of right in there.
THE WITNESS:
A. You know, I'd say GMZ is for an area around a hydraulically downgradient Ash Pond 1, 2 and 3, so I don't show the actual GMZ in my figures for Joliet.
Q. Have you determined what type of nature and extent investigation would be necessary at Joliet based on the board's findings?

A. I haven't.
Q. And you don't plan to?
A. Well, it's not my job to define the nature and -- design the investigation, it's Midwest Gen's.
Q. And you're not making any recommendations to Midwest Gen as to the nature of the investigation at Joliet 29?
MR. WANNIER: Objection. Mischaracterizes. Vague.
THE WITNESS:
A. Well, certainly recommendations would be to investigate areas that historical disposal and/or affiliate areas that were identified by the board and any others that have come up in the record, that would be a great starting spot.
Q. Anything else?
A. Like I said I haven't come up with a plan nor do I intend to, but that would be a great starting spot.
Q. Okay. Turning to Page 6, and that's a carryover of -- This is Page 6 of the Quarles Deposition Exhibit 1, which is a carryover of Section 2.2, Powerton Station Coal Ash Disposal. On Page 6 do you see, starting in the third full

EXHIBIT 2

CONTAINS NON-DISCLOSABLE INFORMATION

Deletions Pursuant to Hearing Officer Order

EXPERT OPINION

on

Economic Benefit of Noncompliance

and

Economic Impact of Penalty Payment and Compliance Costs

In:

Sierra Club,
Environmental Law and Policy Center,
Prairie Rivers Network, and
Citizens Against Ruining the Environment
v.
Midwest Generation, LLC

Pollution Control Board of the State of Illinois
PCB No-2013-015

Submitted on:
January 25, 2021

Expert Report of:
Jonathan S. Shefftz

d/b/a JShefftz Consulting
14 Moody Field Road
Amherst MA 01002

Table 3: **ECONOMIC BENEFIT FROM DELAYED AND/OR AVOIDED COMPLIANCE MEASURES**

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)	(k)	(l)	(m)	(n)	(o)	(p)	(q)	(r)	(s)	(t)	(u)
	Site Name and					Depreciate?	Recurring?	**On-Time Compliance Scenario:**						**Delayed Compliance Scenario:**						
	Total Remedy	Per-Year Cost Estimate:		Cost Index:					Cost Index	Adjusted Cost for	After-Tax	PV Factor at:	After-Tax		Cost Index	Adjusted Cost for	After-Tax	PV Factor at:	After-Tax	Economic
	Costs	Amount	Date	Choice	Value			Date	Value	Inflation	Value	25-Jan-21	PV	Date	Value	Inflation	Value	25-Jan-21	PV	Benefit
(1)	Joliet:	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-11	181.1	$3,099,354	$1,823,040	1.5966	$2,910,730	1-Jan-22	200.1	$3,423,880	$2,447,732	0.9515	$2,329,083	$581,647
(2)	Site-Wide =	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-12	191.1	$3,270,494	$1,923,705	1.5252	$2,933,992	1-Jan-23	204.9	$3,506,054	$2,506,478	0.9022	$2,261,452	$672,540
(3)	$20,742,381	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-13	192.6	$3,296,165	$1,938,804	1.4626	$2,835,644	1-Jan-24	209.8	$3,590,053	$2,566,529	0.8555	$2,195,695	$639,948
(4)	NE Landfill =	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-14	194.2	$3,323,548	$1,954,911	1.3997	$2,736,294	1-Jan-25	214.7	$3,674,269	$2,626,735	0.8111	$2,130,499	$605,794
(5)	$10,278,011	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-15	185.0	$3,166,099	$1,898,393	1.3364	$2,536,989	1-Jan-26	219.6	$3,758,778	$2,687,150	0.7691	$2,066,614	$470,375
(6)	Pond Areas =	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-16	179.7	$3,075,394	$1,844,006	1.2814	$2,362,937	1-Jan-27	224.7	$3,845,229	$2,748,955	0.7292	$2,004,645	$358,292
(7)	$1,239,585	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-17	185.6	$3,176,367	$1,886,444	1.2306	$2,321,539	1-Jan-28	229.9	$3,933,670	$2,812,180	0.6915	$1,944,534	$377,005
(8)	Total =	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-18	192.6	$3,296,165	$2,356,429	1.1753	$2,769,436	1-Jan-29	235.1	$4,024,308	$2,876,978	0.6556	$1,886,027	$883,408
(9)	**$32,259,977**	$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-19	194.3	$3,325,259	$2,377,228	1.1076	$2,633,102	1-Jan-30	240.7	$4,118,879	$2,944,587	0.6216	$1,830,367	$802,735
(10)		$3,225,998	Jul-15	PPI	188.5	n	n	20-Jan-20	196.6	$3,364,621	$2,405,368	1.0555	$2,538,977	1-Jan-31	246.3	$4,215,673	$3,013,785	0.5894	$1,776,350	$762,627
(11)	Powerton:	$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-11	181.1	$16,871,392	$9,923,753	1.5966	$15,844,615	1-Jan-22	200.1	$18,637,959	$13,324,277	0.9515	$12,678,410	$3,166,205
(12)	Site-Wide =	$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-12	191.1	$17,802,998	$10,471,723	1.5252	$15,971,243	1-Jan-23	204.9	$19,085,270	$13,644,060	0.9022	$12,310,259	$3,660,985
(13)	$135,964,711	$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-13	192.6	$17,942,739	$10,553,919	1.4626	$15,435,881	1-Jan-24	209.8	$19,542,521	$13,970,948	0.8555	$11,952,310	$3,483,570
(14)	Pond Areas =	$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-14	194.2	$18,091,796	$10,641,594	1.3997	$14,895,068	1-Jan-25	214.7	$20,000,956	$14,298,683	0.8111	$11,597,414	$3,297,654
(15)	$39,643,093	$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-15	185.0	$17,234,718	$10,333,937	1.3364	$13,810,150	1-Jan-26	219.6	$20,460,978	$14,627,553	0.7691	$11,249,655	$2,560,495
(16)	Total =	$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-16	179.7	$16,740,967	$10,037,884	1.2814	$12,862,693	1-Jan-27	224.7	$20,931,580	$14,963,987	0.7292	$10,912,324	$1,950,369
(17)	**$175,607,804**	$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-17	185.6	$17,290,615	$10,268,896	1.2306	$12,637,340	1-Jan-28	229.9	$21,413,007	$15,308,159	0.6915	$10,585,108	$2,052,232
(18)		$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-18	192.6	$17,942,739	$12,827,264	1.1753	$15,075,476	1-Jan-29	235.1	$21,906,398	$15,660,884	0.6556	$10,266,626	$4,808,850
(19)		$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-19	194.3	$18,101,112	$12,940,485	1.1076	$14,333,342	1-Jan-30	240.7	$22,421,198	$16,028,915	0.6216	$9,963,639	$4,369,703
(20)		$17,560,780	Jul-15	PPI	188.5	n	n	20-Jan-20	196.6	$18,315,382	$13,093,666	1.0555	$13,820,971	1-Jan-31	246.3	$22,948,096	$16,405,594	0.5894	$9,669,594	$4,151,376
(21)	Waukegan:	$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-11	181.1	$10,203,931	$6,001,952	1.5966	$9,582,930	1-Jan-22	200.1	$11,272,363	$8,058,612	0.9515	$7,667,988	$1,914,942
(22)	Site-Wide =	$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-12	191.1	$10,767,373	$6,333,369	1.5252	$9,659,515	1-Jan-23	204.9	$11,542,900	$8,252,019	0.9022	$7,445,327	$2,214,188
(23)	$77,899,032	$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-13	192.6	$10,851,889	$6,383,081	1.4626	$9,335,724	1-Jan-24	209.8	$11,819,448	$8,449,724	0.8555	$7,228,838	$2,106,887
(24)	Pond Areas =	$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-14	194.2	$10,942,040	$6,436,108	1.3997	$9,008,637	1-Jan-25	214.7	$12,096,713	$8,647,940	0.8111	$7,014,194	$1,994,443
(25)	$28,309,749	$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-15	185.0	$10,423,673	$6,250,035	1.3364	$8,352,472	1-Jan-26	219.6	$12,374,937	$8,846,842	0.7691	$6,803,867	$1,548,605
(26)	Total =	$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-16	179.7	$10,125,049	$6,070,980	1.2814	$7,779,443	1-Jan-27	224.7	$12,659,561	$9,050,320	0.7292	$6,599,847	$1,179,596
(27)	**$106,208,781**	$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-17	185.6	$10,457,480	$6,210,697	1.2306	$7,643,148	1-Jan-28	229.9	$12,950,730	$9,258,477	0.6915	$6,401,944	$1,241,204
(28)		$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-18	192.6	$10,851,889	$7,758,016	1.1753	$9,117,749	1-Jan-29	235.1	$13,249,137	$9,471,808	0.6556	$6,209,324	$2,908,425
(29)		$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-19	194.3	$10,947,674	$7,826,492	1.1076	$8,668,902	1-Jan-30	240.7	$13,560,492	$9,694,395	0.6216	$6,026,076	$2,642,826
(30)		$10,620,878	Jul-15	PPI	188.5	n	n	20-Jan-20	196.6	$11,077,266	$7,919,137	1.0555	$8,359,016	1-Jan-31	246.3	$13,879,163	$9,922,214	0.5894	$5,848,236	$2,510,780
(31)	Will County:	$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-11	181.1	$3,082,219	$1,812,961	1.5966	$2,894,638	1-Jan-22	200.1	$3,404,952	$2,434,200	0.9515	$2,316,207	$578,431
(32)	Site-Wide =	$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-12	191.1	$3,252,413	$1,913,070	1.5252	$2,917,772	1-Jan-23	204.9	$3,486,670	$2,492,621	0.9022	$2,248,950	$668,822
(33)	$26,651,067	$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-13	192.6	$3,277,942	$1,928,086	1.4626	$2,819,967	1-Jan-24	209.8	$3,570,205	$2,552,340	0.8555	$2,183,557	$636,410
(34)	Pond Areas =	$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-14	194.2	$3,305,174	$1,944,103	1.3997	$2,721,166	1-Jan-25	214.7	$3,653,956	$2,612,213	0.8111	$2,118,721	$602,445
(35)	$5,430,561	$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-15	185.0	$3,148,595	$1,887,897	1.3364	$2,522,964	1-Jan-26	219.6	$3,737,997	$2,672,294	0.7691	$2,055,189	$467,775
(36)	Total =	$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-16	179.7	$3,058,392	$1,833,812	1.2814	$2,349,873	1-Jan-27	224.7	$3,823,971	$2,733,757	0.7292	$1,993,562	$356,311
(37)	**$32,081,628**	$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-17	185.6	$3,158,806	$1,876,015	1.2306	$2,308,704	1-Jan-28	229.9	$3,911,922	$2,796,633	0.6915	$1,933,784	$374,920
(38)		$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-18	192.6	$3,277,942	$2,343,401	1.1753	$2,754,125	1-Jan-29	235.1	$4,002,060	$2,861,072	0.6556	$1,875,600	$878,524
(39)		$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-19	194.3	$3,306,876	$2,364,085	1.1076	$2,618,545	1-Jan-30	240.7	$4,096,108	$2,928,308	0.6216	$1,820,248	$798,297
(40)		$3,208,163	Jul-15	PPI	188.5	n	n	20-Jan-20	196.6	$3,346,020	$2,392,070	1.0555	$2,524,940	1-Jan-31	246.3	$4,192,367	$2,997,123	0.5894	$1,766,529	$758,411

Notes:

(a) Line number, for reference only. (b) Compliance measure. (c) Cost estimate for compliance measure. (d) Date for cost estimate.

(e) CCI= Construction Cost Index (*Engineering News Record*) PCI= Plant Cost Index (*Chemical Engineering* mag.) PPI= Producer Price Index & ECI= Employment Cost Index (U.S. Bureau of Labor Statistics)

(f) Monthly value for selected cost index used for inflation adjustments.

(g) Whether measure is a capital investment that is depreciated over time for tax purposes (i.e., as opposed to fully expensed the year in which it is incurred).

(h) Whether measure is an annually recurring cost (and hence avoided entirely each year over the period of noncompliance).

On-Time Compliance Scenario:

(i) For capital investments, mid-point for each year-long period of On-Time Compliance Scenario; for O&M, date when costs first start.

(j) Monthly value for selected cost index used for inflation adjustments.

(k) Original cost estimate adjusted for inflation from cost estimate date (i.e., original cost estimate divided by associated cost index value, then multiplied by date-specific value).

(l) Inflation-adjusted cost adjusted for tax deductibility (i.e., either tax rate from Table 2 if fully expensed, or tax shield present value from Table 4 if depreciated).

(m) Value of a dollar brought to present from scenario start date, calculated as: {1 + Table 2 yr-specific Column "p"} ^ {(pv date - Table 3 Column "i" or "i" & "o" avg for recurring costs}/365.25).

(n) After-tax inflation-adjusted cost multiplied by present value factor.

(o) through (t) Identical calculations for the Delayed Compliance Scenario except for different start date, and any measures that are avoided entirely are not incorporated here.

(u) Difference of the after-tax present values in the scenarios for the On-Time Compliance Scenario versus the Delayed Compliance Scenario.

EXHIBIT 3

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)
SIERRA CLUB, ENVIRONMENTAL LAW AND)
POLICY CENTER, PRAIRIE RIVERS)
NETWORK, AND CITIZENS AGAINST)
RUINING THE ENVIRONMENT,)
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
WWW.DEPO.COM

REPORTED BY: CHERYL LYNN MOFFETT, CSR NO. 084-002218
FILE NO. 4949402

P.E., dated July 1, 2015. Correct?

A. Correct.

(WHEREUPON, Shefftz Exhibit No. 5 was marked for ID.)

BY MS. GALE:

Q. So, turning to Exhibit 5, the Kunkel remedy report. Do you have that in front of you or is it on your computer or do I need to put it on the screen?

A. It's on my computer. I'm looking at it on my computer.

Q. Okay. Great. And this is the report that you relied upon?

A. Yes. I didn't match it up with what's on my computer, but -- I mean what's in my original file outside of -- per my original files outside of the new folder I created for the deposition exhibits. But the date matches up, the name matches up. I didn't remember the cute picture of the waterfall, but the rest of it seems to be what I remember.

Q. Very good. Did you review any other report by Dr. Kunkel?

A. I have no recollection of that, and I don't see any citations of that here. So.

Q. Okay.

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

EXHIBIT 4

James R. Kunkel, Ph.D., P.E.
11341 West Exposition Drive
Lakewood, CO 80226

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.	)	

Expert Report on Remedy for Ground-water Contamination

James R. Kunkel, Ph.D., P.E.

July 1, 2015

used, the estimated cost to excavate, haul and backfill this volume of coal ash-impacted soil is approximately $58.2 million, also as shown in Table 6.

The cost of 15 additional geoprobe soil borings at the site, assuming 8 borings per day and $1,500 per day for a geoprobe unit, is estimated to be $3,000. The average mobilization cost for the coal ash-impacted soil equipment is estimated to be approximately $25,000 also as shown in Table 1. Therefore, the total estimated cost for the coal ash-impacted soil remedy ranges from approximately $39.7 to $58.2 million for the Powerton site. These estimates are highly dependent on the assumed coal ash-impacted soil thickness estimated for the ash pond area.

WAUKEGAN

Coal Ash-Impacted Soil Estimates

The quantity of coal ash-impacted soils at the Waukegan site is based on the total land area inside the red perimeter line shown on Figure 3. This site area was estimated to be 249 ac (Bates Nos. 48427-48432), including the area described for the ponds and the former coal ash/slag storage area shown inside the solid blue line. Within this 249-ac area is a smaller pond and coal ash/slag storage area located inside the dashed red and solid red perimeter line. This pond and coal ash/slag area was estimated to be 44 ac, as shown on Figure 3. These coal ash-impacted areas are summarized for the Waukegan site on Table 6.

I calculated the coal ash-impacted soil volumes for the site area and the ash pond area from existing soil borings shown on Figure 3 and the average estimated thickness of coal ash-impacted soils from the borehole logs summarized in Table 4. The average coal ash-impacted soil thickness for the site area, based on the available soil borings, is 5.3 ft. Utilizing the average site area (249 ac) and its average coal ash thickness of 5.3 ft as shown in Table 4, the site-wide coal ash-impacted soils is calculated to be on the order of 2,129,000 yds^3, as shown in Table 6. The ash pond and coal ash/slag storage areas of 44 ac is estimated to have approximately 774,000 yds^3 of coal ash-impacted soils (Table 6), based on an average coal ash-impacted soil thickness of 10.9 ft for these areas. The total volume of coal ash-impacted soils at the Waukegan power plant site may range from approximately 774,000 to 2,129,000 yds^3. Removal of the 774,000 yds^3 of coal ash-impacted soils, the ash ponds and coal ash/slag storage area would significantly reduce the ground-water contamination source-term at the Waukegan plant site.

Additional Soil Borings

Visual inspection of Figure 3 indicates that the Waukegan total site area most likely has sufficient soil borings to adequately characterize the thickness of coal ash-impacted soils. Thus, no additional soil borings are required at the site.

Additional Ground-water Monitoring

Visual inspection of Figure 3 indicates that the Waukegan total site area likely has sufficient ground-water monitoring to adequately monitor the impacts of removal of the ash ponds and the coal ash/slag storage area. Thus, no additional ground-water monitoring wells are required at the Waukegan site.

Coal Ash-Impacted Soil Remedy Cost for Waukegan

For the Waukegan power plant site, the removal of coal ash-impacted soils in the coal ash/slag storage area as well as the existing ash ponds is assumed to be the remedy. The cost of this remedy is the cost of coal ash-impacted soil excavation and hauling to an approved off-site landfill and backfilling with soil to achieve the pre-removal ground-surface contours.

I assumed that the volume of coal ash-impacted soils is the volume shown in Table 6 for the coal ash/slag and ash pond areas (a total of 44 ac) totaling approximately 774,000 yds^3. Assuming a dry unit weight per yd^3 of 1.25 tons and a unit cost of $29.27 per ton, the estimated cost to excavate, haul and backfill this volume of coal ash-impacted soil is approximately $28.3 million, as shown in Table 6. If the high unit cost of $42.95 per ton is used, the estimated cost to excavate, haul and backfill this volume of coal ash-impacted soil is approximately $41.5 million, also as shown in Table 6.

The average mobilization cost for the coal ash-impacted soil equipment is estimated to be approximately $25,000, also as shown in Table 1. Therefore, the total estimated cost for the coal ash-impacted soil remedy ranges from approximately $28.3 to $41.5 million for the Waukegan site. This estimate is highly dependent on the assumed coal ash-impacted soil thickness.

WILL COUNTY

Coal Ash-Impacted Soil Estimates

The quantity of coal ash-impacted soils at the Will County site is based on the total land area inside the red perimeter line shown on Figure 4. This total area was estimated to be approximately 215 ac (Bates Nos. 48433-48438) including the area described for the ponds shown inside the dashed red line. Within this 215-ac area is a smaller pond area located inside the dashed red and solid red perimeter line. This pond area was estimated to be 20 ac, as shown on Figure 4. These coal ash-impacted areas are summarized for the Will County site on Table 6.

From existing soil borings shown on Figure 4 and the average estimated thickness of coal ash-impacted soils from the borehole logs summarized in Table 5, I made an estimate of the coal ash-impacted soil volumes for the total area and the ash pond area. The average coal ash-impacted soil thickness for the site area, based on the available soil borings, is 2.1 ft. Utilizing the average total site area (215 ac) and its average coal ash thickness of 2.1 ft, as shown in Table 5, the total site-wide coal ash-impacted soils are calculated to be on the order of 728,000 yds^3, as shown in Table 6. The ash pond area of 20 ac is estimated to have approximately 148,000 yds^3 of coal ash-impacted soils (Table 6) based on an average coal ash-impacted soil thickness of 4.6 ft for that area. The total volume of coal ash-impacted soils at the Will County power plant site may range from approximately 148,000 to 728,000 yds^3. Removal of the 148,000 yds^3 of coal ash-impacted soils and the ash ponds would significantly reduce the ground-water contamination source-term at the Will County plant site.

Additional Soil Borings

Visual inspection of Figure 4 indicates that the Will County total site area most likely has sufficient soil borings to adequately characterize the thickness of coal ash-impacted soils. Thus, no additional soil borings are required at the site.

Additional Ground-water Monitoring

Visual inspection of Figure 4 indicates that the Will County total site area most likely has ground-water monitoring to adequately assess the impacts of removal of the ash ponds area. I recommend that one up-gradient ground-water monitoring well be installed at the north boundary of the site near East Romeo Road and the Des Plaines River to assess overall ground-water flow direction at the site. However, this is not a prerequisite for the remedy discussed above.

Coal Ash-Impacted Soil Remedy Cost for Will County

For the Will County site, the remedy is the removal of coal ash-impacted soils in the existing ash pond area. The cost of this remedy is the cost of coal ash-impacted soil excavation and hauling to an approved off-site landfill and backfilling with soil to achieve the pre-removal ground-surface contours.

EXHIBIT 5

ILLINOIS POLLUTION CONTROL BOARD
April 26, 2016

JOHNS MANVILLE,	)	
	)	
Petitioner,	)	
	)	
v.	)	PCB 14-3
	)	(Enforcement)
ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
	)	
Respondent.	)	

ORIGINAL

HEARING OFFICER ORDER

On February 8, 2016, the Illinois Department of Transportation (IDOT) filed two motions: a motion *in limine* to bar certain opinion testimony of Douglas G. Dorgan (Mot. to Bar Dorgan), and a motion *in limine* to bar introduction of certain statements made by former IDOT employee Duane Mapes (Mot. to Bar Mapes). Johns Manville (JM) also filed two motions on February 8, 2016. JM filed a motion *in limine* to bar IDOT from calling Steven Gobelman as a lay witness at hearing (Mot. to Bar Gobelman), and a motion to exclude Mr. Gobelman's opinion testimony (Mot. to Excl. Op. Test. Gobelman).

On February 16, 2016, IDOT filed its responses to JM's Mot. to Bar Mapes and JM's Mot. to Bar Gobelman. Also on February 16, JM filed its responses to IDOT's Mot. to Bar Dorgan and IDOT's Mot. to Bar Mapes.

This order first summarizes the filings regarding each motion and then provides my ruling on each motion.

IDOT's MOTIONS

IDOT's Motion *In Limine* To Bar Opinion Testimony Of Douglas Dorgan

Summary of IDOT's Motion

IDOT requests an order barring Mr. Dorgan from testifying at hearing about his disclosed opinions 3.2, 3.3 and 3.4. Mot. to Bar Dorgan. Mr. Dorgan's disclosed opinions include the proposition that IDOT's conduct was a violation of Section 21 of the Illinois Environmental Protection Act (Act), that the Illinois Environmental Protection Agency (Agency) "likely would view IDOT's conduct to be 'open dumping' under Section 3.305 of the Act," and that the Agency "would treat crushed and buried ACM as both 'solid waste' and 'hazardous waste." *Id.* at 2. IDOT argues that these opinions are legal conclusions that go to the ultimate issue before the Board and are therefore impermissible. *Id.*

IDOT next argues that opinions offered in section 3.2 of Mr. Dorgan's report go to the fundamental question in this case: how IDOT designed and constructed the highway project over forty years ago. *Id.* at 3. IDOT contends that Mr. Dorgan lacks the specialized knowledge, training or experience necessary to render an expert opinion and therefore his opinion must be barred. *Id.* at 3-5. Further, IDOT argues that Mr. Dorgan's opinions relating to the construction work should be barred because the opinion, in part, was based on another expert's opinion. *Id.* at 5. IDOT states that Mr. Dorgan indicated in his deposition that when reaching his opinions, he consulted with a colleague, Mr. Talbot, about construction-related issues. *Id.* at 6-7. IDOT argues that because Mr. Dorgan relied on another expert's opinion to form his own, Mr. Dorgan must be barred from testifying about those issues at hearing. *Id.* at 7-8.

Finally, IDOT seeks to bar Mr. Dorgan's opinions in sections 3.2 and 3.3 of his report because they are speculative, according to IDOT. *Id.* at 8. Specifically, Mr. Dorgan opined that remedial activities are more extensive because "IDOT used, spread, buried, placed and disposed of ACM waste, including Transite pipe, throughout Site 3 and portions of Site 6 during construction . . . ." *Id.* IDOT argues that Mr. Dorgan's opinions must be barred because they "are based on nothing more than information provided to him by his colleague" and because they are speculative and unfounded. *Id.*

Summary of JM's Response

JM responds that Mr. Dorgan's opinions do not speak to the ultimate issue in the case because "while IDOT's conduct is relevant to the ultimate question, the only ultimate question is whether JM, as a matter of law, has met its burden of proof." Resp. at 2. JM next argues that even if IDOT committed the alleged violations, "nowhere in the body of Mr. Dorgan's Expert Report does Mr. Dorgan ultimately conclude that IDOT violated the [Act]." Resp. at 3. Moreover, JM argues that opinion testimony describing "the conduct of IDOT in reference to specified rules, regulations and statutes" is permitted under Illinois Rules of Evidence 704. Resp. at 3-4.

JM next contends that Mr. Dorgan is qualified to provide the expert opinions in Section 3.2 of his report because of his education and work history, including environmental consultant at engineering firms. Resp. at 5-8. JM argues that Mr. Dorgan's opinions were not based on Mr. Talbot's opinions, and that Mr. Talbot only assisted Mr. Dorgan in reviewing figures. Finally, JM states that Mr. Dorgan's opinions are not speculative and are based on documentary evidence. Resp. at 11-13.

Discussion and Ruling

Illinois Rules of Evidence 704 allows opinion testimony on the ultimate fact or issue that will be decided by the trier of fact. Expert opinion testimony is admitted to assist the Board in understanding the ultimate issue to be decided. *See* Townsend v. Fassbinder, 372 Ill. App. 3d 890, 905 (2d Dist. 2007). 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 decision. Thompson v. Gordon, 221 Ill. 2d 414, 428-29

(Ill. 2006). An expert only needs to have knowledge and experience beyond the average citizen. *Id.*

I find that Mr. Dorgan may testify as an expert given his knowledge and experience, which go beyond that of an ordinary citizen and could consequently assist the Board in its determinations. Mr. Dorgan's assertions regarding the environmental concerns of this case do not amount to legal conclusions, but rather opinions as to the relationship between the facts of this case and applicable laws . Such testimony could conceivably aid the Board. Nor will his testimony encroach upon the Board's ultimate determination, although opinion testimony is not objectionable because it embraces an ultimate issue to be decided by the Board. Ill. R. Evid. 704.

Further, even though Mr. Dorgan consulted with a colleague and had the colleague review Mr. Dorgan's report, the colleague's contribution was minimal and Mr. Dorgan represented that all of the opinions in his report are his own. Finally, Mr. Dorgan's opinions are not impermissibly speculative but based on documentary evidence in the record including a number of reports and manuals. Mr. Dorgan will be allowed to offer his disclosed opinions found in sections 3.2, 3.3 and 3.4 of his report.

IDOT's Motion *In Limine* to Bar Opinion Testimony of Douglas Dorgan is denied. IDOT, however, may renew its objection at hearing.

IDOT's Motion *In Limine* To Bar Introduction Of Certain Statements Made By Former IDOT Employee Duane Mapes

Summary of IDOT's Motion

IDOT seeks an order barring JM from entering into evidence or eliciting testimony regarding statements former IDOT employee Duane Mapes made to former IDOT attorney J. Randall Schick. Mot. to Bar Mapes at 1-2. IDOT contends the statements are inadmissible hearsay. *Id.* at 2. IDOT further contends that the statements are not admissible as non-hearsay admissions of a party-opponent under Illinois Rule of Evidence 801(d)(2)(D) because the statements were not made while Mr. Mapes was an IDOT employee. *Id.* at 3.

Summary of JM's Response

JM contends that Mr. Mapes' statements are are not hearsay under Illinois Rule of Evidence 801(d)(2) because IDOT "manifested an adoption or belief in the truth of Mr. Mapes's statements by transmitting them to the USEPA in IDOT's 104 (c) Response" Resp. at 3-4. Additionally, JM claims the statements are not hearsay under Illinois Rule of Evidence 801(d)(2)(C) because IDOT authorized Mr. Mapes to make the statements. *Id.*

JM also argues that even if the statements are hearsay, they fall within the hearsay exception under Illinois Rule of Evidence 803(8) and 804(b)(3). *Id.* at 4. JM contends that the public records exception under Rule 803(8) applies because IDOT's 104(e) CERCLA Response

was a public record setting forth IDOT activities related to matters observed during IDOT's work on the project that IDOT had a duty to report to the USEPA, and that nothing in the Response indicates a lack of trustworthiness. *Id.* at 5. JM further states that the hearsay exception under Rule 804(b)(3) applies because by making the statement, Mr. Mapes was subjecting himself to potential civil or criminal liability and therefore would not make the statement unless he believed it to be true. *Id.* at 6.

Further, JM argues that Mr. Mapes' statements are admissible under the Illinois Administrative Procedure Act because a "reasonably prudent man can and would rely upon the statements made in that 104(e) Response." *Id.* at 7, citing 5 ILCS 100/10-40 (2014); *see also* 35 Ill. Adm. Code 101.626(a). JM also maintains that the statements should not be barred because Illinois Rules of Evidence 703 and 705 allow an expert witness to rely on otherwise inadmissible statements in formulating an opinion and the expert must disclose the basis for his opinion. *Id.* Finally, JM contends that even if the statements are not admitted for the truth of the matter asserted, they should be admitted to explain the USEPA's investigatory procedure in arriving at its decision to order remedial work on Sites 3 and 6. *Id.* at 9.

Discussion and Ruling

I find Mr. Mapes' statements admissible for a number of reasons cited by JM. For one, they are admissions by a party-opponent through an employee authorized to make statements to USEPA on behalf of IDOT. Beyond that, IDOT's 104(e) Response is a public record and admissible under the corresponding exception to the hearsay rule. Even in the event they are hearsay, I find them trustworthy and material and, having been included in IDOT's 104(e) Response, are the kind of information as would be relied upon by prudent persons in the conduct of serious affairs. *See* 35 Ill. Adm. Code 101.626(a).

IDOT's Motion *In Limine* to Bar Introduction of Certain Statements Made by Former IDOT Employee Duane Mapes is denied. IDOT, however, may renew its objection at hearing.

JM's Motions

JM's Motion To Exclude Opinion Testimony Of Steven Gobelman

Summary of JM's Motion

JM seeks an order excluding opinion testimony from IDOT employee Steven Gobelman. JM first argues that after reviewing Mr. Gobelman's report and deposition, it was unable to discern "whether he has actually arrived at any 'opinions' and the bases for those opinions." Mot. to Excl. Op. Test. Gobelman. JM claims that rather than offering opinions, Mr. Gobelman is merely offering "commentary" on issues in this case. *Id.* at 7. JM argues that the statements must be excluded because it cannot identify any actual opinions, or the bases for any opinions, and IDOT failed to comply with the requirement under Supreme Court Rule 213(f) to disclose the "conclusions and opinions of the witness and the bases therefor." *Id.* at 7-9.

JM next argues that Mr. Gobelman lacks the knowledge, skill, experience, training or education required under Illinois Rules of Evidence 702 to testify as an expert on IDOT's historical and utility practices, JM's economic motivations, and USEPA's remedial strategy and decision making processes. *Id.* at 10-14. In particular, JM argues that in Comments 1-3 and 5-8 of his report, Mr. Gobelman makes comments regarding IDOT's historical practices as they relate to this case. *Id.* at 11. JM claims that he should not be allowed to offer such testimony because he reached his opinions without having any first-handknowledge of IDOT's past practices, without studying sufficient examples of such practices, and without discussing such practices with any person that took part in past projects. *Id.* at 12.

JM next argues that in Comments 4 and 8-11 of his report, Mr. Gobelman similarly offered comments regarding utility practices, JM's economic motivations, and USEPA's decision making process without having the requisite knowledge or experience to be considered an expert on the topics. *Id.* at 13-14. Lastly, JM argues that Mr. Gobelman's opinions regarding IDOT's historical practices, utility practices, JM's economic motivations, and USEPA's deliberative process are based solely on speculation. *Id.* 15-21.

Summary of IDOT's Response

IDOT contests JM's assertions and states that Mr. Gobelman's ample experience and qualifications make him qualified to offer all of his expert opinions in this case. Resp. at 6-13. IDOT also maintains that Mr. Gobelman's opinions are not speculative and are either based on his own knowledge and experience or other documents relevant to this case. *Id.*

Discussion and Ruling

Applying the same standard and reasoning used in my ruling regarding Mr. Dorgan's testimony, I deny JM's motion.

While working for IDOT for over twenty years, Mr. Gobelman participated in the investigation and remediation of contaminated sites and also has examined the records of the project at issue in this case, along with the records of several other IDOT highway construction projects. IDOT has demonstrated that Mr. Gobelman has experience and knowledge of IDOT's historical practices, utility practices, economic considerations of remediation projects, and USEPA's concerns with contaminated property beyond that of an average citizen. Therefore, Mr. Gobelman may offer opinion testimony on these subjects as an expert witness.

Furthermore, after reviewing Mr. Gobelman's report and deposition testimony, I find that regardless of how Mr. Gobelman characterized his opinions, it is plain he did offer opinions and identified documentary evidence and experience on which they are based. Nor am I persuaded that Mr. Gobelman's testimony is speculative or that IDOT violated Supreme Court Rule 213(f)'s disclosure requirement.

JM's Motion to Exclude Opinion Testimony of Steven Gobelman is denied. JM, however, may renew its objection at hearing.

JM's Motion In Limine To Bar IDOT From Calling Steven Gobelman As A Lay Witness At Hearing

Summary of JM's Motion

JM seeks an order barring Mr. Gobelman from testifying as a lay witness. JM argues that IDOT did not disclose Mr. Gobelman as a fact witness in discovery and JM did not have the opportunity to depose him as a fact witness. Mot. to Bar Gobelman at 3. JM argues that if he is allowed to testify as a lay witness, the scope of Mr. Gobleman's testimony must be limited to discussing IDOT's Section 104(e) response. *Id.*

Summary of IDOT's Response

IDOT argues that Mr. Gobelman should not be barred from testifying as a lay witness because during his deposition, JM questioned Mr. Gobelman "extensively" and about matters beyond his expert opinions including but not limited to his involvement in IDOT's 104(e) Response. Resp. at 3-4. IDOT adds that Mr. Gobelman "may be the only living person" involved in the 104(e) Response. *Id.* at 3. IDOT adds that it properly identified Mr. Gobelman in response to an interrogatory about persons contacted in preparing the 104(e) Response. *Id.* at 1-2. Consequently, IDOT argues that JM will not be prejudiced or "harmed in any way" by Mr. Gobelman testifying as a lay witness. *Id.*

Discussion and Ruling

I find no basis for barring Mr. Gobelman from testifying as a lay witness, nor any reason to exclude lay testimony on subjects other than just IDOT's Section 104(e) Response. JM was not limited in the subjects it could explore in deposing Mr. Gobelman and clearly inquired into his knowledge of facts relating to the sites at issue and IDOT records. *See* Resp. at 3 & Exh. B. JM has not shown that it will be prejudiced if Mr. Gobelman testifies as a lay witness and on matters other than just IDOT's 104(e) Response.

JM's Motion *In Limine* To Bar IDOT From Calling Steven Gobelman As A Lay Witness At Hearing is denied. JM, however, may renew its objection at hearing.

IT IS SO ORDERED.

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Hearing Officer
Illinois Pollution Control Board
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100 W. Randolph Street
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CERTIFICATE OF SERVICE

It is hereby certified that true copies of the foregoing order were e-mailed and mailed, first class, on April 26, 2016, to each of the persons on the attached service list.

It is hereby certified that a true copy of the foregoing order was hand delivered to the following on April 26, 2016:

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